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19 September 2006

Ms Pamela Criddle
National Project Officer
Uniform Consumer Credit Code Management Committee
Department of Consumer & Employment Protection (WA)

Email:

Dear Ms Criddle

Pre-Contractual Disclosure and the Uniform Consumer Credit Code

Thank you for the opportunity to make a submission on the consultation package.

This submission is made on behalf of the Mortgage Industry Association of Australia, Australia's peak body for the mortgage industry. This submission is also endorsed by Gadens Lawyers and a number of lenders for whom Gadens Lawyers act.

Support for objective of simple disclosure

The objective of making pre-contractual information (**PCI**) easier for consumers to understand is obviously supported.

While it is sometimes said that the existing disclosure regime is complex, we are not aware of any research done to establish that borrowers are in fact confused. Obviously, the disclosure is more complex than pre-UCCC disclosures were, but this is largely the result of more complex products and better disclosure of fees and charges. Simplification and better consumer disclosure is a great objective, but we consider the proposals do not achieve that result and will involve the industry in significant compliance expense.

There have been previous calls for lenders and their lawyers to simplify credit contracts and in particular financial tables. Our observation is that the industry has greatly simplified documentation in response.

General comments on proposal

1. A key objective of the change is to simplify documentation. That objective is not achieved by creating duplication or adding extra pages or an additional document. As a general statement, more documentation reduces understanding.

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2. It is undesirable to duplicate information as duplication adds to cost and confusion.
3. Duplication creates the risk of error. There will be a need to cross-check information to make sure there is no inconsistency.
4. Borrowers are already faced with a large amount of documentation in relation to loans. The creation of additional documents is undesirable.
5. Consumers generally keep a minimum of documentation. We consider it is important that consumers are encouraged to keep the credit contract, and that the credit contract contains key information set out in a way the consumer can understand. If the simplified table is separated from the credit contract, it is likely that one but not both of these documents will be kept and the benefit of providing consumers with clear information may be lost.
6. We have enclosed a sample pre-contractual statement. We could not fit the required information into two pages - although we could have squashed up the information some more. If the product was more complex, it may be impossible.
7. It is reasonably common for borrowers to borrow, in one transaction, a fixed, variable, line of credit, and credit card account - a multi-facility. It is more convenient for a borrower obtaining a multi-facility to receive that information in a single summary. If four separate *pre-contractual statements* are required, the borrower would:
 - (a) need to add together all the individual facility limits to determine the full amount of credit; and
 - (b) be faced with possible duplication of fees.

As a general statement, we think it is fair to say that more paper is more confusing than less paper. The proposals introduce more paper, and so we oppose them in their current form.

Alternate suggestion

We think a preferable approach may be to retain the existing financial statement, but require the information to be broken into seven discrete sections dealing with the following topics:

- type of credit facilities and amounts of credit for each component account;
- annual percentage rate(s);
- term of loan;
- repayments;
- upfront fees and charges;
- ongoing non-contingent fees and charges;
- contingent fees and charges.

Detailed comments

In the attached pages we make specific comments on the detail of the proposals.

Yours sincerely
 Jon Denovan
 for **GADENS LAWYERS**

Credit providers are not lawyers or settlement agents

The proposal also contemplates that the SOOI will state “Ask your credit provider about other costs that you will incur in buying a property, such as duty on the transfer of land and fees that the credit provider will incur in the stamping and registration process and whether these costs will be passed on to you”.

Credit providers are not generally in a position to provide this information and so we oppose this proposal. Borrowers should obtain this information from their conveyancer or lawyer. Often credit providers are not aware of all the costs involved in the transaction, and so the information they give may be misleading or incomplete. Credit providers should not be placed in a position where they are quasi legal advisors or conveyancers.

In any event, it is inappropriate to single out real estate purchases. If it is really considered that credit providers must disclose information regarding asset purchases, then the same should be true for the purchase of cars, boats, aeroplanes, and other property.

We are also concerned that this statement could mislead a consumer into thinking that the credit provider is undertaking a due diligence in relation to the asset purchase, which is not the case. If it is felt that some warning is appropriate, the credit contract could contain a statement *“If you are using this loan to acquire real estate or other property, make sure you understand the other costs of acquiring those assets and obtain legal advice if you are uncertain. The credit provider takes no responsibility in relation to the purchase or quality of those assets.”*

If the words in the consultation draft are retained, permit the use of “we/us” to refer to the credit provider.

Total term fees

Section 15(G)(c) requires a credit contract to specify the total amount of credit fees and charges to the extent that it is ascertainable.

It is unclear whether the total has to be compiled on the assumption that the contract runs its full term. The new proposed disclosure of total upfront fees and charges and total ongoing fees as an amount per annum is much more useful to the consumer. The utility of this new disclosure will be reduced unless s 15(G)(c) is repealed and replaced (if thought necessary) with a requirement reflecting the new regime.

