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User-friendliness in Legislative Drafting : The Credit Bill 1989

Abstract

In September 1989, the Standing Committee of Consumer Affairs Ministers released the draft Credit Bill 1989 for public comment. It is intended to form the basis of uniform legislation through Australia in 1990. That Bill is important for two main reasons. The first is its policy. It incorporates a number of substantial changes to the policy contained in the existing Credit Act. Perhaps the main policy change is the setting of a new standard for disclosure. The Bill requires disclosure of the effective rate of interest and costs in place of the present requirement of disclosure of the annual percentage rate of interest.

The second reason why the Bill is so important is the form in which it is drafted. The Bill is expressed in a much more direct way than the Act it is designed to replace. It is also set out in a new format, incorporating a modified decimal numbering system. The final draft of the Bill will be incorporated as one of the models in the Commission's forthcoming report 'The Formatting of Legislation'.

This article is not concerned with the policy changes incorporated in the draft legislation; they are a matter for further consideration by SCOCAM, in the light of public consultations on the Bill. Instead, this article is concerned with the drafting changes contained in the Bill. It examines the drafting defects in the Credit Act and the reasons for the changes made in the Bill, and explains how the new format will help in ensuring better communication of the law to its audience.

Keywords

Credit Bill 1989, drafting legislation

Articles

USER-FRIENDLINESS IN LEGISLATIVE DRAFTING—THE CREDIT BILL 1989



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In September 1989, the Standing Committee of Consumer Affairs Ministers released the draft Credit Bill 1989¹ for public comment. It is intended to form the basis of uniform legislation through Australia in 1990. That Bill is important for two main reasons. The first is its policy. It incorporates a number of substantial changes to the policy contained in the existing *Credit Act*.² Perhaps the main policy change is the setting of a new standard for disclosure. The Bill requires disclosure of the effective rate of interest and costs in place of the present requirement of disclosure of the annual percentage rate of interest.

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WHAT'S WRONG WITH THE DRAFTING OF THE CREDIT ACT?

The *Credit Act* is widely regarded as one of the most difficult and impenetrable pieces of legislation in this country. The drafting of the Act has been subject to more outspoken criticism than any other legislation

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1 The Bill was drafted for SCOCAM by the Victorian Law Reform Commission with the assistance of Rod Armitage (Armitage Associates), Simon Begg (Corrs Australian Solicitors), Tony Duggan (University of Melbourne and Corrs Australian Solicitors) and Dick Viney (Chairman, Credit Licensing Authority (Vic)).

2 1984 (NSW); 1984 (Vic); 1984 (WA); 1985 (ACT); 1987 (Qld).

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with which I am familiar. One has only to look at Pengilly's *Credit Act 1984*³ or Duggan, Begg & Lanyon's *Regulated Credit: The Credit & Security Aspects*⁴ to become aware of the problems which even the most experienced and capable lawyers face in trying to find their way through the maze of words. Having been involved in an exercise which involves rewriting many of the Act's provisions in a more intelligible form, I can confirm that the criticisms of the writers are justified. In brief, the *Credit Act* is virtually unintelligible:

- it mistakes its audience
- it violates basic principles of communication
- it provides the reader with virtually no finding aids or explanations

The Credit Act mistakes its audience

Like so much legislation, the *Credit Act* appears to have been drafted on the assumption that its audience consists solely of a few expert lawyers. Much of it must have been unintelligible to most of the Members of Parliament who had to vote on it as a Bill. It is certainly not intelligible to the credit industry and its clients. Take s 107 as an example. It deals with the notice that a creditor must give before commencing proceedings against a defaulting debtor. RightWriter, a software intelligibility test, rates it as intelligible only to people with 22 years of formal education. That's the equivalent of primary, secondary and first degree tertiary education, followed by two PhD's!

The only explanation for the type of drafting found in s 107 is that the drafter has failed to realise that an Act is not important solely because it is a *legal* document. It is also important because it is a *management* document. It is, in fact, the basis on which the people to whom it is directed—creditors and administrators, in particular—must manage their affairs. What earthly use is a management document if it is unintelligible to those who must comply with it or administer it? As Sir Courtenay Ilbert, Parliamentary Counsel to the Treasury, said in 1901:

An Act of Parliament has to be interpreted, in cases of difficulty, by legal experts, but it must be passed by laymen, and operate on laymen. Therefore it should be expressed in language intelligible by the lay folk.⁵

There really is no excuse for the *Credit Act's* failure to address its audience. The leading modern text on legislative drafting is undoubtedly the work by Thornton, now in its third edition. He makes it absolutely plain that the drafter must pay attention to the needs of his or her audience, and that the audience of a piece of legislation is not just the judges or a few expert lawyers. It also includes Members of Parliament, those upon whom the legislation imposes duties or confers benefits, and those who must administer it.⁶ Regrettably, Thornton's clear advice has been ignored in the *Credit Act*.

