17 May 2016

The Treasury
Langton Crescent
PARKES ACT 2600
AUSTRALIA

By email: consumercredit@treasury.gov.au

Dear Treasury,

Review of the Small Amount Credit Contract Laws – Final Report

We write in relation to the final report by the Small Amount Credit Contracts Review Panel (**Review Panel**) into matters relating to small amount credit contracts (**SACCs**) and consumer leases. Consumer Action Law Centre (**Consumer Action**) was actively involved in the consultation period of the inquiry, and our submission is noted in the report. In addition to this brief submission, we **attach** our submissions to both the initial Discussion Paper, and the Review Panel's Interim Report.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Consumer Action Submission: SACC Review Panel Final Report

Following a comprehensive consultation period the Review Panel has made twenty-four recommendations which would provide significant additional protection for vulnerable consumers, and reduce the harm caused by SACCs and consumer leases.

While the full range of recommendations provide for a significantly improved consumer protection framework, Consumer Action regards the following eight recommendations as being of primary importance for vulnerable consumers:

- Recommendation 1 – Affordability (SACCs)
- Recommendation 8 – Unsolicited offers (SACCs)
- Recommendation 11 – A cap on cost (consumer leases)
- Recommendation 15 – Affordability (consumer leases)
- Recommendation 16 – Centrepay implementation
- Recommendation 18 – Unsolicited marketing (consumer leases)
- Recommendation 22 – Disclosure of APRs (SACCs and consumer leases).

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- Recommendation 24 – Avoidance

The recommendations are considered and measured, and have been made with the key objective of facilitating financial inclusion.

Unfortunately, the recommendations do not go far enough to address the issue of affordability and prevent ongoing debt spirals that often lead to financial exclusion and costs to the community through provision of emergency services, legal support and financial counselling.

Where this submission is silent on proposed reforms, Consumer Action can be taken as being supportive. As outlined below, our additional comments relate to cost caps and affordability measures that we believe should be taken into consideration in any Government response to the report.

Cost caps

We welcome the extension of cost caps to consumer leases, however we urge reconsideration of the proposed cap.

The Review Panel has recommended that consumer lease providers be permitted to charge 4 per cent per month on top of the "Base Price" of the good which they are leasing, for every month of the lease. The report makes clear that this equates to an annual percentage rate (**APR**) of between 68 per cent and 82 per cent. Such a high APR is excessive, especially for a product that is relied upon by lower income Australians.

The report proposes to define the Base Price as the recommended retail price (**RRP**). The report notes that this is a very generous starting point, given that lessors commonly receive a discount on the RRP when purchasing goods. It is of course common for retailers to include a retail margin in the supply of goods—Consumer Action is advised that at least one large lessor already imposes a mark-up on their goods of over 20 per cent.

What the report doesn't make clear, however, is that the proposed approach presents an opportunity for a lessor to further inflate a RRP, knowing that the permitted monthly fee can be charged on top of that. This is particularly an opportunity for lessors that lease their own branded range of goods. Given that they are the only business that supply these goods, there is no obvious comparison point to confirm that the RRP is a competitive one.

It is crucial to understand the consumer base for consumer leases when considering regulation to promote financial inclusion. A forthcoming University of Melbourne research report examining consumer lease contracts recently interviewed community workers, community solicitors, and financial counsellors in Victoria and New South Wales. Those interviewed stated that in their case work experience, consumer leases are exclusively obtained by community members who are welfare dependent or otherwise financially vulnerable.[1] Given that consumer leases are an extremely

[1] Mcrae, C (May 2016) pers comm

expensive way to acquire consumer goods (more expensive, in fact, than taking out a SACC), and given that the consumer base for consumer leases is overwhelmingly low-income, and very often welfare dependent, it is difficult to see how consumer leases can be regulated to promote financial inclusion without seriously addressing the issue of cost. While it is pleasing that the SACC Review Panel have recommended at least some price control, the recommendation does not go nearly far enough to facilitate financial inclusion.

Given these risks, we urge any Government response to limit the amount lessors can charge to a maximum APR of 48 per cent. This would have the added benefit of ensuring regulatory consistency with credit contracts of similar types (i.e., contracts of more than $2,000 lasting more than one year).

We are also disappointed about the lack of any change to the cost cap for SACCs. The Review Panel considered reducing the cap for establishment fees from 20 per cent of the amount borrowed to 10 per cent, but rejected this option on the basis that it would not allow recovery of lenders' costs of establishing a loan (including general business and advertising costs).