Even if the new proposals are not adopted, s 15(G)(c) should be repealed or amended. The disclosure of fees for the whole term should not be required where the term is more than seven years, in the same way as the disclosure of total repayments is limited to seven years. The disclosure of total term fees is not useful information in long term credit contracts as they are usually paid out early.

Current compliance with s15(G)(c) is inconsistent. Some lenders only disclose the total of upfront fees. Other lenders use different methods to calculate the total (ie what is included or excluded is inconsistent). If the current provision is to remain, it should be clarified in order to achieve consistency.

Upfront fees unascertainable

The disclosure of total upfront fees in the new pre-contractual statement would need to allow for situations where some or all of the upfront fees are unascertainable. Section 15(G) allows this by requiring total fees to be specified only to the extent they are ascertainable.

A possible solution is that total fees must be specified to the extent they are ascertainable, and column 2 should specify which fees are unascertainable.

Total ongoing fees as an amount per annum

Similarly to our comment above, the total amount per annum of ongoing fees should be specified to the extent ascertainable, and column 2 should specify which fees are unascertainable.

References to terms in the contract

In several places, the proposals suggest that the SOOI will refer to specific terms in the credit contract. This would require cross-reference to specific clause numbers in the credit contract or terms and conditions booklet (as distinct from a general statement that the details are provided in the credit contract and/or the terms and conditions). We oppose this recommendation for the following reasons.

1. We consider that cross-referencing is generally confusing to the reader and can significantly detract from the meaning of the document as a whole. The reader is often tempted to read the cross-referenced clause at the time and therefore the impact of the new disclosure statement will be depleted.
2. Terms and conditions are often updated from time to time and so the cross-references may become incorrect and therefore misleading over time.
3. The use of extensive numbering and cross-referencing is a retrograde step in the endeavour to achieve plain English drafting.

Sample financial summary table for a fixed term contract

We are confused because the sample *financial summary table* included in the consultation package does not appear to conform with proposed s13A in the following ways.

- 13A(4)(a) How each rate applies is to be inserted in column 3. The sample provides this information in column 2. We do not understand what content is required by this sub-section.
- 13A(4)(c) The sample states that fees for switching are included in the summary table (presumably a reference to the *summary of other information*). The draft does not contemplate that fees of this kind will be shown in the SOOI.
- 13A(8)(a) Should the changed repayment after increase in the interest rate be specified?

Comments on content of the financial summary table

- 13(1)(a) Does “two sides of A4 paper” mean one sheet double sided? How can we be sure consumers will turn over the page? A requirement to print on both sides of a sheet may create practical difficulties for some lenders.
- 13A(6) Provision needs to be made for situations when the upfront or ongoing fees and charges (or both) are unascertainable.
- 13A(6)(b) In this sub-section, “will” should be changed to “may”. The lender may not know whether a government charge will apply (eg a refinance mortgage duty exemption or a first home buyer’s conveyance stamp duty exemption may apply).
- 13A(6)(b) This clause refers to *additional* government charges. This is unclear. Additional to what? We consider that only government charges in relation to the loan should be specified. Government charges in relation to discharge of existing mortgages or transferring property are irrelevant.
- 13A(9) We do not understand what is intended by “how the credit contract can be cancelled”. We think it may be confusing to consumers to see a statement that the contract can be cancelled prior to draw down, as this may lead them to conclude that the money can’t be called up on default.

Other issues

The opportunity should be taken to clarify the situation in relation to the following.

1. Some commentators consider that registration fees on discharge of existing mortgages and transfers, and discharges of the mortgage to secure the loan should be inserted in the credit contract. We consider these costs do not relate to the borrowing and should not be specified.
2. There is confusion about the interpretation of section 15(G) in relation to fees and charges such as “letter notifying default \$15”. Schedule 1 defines a credit fee and charge as not including “default charges” or “enforcement expenses”. Is this type of fee a default charge? We consider it is useful for this type of fee to be disclosed to consumers, and so it is unfortunate if it must be excluded from the financial table.

Also, it is unclear what section 15G(a) means when it refers to “default charges”. Is this meant to be read in the context of the earlier part of the phrase, so that it is a reference to default interest charges?

3. Section 13(7) seems to imply that no information other than the information contained in sections 13A and 13B may be included in the pre-contractual statement. If that is the intention, the prohibition should be express. We would like the freedom to insert warnings about the key features of a credit contract such as the following.

Borrowers Please Note

We recommend you consider obtaining legal and financial advice in relation to this loan.

If you repay early, break costs and deferred establishment fees may apply. Break costs and deferred establishment fees may be significant.

4. There should be provision for the setting out of the borrower’s and lender’s names.
5. Should section 14(6) of the UCCC be repealed as the new pre-contractual statement needs to be in a single document? We note it is contemplated that section 14(5) will be amended or repealed.