3 Longman Professional (1984).

4 Law Book Co (1989).

5 *Legislative Methods & Forms*, Clarendon Press, Oxford (1901), 247. See also Thring, *Practical Legislation*, 2nd ed John Murray (1902), 82: 'law is made for man, and not man for law; and it is too often forgotten by lawyers and draftsmen that the greater number of Acts of Parliament contain rules of conduct to be observed by illiterate persons, and to be enforced by authorities unacquainted with the technical language of Coke and the year books'.

6 *Legislative Drafting*, Butterworths 1987.

The Credit Act violates basic principles of communication

There are several ways in which the *Credit Act* violates basic principles of communication. I will discuss its failure to comply with three of those principles. They are:

- Use short sentences and simple sentence structures
- Use terms that are in common use and likely to be widely understood
- Present information in an order that follows the logic of the ideas being presented

Use short and simply structured sentences

It has been well known for some time that the intelligibility of written material can be prejudiced by the use of long sentences. Anything more than an average 20-25 words per sentence creates significant difficulties in comprehension. It is hardly surprising, therefore, that leading writers on legal drafting should warn drafters against unnecessary length and complexity. As Driedger put it 50 years ago:

The best and safest rule for the draftsman to follow is that words and sentences should be as short and simple as circumstances permit.⁷

How does the *Credit Act* perform in this regard? Very poorly indeed. Take s 25(3) as an example. It's a single sentence of 345 words. And it's not the only example. Try s 38 (191 words); 45(1) (165 words); 49(1) (208 words); 65 (171 words); 69(1) (220 words); and 94(1) (141 words). The list could go on and on.

The extraordinary length of these sentences in most cases reflects the complexity of their structure. Take s 25(3)(d). It reads as follows:

Where, by reason of sub-section (1), a tied loan contract is discharged when a contract of sale is rescinded or discharged—

...

- (d) if the goods are in the possession of the buyer—
- where, before the rescission or discharge of the contract of sale, there was a mortgage relating to the tied loan contract to the extent that it is discharged, the buyer shall deliver the goods to the credit provider; and
 - where before the rescission or discharge of the contract of sale, there was a mortgage relating to the tied loan contract to the extent that it is discharged, the buyer shall deliver the goods to the credit provider; and
- (e) if the goods are in the possession of the credit provider and no amounts are owed to the credit provider under paragraph (b), the credit provider shall deliver the goods to the supplier.

This type of sentence structure is well-known to linguists. It is referred to as 'syntactic nesting'—the nesting of one clause within another. As one linguist has said:

the human mind can take only a limited amount of syntactic nesting because nesting forces the brain to keep track of the initial part of the construction

⁷ 'Legislative Drafting' (1949) 27 Can Bar Review 291, 295. See also Driedger, *A Manual of Instructions for Legislative and Legal Writing*, Dept of Justice, Canada (1982), 6.

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until the nested item has been absorbed and the balance of the construction is revealed.⁸

In simple terms, the greater the amount of nesting in a sentence, the greater the chance that the reader will be unable to comprehend it. Nesting of the type found in s 25(3)(d) is found in many of the *Credit Act's* provisions. Small wonder, then that it is so difficult to follow.

Use common, widely understood terms

There is a tendency in legislative drafting to create a special language. This tendency is exhibited in two practices. The first practice is that of avoiding a 'new' or unusual use of a word even if that use is convenient, well accepted, and readily understood by the audience of the particular legislation. The *Takeovers Code*, for example, carefully avoids use of terms like 'multiplier' and 'escalation', preferring lengthy circumlocutions instead.⁹ In s 107 of the *Credit Act*, circumlocution of this type reaches giddy heights. People in the credit industry, and their legal advisers, are familiar with the meaning of the term 'acceleration'. It means the acceleration or bringing forward of the debtor's payment obligations. The concept of acceleration is, of course, dealt with in the *Credit Act*, notably in s 107(1)(b). But the word 'acceleration' is conspicuously absent. Note the remarkable, extended euphemism that the drafter put in its place when dealing with the creditor's right to accelerate payments:

