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9 December 2005

PRIVATE & CONFIDENTIAL

Ms Pamela Criddle
National Project Officer
Uniform Consumer Credit Code Management Committee
Dept of Consumer and Employment Protection
Locked Bag 14
CLOISTERS SQUARE WA 6850

Dear Ms Criddle

SUBMISSION - CONSUMER CREDIT AMENDMENT BILL 2005

Attached is a submission from the Society in respect of the Consultation Draft of Consumer Credit Amendment Bill 2005.

The Society would be keen to participate in, or indeed if requested be happy to provide a forum for these technical issues and options for the way forward to be further discussed and explored.

Yours faithfully



**Rob Davis
President**

**Submission on the Consultation Draft of
Consumer Credit Amendment Bill 2005 ("Consultation Draft")**

by the

**Queensland Law Society's Banking & Financial Services
Law Committee ("the Society")**

The Society is in general terms in agreement with and supports the principles behind the Consultation Draft of the Consumer Credit Amendment Bill 2005 ("Consultation Draft").

Members and invited participants of the relevant subcommittee of the Society involve a wide cross section of practitioners active in this area of law and include those representing credit providers, consumers, published authors and academics.

The Society however, does raise some significant technical issues which we submit should be taken into account as follows:-

1. Proposed amendment to section 6

The Society has concerns with the proposed new subsection 1C namely, the deeming of the credit provider being the law practice.

Our concerns are that the deeming effectively renders the credit provider the "lender" under the contract and would make it difficult, if not impossible, to draft a loan contract where the actual lender can also exercise rights, receive funds and enforce securities.

In many instances, should the lawyer's involvement merely be to "arrange credit" for the "credit financing" then it is, in our submission, unfair and unnecessary for the law practice to be additionally deemed to be the credit provider (for example, if the arrangements were facilitated by an accounting practice the resultant credit would not be caught by the amendment).

As we understand how the provisions are designed to operate, should subclause 1C not be enacted then the credit the subject of the arrangements will simply be deemed to be regulated credit for Code purposes. Thus, should the credit provider be an entity associated with the law practice or a client of the law practice, then the entity or the client will become a regulated credit provider.

As a matter of practice, we query whether there would be many legal practices actively consolidating funds for the purposes of "on lending". As we understand it, special purpose entities have been created that have taken over the role previously played by legal practitioners in this regard due to the changes made to many Law Society's Insurance and Practice arrangements.

The Society also notes the wide definition of "credit financing" in the Consultation Draft which in our view, would encompass a legal practice arranging for funding of its professional costs and disbursements on behalf of a client. We note this goes significantly beyond actively consolidating funds for the purposes of "on lending". We query whether this is the intention of the definition, but assuming that it is, should 1C remain in the legislation, then it appears that the "arranging law firm" will be deemed to be the credit provider and not the litigation funder.

In conclusion, in order to avoid the above practical difficulties, we would suggest that 1C be deleted.

2. Proposed amendment to section 9A and 9B

Section 9A

Page 4 of the Consultation package states that there are two problems with sales of land by instalment:

- (1) that "there remains some doubt" about whether the Code applies to these contracts because the instalments may not be deferred debts; and
- (2) purchasers being let into possession without getting title and having to pay more than the cash price because they are in substance receiving credit.

In relation to (1), we query the extent of, or whether there is in fact any "doubt" [McGill and Willmott *Annotated Consumer Credit Code* LBC Information Services 1999 para [8.15.2]]. However, assuming "doubt" exists, the approach of the proposed s 9A which deems a debt to have been incurred without also deeming it to be a deferred debt seems unlikely to resolve the problem.

In relation to (2), defining an instalment contract for the sale of land by reference to the amount of deposit paid, rather than by reference to the purchaser being let into possession and being required to pay instalments which exceed the ordinary price, means that the provision will operate in a wider category of cases than those said to be giving rise to the need for consumer protection. The proposed s 9A uses the same test as the State legislation, which has given rise to a considerable amount of litigation. Such a test would bring within the Code a wide range of contracts where purchasers are not in substance obtaining credit and are not in need of Code protection. For example, if an ordinary contract for the sale of land provided for a 10% deposit with the balance purchase price payable on completion, but was then varied to give the purchaser an extension of time for settlement in consideration of the deposit and interest on the deposit being paid over the vendor at the time of variation, and of the purchaser agreeing to pay interest on the unpaid balance from the time of variation until settlement, the contract as varied would be an instalment contract under the State legislation and under the test in the proposed s 9A. This occurred in *Starco Developments Pty Ltd v Ladd* [1998] QCA 344.

Perhaps a preferable approach would be to amend the proposed s 9A to define such a contract as follows:

S 9A. (1) Where under a contract-

- (a) a vendor lets a purchaser into possession of land; and

- (b) the purchaser is obliged to make **periodic** payments which, together with any deposit, exceed the cash price of the land; and
- (c) the vendor retains title until the purchaser has paid all moneys payable -

the contract is an instalment contract for the sale of land.

(2) Under such an instalment contract for the sale of land –

(a) payments made by the purchaser, other than the deposit and final payment to be made in exchange for conveyance, are to be regarded as deferred debt for the purposes of this Code;

(b), (c) and (d) remain unchanged.

(3) remains unchanged

(4) delete.