- (b) . . . a right under a regulated contract arising by reason of—
- (i) a default by the debtor;
 - (ii) a failure by the debtor to observe provisions of the contract, being a failure that does not constitute a breach of the contract;
 - (iii) the exercise of an option by the credit provider; or
 - (iv) any other fact, act or thing—

by reason of which the whole or a part of the outstanding balance of the amount financed or of the amount owed has become due on a date earlier than the date on which it would have become due if the fault, failure, exercise, fact, act or thing had not occurred or been done

The reverse side of the coin is the practice of creating artificial concepts and an artificial language. The most obvious example in the *Credit Act* is the use of the qualifier 'regulated' in such phrases as 'regulated contract', 'regulated credit sale contract', 'regulated loan contract', 'regulated continuing credit contract' and so on. There is simply no need for any of those concepts. Had the scope of the Act been set out clearly at the beginning, the drafter could have used the terms 'contract', 'credit sale contract', 'continuing credit contract', 'loan contract' and so on without fear of misunderstanding. That would have been much simpler and would have avoided the need to define each of the regulated contracts in terms of the applicability of a particular Part of the Act. In fact, the scope of the *Credit Act* is never stated directly. It is to be inferred from a large number of interlocking definitions of a more or less artificial nature.

⁸ Saha, 'A Modern View of Language' (1972) 23 Case Western Reserve LR 318, 351.

⁹ See VLRC, *Plain English and the Law* (1987), Appendix 2, 26-37.

Perhaps the most artificial of all is in s 13 which 'deems' certain hiring contracts to be credit sale contracts.¹⁰

The *Credit Act* is, of course, not by any means the worst example of the use of artificial concepts. It contains nothing to compare with s 39(2) of the *Takeovers Code*:

Where—

- (a) at a particular time during a period that is a relevant period in relation to a company, the percentage of the voting shares in the company to which a relevant person is entitled is less than a prescribed percentage; and
- (b) immediately after that time, the percentage of the voting shares in the company to which the relevant person is entitled is equal to or greater than that prescribed percentage,

the relevant person shall, as soon as practicable, and in any event within two business days, after that time, serve on the company a notice in writing setting out the percentage of the voting shares in the company to which the relevant person is entitled at the time when the notice is so served.

This sentence is simply unintelligible. To make any sense of it at all one has to refer to a series of definitions set out in s 39(1) that create the artificial concepts 'relevant period', 'relevant person' and 'prescribed percentage'.

Present information in a logical order

Perhaps the worst aspect of the *Credit Act* is the incoherence of its structure. Both Pengilley¹¹ and Duggan, Begg and Lanyon¹² are highly critical of the ordering of ideas in the *Credit Act*. I have already referred to the fact that the scope of the Act is never stated directly, but is to be gleaned from a number of interlocking definitions. But it's worse than that. There is a lack of logical progression in the interlocking provisions. As Duggan, Begg and Lanyon point out, the basic scheme of the Act can be represented in the form of the following pyramid representing a progression downwards from the general to the particular.¹³

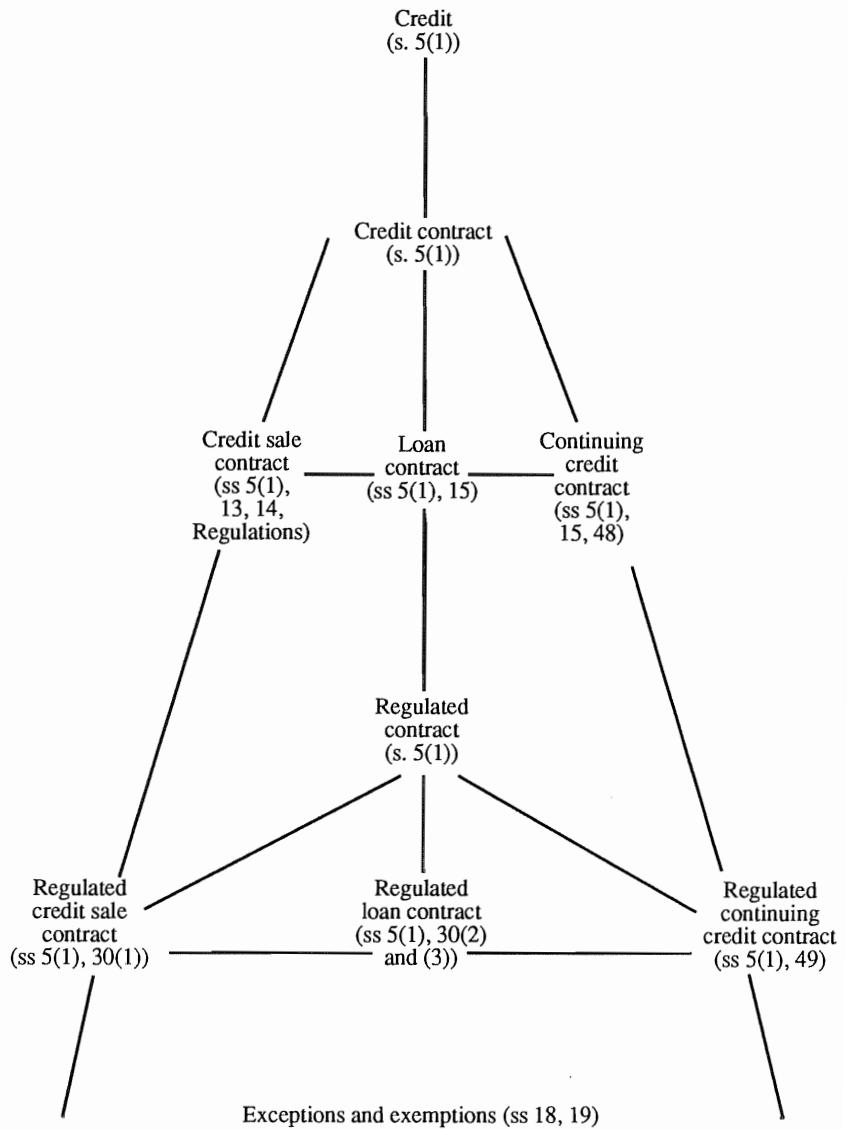
¹⁰ See s 13.

¹¹ *The Credit Act 1984* (1984).

¹² *Regulated Credit: The Credit and Security Aspects* (1989).

¹³ 41f.

SCOPE OF LEGISLATION



The variety of, and distance between, the section numbers referred to in this pyramid are indication enough of the complex task facing anyone who has to decide whether a particular transaction is covered by the Act or not. On closer analysis, however, the complexity is even worse than that indicates:

At each stage, various transactions are removed from the ambit of the legislation. Logically, the exceptions should become more and more particularised as progress is made from one stage to the next. Regrettably, however, this is not the case. The drafters of the legislation have unduly complicated matters by failing to keep the factors relevant to the third level of inquiry (the sub-species of credit contract with which the legislation is concerned) in the one place. There are five such factors: (1) the status of the debtor (as a general rule, the legislation does not apply if the debtor is a body corporate); (2) the status of the credit provider (the legislation does not apply if the credit provider is not in business); (3) the debtor's purpose in obtaining credit (a transaction entered into for the debtor's business purposes is by and large excluded); (4) the amount financed (there is a ceiling relevant to most transactions, above which the legislation will not apply); and (5) the rate of credit charge (there is a floor relevant to some transactions, below which the legislation will not apply). Factors (1) and (2) appear not in the provisions which define 'regulated contract', which would have been the appropriate place, but, instead, in the definitions of 'credit sale contract', 'loan contract' and 'continuing credit contract'. The consequence is to make these definitions relevant to both the second and third levels of inquiry, instead of just the second and so to subvert the logical progression inherent in the pyramidal structure described above

This method of drafting forecloses the prospect of using the pyramid as a flow-chart. Instead of a logical progression from top to bottom (general to particular), movement backwards and forwards between the different levels is necessary in order to achieve a proper understanding of the scope of the legislation. In actual terms, what this means is that a person wanting to discover whether the legislation applies in a given case must look simultaneously, instead of sequentially, at the various provisions referred to above, as well as at the regulations and exemption orders. *This is a feature of the legislation which severely taxes comprehension.*¹⁴

But the problem is not only with the scope of the Act. One of the most remarkable things about the ordering of its provisions is that the first *substantive* sections—in Part II of the Act—are concerned with contracts of sale that are conditional on the grant of credit, and with the responsibilities of linked credit providers. Important as those provisions undoubtedly are, they are *not* the main message of the Act. The main aim of the Act is to regulate *credit* contracts, not contracts of sale that are related to credit contracts. The provisions dealing with credit contracts are unaccountably delayed until Parts III and IV of the Act.