Section 9B

Page 7 of the Consultation package states- "Unlike section 10 of the Code which deals with hire purchase contracts, the Bill does not alter the common law position in relation to title – namely, that title does not pass until the last instalment has been made." This comment is repeated on page 10 of the commentary – "however, section 9B does not alter the common law position regarding title to the goods, (unlike section 10)." Page 6 of the package describes the kind of circumstances that are said to have produced the need to include s 9B.

At common law, contracts "for the sale of goods by instalments", where that term denotes payment of the price in instalments by the buyer with the seller retaining property in the goods until full payment has been made, fall into two categories:

- (1) a contract under which the buyer gained possession of the goods in return for payments of hire and had a right to buy the goods or return them. If the buyer exercised the right to buy, then the contract became one for the sale of goods at common law.¹
- (2) a contract under which the buyer had an obligation to buy the goods, although property in the goods was not to pass until all instalments of the price had been paid.² These have been known as "conditional purchase" agreements.³

¹ Sutton *Sales and Consumer Law* Fourth Edition LBC Information Services 1995 para [2.3.]

² Sutton, *ibid.*

³ Sutton, para [2.4]

Both these were defined to be hire purchase contracts by the hire purchase legislation.⁴ The Code has defined both kinds of contracts to be contracts for the sale of goods by instalments by s 10 – "...a contract for the hire of goods under which the hirer has a right or obligation to purchase the goods..." The circumstances that are said on page 6 of the package to have produced the need to include s 9B fall within s10. Thus, the case of "Christine and the Commodore" was subject to the Consumer Credit Code and under s 10(3) (d) property had passed to the buyer on delivery or the making of the contract, whichever occurred last. This is perhaps explained in more detail in McGill and Willmott *Annotated Consumer Credit Code* LBC Information Services 1999 para [10.2].

The Code defines "a credit provider's title to ...goods subject to a sale by instalments" as a "mortgage": see para (b) of the definition of "mortgage" in Schedule 1. The Code applies to a mortgage which secures obligations under a credit contract if the mortgagor is a natural person: s 8. Therefore the effect of s 8 is that the Code applies to an instalment contract for the sale of goods, if an instalment contract for the sale of goods is a credit contract. The term "goods subject to a sale by instalments" in paragraph (b) of the definition of "mortgage" must mean a contract by which the supplier sells and delivers goods to the buyer who pays for them by instalments. In such a contract property must have passed on the making of the contract or delivery of the goods, because if property had not passed, the contract would be a hire purchase contract and within the ambit of s 10. As property in the goods has passed to the buyer, the assertion that "the Bill does not alter the common law position in relation to title – namely, that title does not pass until the last instalment has been made" is wrong in two respects:

- (1) at common law, property must have passed on the making of the contract or delivery of the goods; and
- (2) the effect of s 8 of the Code is to give the seller the rights of a mortgagee against the goods, and remedies against the goods in the event of default.

This is explained in more detail in McGill and Willmott *Annotated Consumer Credit Code* LBC Information Services 1999 para [8.16].

Proposed s 9B states that it does not apply to a contract for the sale of goods if s 10 applies. S 10 applies to "contracts for the hire of goods under which the hirer has a right or obligation to purchase". At common law, the seller retains property in the goods under such contracts. Therefore s 9B must apply to contracts for the sale of goods where the seller transfers property to the buyer who must pay the price in instalments. These come within s 8.

Therefore the question asked in the consultation material: "Do the proposed amendments succeed in bringing conditional sale of goods and tiny terms under the Code?" should be answered in the negative for the reason that such

⁴ Sutton para [2.4], [2.5].

contracts are already within the Code, as a result of the operation of s 10. Therefore s 9B is unnecessary.

Perhaps, the only utility that could be obtained from the inclusion of provision 9B would be if it operated "for the purposes of removal of doubt".

Some members of the relevant subcommittee of the Society that considered the Consultation Draft, who currently act for many disadvantaged retail borrowers indicated that this approach could be of assistance to their clients.

3. Proposed amendment to "cash price" definition

The Society is concerned that the key definition of "cash price", when used in section 9A and 9B may not practically achieve the outcomes that are sought by the Consultation Draft. This is particularly so in the context of sales of land. It appeared to the members of the relevant sub committee of the Society that considered the Consultation Draft, that from a practical perspective it would be difficult to seek to determine what the "cash price" actually is concerning a sale of vacant land in a broad acre subdivision.

It appears to the Society that each block would arguably have a separate "cash price" and, properly so drafted, a contract could be entered into for payment of that cash price by instalments that in practice could avoid the intended operation of the amendment. This could be achieved by simply ensuring that the price paid included a component of "interest" but that no "base price" had been advertised nor discussed with the consumer - only the inflated cash price.

Some member of the relevant subcommittee of the Society, that considered the Consultation Draft, who currently act for many disadvantaged retail borrowers, suggested that an option to be considered could be a reversal of the onus of proof in certain circumstances where section 9A and 9B apply, such that a charge for the credit would be "presumed to be made" unless the contrary is shown. However, in circumstances, where it is unlikely that any consumer harm is present, then specific regulations could exempt classes of contracts from this reversal of the onus of proof.

4. Conclusion

The Society would be keen to participate in, or indeed if requested would be happy to provide a forum for these technical issues and options for the way forward to be further discussed and explored.

If you have any queries or wish to discuss this further please contact Mr Bernie O'Donnell, Secretary, Queensland Law Society's banking & financial services Law Committee on (07) 3842 5918.

Queensland Law Society
9/12/05