And the story doesn't end there. Perhaps the most important requirements in the Act concern disclosure. The Act requires the creditor to disclose relevant information to the debtor before a contract is entered into. One might have thought that provisions defining what information was 'relevant' for this purpose would have been located in close proximity. Not so! To discover what information a creditor must disclose in relation to a credit sale or loan contract, for example, one must refer not only to s 35, but also to ss 5 (definition of credit sale contract), 11 (definition

¹⁴ 43 (emphasis added).

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of credit charge), 38 (the annual percentage rate), Schedule 2 (the amount financed) and Schedule 3 (the credit charge). S 38 refers, in some cases, to Schedule 6. And a similar variety of provisions must be referred to in relation to the disclosure required in respect of continuing credit contracts.

The Credit Act fails to provide finding aids and explanations

The more complex the legislation, and the more difficult its language and structure, the greater the need for explanations and finding aids. How does the *Credit Act* perform in this regard? Badly. There is no explanatory memorandum. Even if there were, it probably wouldn't help much. Explanatory memoranda often explain very little. One reason lies in their tendency to follow the statutory wording, as the following gem demonstrates:

Migration Legislation Amendment Act 1989
Section 61

Explanatory memorandum

This section allows internal review. It allows for the regulations to provide that certain prescribed decisions of the Secretary are reviewable by prescribed review officers on application as prescribed by prescribed persons.

The Act itself

(1) The regulations may provide for prescribed decisions of the Secretary to be reviewed by prescribed review officers on application, as prescribed, by prescribed persons.

Of course, even if there were an explanatory memorandum, and even if it did, in fact, explain the statutory material, the practice of separating the explanation from the statutory material would still impede communication. Why should one be forced to read two separate documents instead of a single, integrated one?

The lack of an explanatory memorandum is bad enough. But the absence of an index is simply inexplicable. Again, this is not the worst case of such an omission. In 1988, a Joint Select Committee of the Commonwealth Parliament was given the task of examining and reviewing no less than four volumes of legislation: the *Corporations Bill 1988*. The Office of Parliamentary Counsel apparently thought that neither the Committee, nor the Parliament itself, needed an index to find their way through the morass. No-one—member of parliament, lawyer, member of the business community or member of the public—should have his or her needs ignored in this way.

Finally, there is no attempt to highlight defined words. Lawyers in private practice are hardly noted for their radicalism in the drafting of their documents. But even they are now incorporating highlighting devices (bolding, capitalising, asterisking) for defined terms. The reason is obvious enough. Legal drafters have long used—and very often abused¹⁵—definitions as a means of achieving the precision required in their documents. A reader of a lengthy document may miss the nuances of a particular provision if he or she overlooks the fact that one or more of

¹⁵ Compare Lord Thring, *Practical Legislation*, 2nd ed John Murray (1902), 95: 'A word should never be defined to mean something which it does not properly include'.

its terms have been defined. Highlighting of defined terms therefore improves communication by reducing the risk of error. Once more, the *Credit Act* is not alone in its omission. Nowhere in the country does legislation yet incorporate the highlighting of defined terms.

HAS THE DRAFT CREDIT BILL 1989 SOLVED THESE PROBLEMS?

The simple answer is 'Yes'. To demonstrate the truth of that answer, I will examine the Credit Bill 1989 under headings that are equivalent to those used in relation to my criticisms of the *Credit Act*. In doing so, I will, wherever possible, refer to precisely the same provisions in the Bill as I have criticised in the Act.

Does the Credit Bill 1989 mistake its audience?

No. The Bill was drafted on the basis that it should be intelligible to the widest possible audience. To a great extent, that aim has been achieved. Take clause 110, dealing with the notice that is required before a creditor is entitled to commence legal proceedings. It is the equivalent of s 107 of the Act.¹⁶ You will recall that we tested s 107 on Right Writer, a software intelligibility test. It was only intelligible to people with the equivalent of 22 years of formal education. We also tested our clause 110. The result? Only 12 years of formal education are required. In other words, students in their last year of secondary education before proceeding to University should be able to understand it. That may not be perfect. But it's certainly a major improvement on s 107 of the *Credit Act*.

Does the Bill violate basic principles of communication?

No. Central to our work on the Credit Bill is the knowledge that poorly drawn legislation imposes heavy costs on the community. It makes compliance more difficult, creates an artificial demand for legal advice, and increases the need for administrative resources. Worse still, it alienates the people whose conduct it is supposed to regulate, and it impedes their participation in government and in political life. Consequently the Credit Bill 1989 was drafted on the basis that it should observe each of the principles of communication that are flouted in the *Credit Act*.

Use short and simply structured sentences

The sentences in the Credit Bill 1989 are far shorter than those in the *Credit Act*. The Table below compares the sentence length of the provisions in the Bill that correspond most closely with those in the Act which were criticised for their length earlier in this article. In each case, the improvement is remarkable.

¹⁶ Above, at note 9 in text.

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Table Sentence length: Comparison of Act and Bill			
Provision in		Number of Words	
Act	Bill	Act	Bill
38	23.6	191	43
45(1)	107	165	28 (average)
49(1)	3	208	42 (average)
65	42.3	171	47 (average)
69(1)	95	220	44 (average)
74(1)	101	141	33 ¹⁷

In simplicity of sentence structure, the Credit Bill 1989 compares even more favourably with the *Credit Act*. You will remember that I took s 25(3) of the *Credit Act* as an example of the complex sentence structure in the Act. The section exhibits far too much 'syntactic nesting' or the embedding of one clause within another. Compare the corresponding provision of the Credit Bill—clause 85:

If a contract of sale is rescinded or discharged for any reason, a loan contract between the debtor and either the supplier or a linked creditor that is related to that contract of sale is discharged to the extent to which the loan was or is to be used to finance that sale.

85.1 The creditor is entitled to recover from the debtor any money paid by it to the debtor under the loan contract to the extent that it relates to that sale and has not been paid to the supplier.

85.2 The debtor is entitled to recover from the creditor payments made by the debtor under the loan contract to the extent that they relate to that sale.

There is no syntactic nesting—no embedding of clause within clause—at all. The sentences are simple and straightforward.

Use common and widely understood terms

The Bill retains all necessary technical legal terms. Terms are defined whenever it is necessary to achieve precision. But euphemisms of the type found in s 107 of the *Credit Act* are not found in the Credit Bill. The euphemism used in s 107(1)(b) to refer to acceleration of payments (some 108 words) is replaced by the simple phrase 'accelerating payment on the happening of an event' (8 words).

The Credit Bill 1989 also avoids the creation of artificial concepts. There is no 'regulated contract', 'regulated credit sale contract'—in fact, no 'regulated' anything. The Bill speaks simply of 'contracts', 'credit sale contracts' and so on. Use is made of headings to delimit the scope of terms which might otherwise be ambiguous. And nowhere in the Bill is any use made of terms like 'prescribed person', 'relevant person', 'relevant time', 'prescribed period'—terms that are apparently so dear to the heart of some Commonwealth drafters.

¹⁷ Despite the improvement, it's clearly not enough. An average 30-40 words is too much for many readers. In the final draft, we will have to try harder!

Present information in a logical order

Unlike all existing legislation, the Credit Bill commences where it should. Not with the preliminary and peripheral information that Acts now begin with, but with a simple and straightforward statement of the scope of the Bill. Having settled its scope, the Bill proceeds to deal with the main subject of its requirements: credit sale contracts, loan contracts and open-ended contracts. It then deals with mortgages, guarantees, insurance contracts and sales contracts. And so on. Consequently, ordering of the material is, at one level, from the most important to the less important. At another level, it is based on chronological sequence: the creation of contracts, mortgages and guarantees; their variation; their enforcement. The ordering of material is in accordance with what readers would expect. That is, of course, the key to good communication. Surprises are limited to *intended* surprises.

The same principle is followed in relation to specifics. You will remember that the provisions of the *Credit Act* that define the information that the creditor must disclose to the debtor are scattered throughout the Act. Not so in the Credit Bill 1989. Take the provisions dealing with disclosure in relation to credit sale and loan contracts, for example. They are contained in a sequence in clauses 23 to 25. There is no need to refer to any other clauses. Even the required definitions are there.

Does the Bill fail to provide finding aids and explanations?

No. The Credit Bill is much less difficult in its language and structure than the *Credit Act*. Consequently, the need for finding aids and explanations is much reduced. Yet it contains both finding aids and explanations in abundance. A substantial index is provided. Defined terms are highlighted in their first use in any clause. A footnote refers to the place where the definitions are set out. And cross references to related provisions are set out in the margin. But the most important contribution lies in the inclusion of explanatory material, and of examples of the operation of particular provisions. Some people may object to the inclusion of explanatory material and examples on the basis that it might become difficult to tell the difference between the explanatory and exemplary words, on the one hand, and the enacting words, on the other. That 'problem' is avoided by 'boxing' the explanatory and exemplary material.

Others might be concerned at the extent to which the explanatory and exemplary material might be used to interpret the enacting words. But that problem—if, indeed, it is a problem—already exists in those cases where an explanatory memorandum is prepared. Legislation in most jurisdictions allows for 'extraneous' material of that type to be referred to in the interpretation of legislation.¹⁸

Neither of these initiatives is without precedent. Explanatory material was included in a Bill for the first time in this country in the *Statute Law (Miscellaneous Provisions) Bill 1989* (NSW). It improves remarkably the comprehensibility of the material in that Bill. Examples, so far as I

¹⁸ For example, *Interpretation of Legislation Act 1984* (Vic), s 35. Cf *Acts Interpretation Act 1901* (Cth), s 15AB.

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am aware, have never been included in legislation in this country. But they were a central feature of Henry Maine's *Indian Succession Act 1865* and Fitzjames Stephen's *Indian Evidence Act 1877*; and a much admired feature in the *Consumer Credit Act 1974* (UK). The Credit Bill 1989 clearly has respectable forbears—in this respect, at least!

CONCLUSION

Legislative drafting in this country is in need of substantial re-assessment. Much of it appears fixed in a time warp bounded by the structural and language innovations of George Coode¹⁹ and Henry Thring²⁰ in the mid and late 19th century. Coode, in particular, would relish the following masterpiece from the 1989 Accident Compensation Amendment Bill (Vic):

If—

- (a) a worker's incapacity for work results from, or is material contributed to by, the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease; and
- (b) the worker has received weekly payments for incapacity resulting from, or materially contributed to by, the pre-existing injury or disease or its recurrence, aggravation, acceleration, exacerbation or deterioration for a period or periods (whether consecutive or not) of not less than 52 weeks; and
- (c) the Commission or self-insurer considers that—
 - (i) the worker is not totally incapacitated for work; or
 - (ii) the worker's level of impairment resulting from, or materially contributed to by, the injury or its recurrence, aggravation, acceleration, exacerbation or deterioration would, if assessed according to the methods prescribed for the purposes of s 100A, be less than 15 per centum—

a weekly payment to the worker must not exceed—

- (d) 60 per centum of the worker's pre-injury average weekly earnings; or
- (e) \$380—

whichever is the lesser unless the payment is in respect of any part of a period or periods (whether consecutive or not) of entitlement to compensation of 52 weeks immediately after a period or periods (whether consecutive or not) of not less than 52 weeks in respect of which the worker has received no weekly payment for incapacity resulting from, or materially contributed to by, the pre-existing injury or disease or its recurrence, aggravation, acceleration, exacerbation or deterioration.

This follows, with apparent reverence, Coode's injunctions²¹ concerning the ordering of material in legislative provisions. Put simply, the 'case'—that is, the circumstances in which the provision is to operate—should be put first. The 'action'—that is, the prescription made by the provision for those circumstances—should be put second. The trouble with following this injunction today—at least when carried to the lengths that it is in

19 Author of the most influential work on drafting in the 19th century: *On Legislative Expression or the Language of the Written Law* (1843).

20 Lord Thring established the Office of Parliamentary Counsel (UK) in 1877. See his *Practical Legislation* (1902).

21 *On Legislative Expression or The Language of the Written Law* (1843): republished in Driedger, *The Composition of Legislation*, 2nd rev ed Dept of Justice, Alberta, (1986). Appendix I.

s 93C—is that it fails to take account of a remarkable discovery in linguistics.

As Kolers points out, languages can be divided into ‘right-branching’ and ‘left-branching’ languages. In right-branching languages, qualifications and exceptions normally come after the verb. English is a right-branching language. But legal English, following Coode, is left-branching. This creates peculiar difficulties for most readers. Having become accustomed to ‘processing’ language in one way, they find it particularly difficult to process it in the opposite way. Paradoxically, the Coode style is suitable for those who speak and think in Japanese or Turkish; but not for those who speak and think in English—or indeed, in any other European language.²² There may, of course, be a few cases where the Coode method is appropriate. But it should certainly not be followed uncritically. As Lord Thring said:

arrangement of those parts must depend on the judgment of the draftsman: the only general rule to be observed is that each part should in substance be clearly distinguishable, and should comprise, as far as possible, a short sentence or sentences.²³

The process of the reassessment of the principles of legal drafting will obviously take time. I hope that, despite its own faults, the Credit Bill 1989 will contribute significantly to that process, particularly in its adoption of a modified decimal numbering system. That system is probably the most significant innovation in the whole Bill. It literally forces the drafter to separate out, and to highlight, the main principle. One of the main criticisms of the traditional drafting style is its failure to distinguish principle from detail.²⁴ The present subsection numbering system does not require drafters to establish priority as between different propositions. The modified decimal numbering system does precisely that. No longer can the drafter hide the main principle in a welter of detail. No longer can anyone draft a section like s 93C of the *Accident Compensation Act*. The medium is, to that extent at least, the message.

Perhaps the most pressing need of all is for the development of a formal training course for drafters. To date, their training has been, at best, haphazard. It has largely followed the apprenticeship style. Some drafters have not been made sufficiently aware of the needs of their various audiences. Nor have they been made sufficiently aware of the wider political and social context in which they draft. Some of them remain ignorant of the work done on legal language in disciplines other than law. Small wonder, then, that some of them believe in a specialised art (or science) of legislative drafting, and think that legislative language is a language apart from all others. They have not heeded the warning given by Driedger some thirty years ago:

There are no special rules of grammar or syntax for statutes. English is English. Many think that to make something ‘legal’ you must fill it with whereases, provided thats, hereinbefores and notwithstanding; that every verb must be in the future perfect; that every section must be a compound sentence in which many distinct sentences are combined, each with multiple adverbial and

22 P A Kolers, cited in Friedland, *Access to the Law*, Carswell-Methuen, Toronto, (1975), Appendix 7. See also F Bowers, *Linguistic Aspects of Legislative Expression*, University of British Columbia Press (1989), 337-342.

23 *Practical Legislation*, 81.

24 Dale, *Legislative Drafting: A New Approach*, Butterworths (1977).

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adjectival clauses, many of which must be exceptions and exceptions to exceptions. If you want to write a law, stick to plain words and grammar and a construction as simple as the subject-matter permits.²⁵

Instead, they continue to rely on the canard that precision and plain English are incompatible. Of that, much has been said—and often—by others. Bentham was justifiably outspoken in rejecting the view that the use of simple, straightforward language in legislation would result in imprecision:

For this . . . accumulation of excrementitious matter in all its various shapes . . . for all the pestilential effects that cannot but be produced by this so enormous a load of literary garbage—the plea commonly pleaded . . . is, that it is necessary to precision or . . . certainty. But a more absolutely sham plea never was countenanced, or so much as pleaded in either the King's Bench or Common Pleas.²⁶

Moreover, the excuse given for not moving to a plainer and more direct style makes a quite unwarranted assumption—that the present style produces a unique level of certainty or precision. It just isn't so. In fact, there are many examples of uncertainty or imprecision in the *Credit Act*. Nor is this unique to that particular Act. As Melinkoff said:

Lawyers spend more time talking about being precise than others similarly addicted to words—politicians and the clergy, for example. Listening to these discussions about precision, and contrasting their own concern with the indifference of the street, law students and lawyers come to the effortless conclusion that with so much interest in precision, there must be a lot of it around.²⁷

There are, of course, faults in the Credit Bill as well. We will fix as many of them as we can before we present our final draft to the Standing Committee of Consumer Affairs Ministers. No doubt some faults will remain. But they should be attributed to human frailty, not to our general drafting style. There is nothing about a plain English style that leads to a lack of precision. Anyone who doubts it should reflect on what Lord Reid had to say about the matter:

If only lawyers would realise that no language is a precision tool, and that simple short sentences, though they may look less precise, are really much more likely to have a clear meaning than the kind of jargon which is now fashionable.²⁸

25 *A Manual of Instructions for Legislative and Legal Writing*, Department of Justice, Canada, (1982) Vols 1, 2.

26 *Nomography*, in *Works* (Bowring ed) 1843, Vol 3, 260.

27 *The Language of the Law*, Little Brown (1963), 293.

28 'The Judge as Law Maker', (1972) 12 JSPTL 22, 28.