This contention doesn't stand up to analysis. First, the Review Panel does not appear to have analysed the costs incurred by lenders, but rather accepted assertions of lenders. Second, the establishment fee is expressed as a percentage of loan, when establishment costs for a loan are likely to be primarily fixed. Finally, reducing the establishment fee would help reduce the incentive for lenders to structure loans as short-term (this is explained further below).

The Review Panel's report, helpfully, describes the cap for SACCs as a concession from the 48 APR per cent cap that applies to consumer credit generally. Yet the Review Panel has not adequately explained the reasoning for maintaining this current concession, nor any basis for the structure of the cap. Given this, we recommend that the cap for SACCs be limited to a maximum APR of 48 per cent.

Affordability measure

We generally support the proposals to cap the total amount of SACC and consumer lease repayments to a percentage of a consumer's net income. However, we believe that the Review Panel has overlooked some unintended consequences.

With regard to SACCs, the Review Panel has recommended limiting SACC repayments to 10 per cent of the consumer's net income, but has also recommended removal of the rebuttable presumption that a SACC should be considered unsuitable if the borrower has had two or more SACCs in the previous 90 days. While there is some logic to this recommendation (the affordability requirement should limit the risk of debt spirals), we believe that it will result in more consumers becoming repeat (back-to-back) users of SACCs.

The Review Panel suggests that the 10 percent net income cap would encourage longer loan terms. However, we submit that there remains a strong incentive for lenders to structure SACCs as relatively short-term (one to three months in length) given that the cost cap provides a large upfront establishment fee for each loan. Further, the tables included in the report confirm that for minimum wage earners, a 3 month $500 SACC will result in repayments below the 10 per cent cap. For loans of

lower amounts, it is likely that even shorter loans (with a higher APR) will result in repayments below the 10 per cent case.

The risk is that at the end of a short loan period, the lender could re-contact the customer and entice them into another loan. Such marketing would not be considered unsolicited if the consumer has opted-in to receive such offers when taking out the previous loan—and this could be achieved with a simple tick box on the application form. The behavioural aspects of borrowing, the generally poor rate of financial literacy in the community, and the tendency of lenders to seek to establish ongoing relationships with their customers, will likely mean that many people will become repeat borrowers without considering other options such as more affordable finance or the availability of free financial counselling.

The continuing need for small amount credit contracts is often predicated on the basis that they are sometimes necessary for "one off" emergencies, and their high cost is justified on the basis of administrative costs. Removing the rebuttable presumption (and thereby enabling ongoing repeat borrowing) puts a lie to both of these justifications. Consumer Action notes that on May 12, 2016 Google announced that from July 13 an international ban on payday loan ads will apply to their web-site. The ban will apply to loan contracts with a repayment period of less than 60 days, and in the US will apply to products with an APR of 36% or higher. This is a significant statement by Google, and effectively places payday loans in the same category as other dangerous goods such as firearms, tobacco and explosives. We raise the action of Google to demonstrate that the debt spiral effect and the dangers of repeat borrowing have long been widely acknowledged. We believe that any sensible reform of small amount credit contract laws should address this issue – and would need to go further than the SACC Review Final Report recommendations in order to do so.

To "short circuit" the tendency of borrowers to take out another loan immediately on repayment of their previous loan, we recommend that a cooling off period of 60 days should be instituted, in lieu of the repeat borrowing rebuttable presumption. This would prevent borrowers from taking out another SACC within 60 days of repaying their previous loan, and would break the pattern of repeat borrowing. If SACCs truly are for one-off emergencies, then there should be no need for consumers to have access to such high cost credit on an ongoing, continuing basis.

While this proposal has not been made by the SACC Review Panel, it is not without international precedent. The Consumer Financial Protection Bureau (**CFPB**) has proposed a 60 day cooling off period for payday loans in the United States, precisely for the purpose of ending ongoing reliance on high-cost credit.[2]

With regard to consumer leases, we submit that the long term nature of lease contracts should be taken into account when considering the Review Panel's recommendation of limiting lease repayments to 10 per cent of net income.

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[2] CFPB Press Release, March 26 2015 (http://www.consumerfinance.gov/about-us/newsroom/cfpb-considers-proposal-to-end-payday-debt-traps/)

If the cost caps for leases are allowed to be charged over a 48 month period (i.e. 4 years), it is not inconceivable for products to tend to that length. This is a much longer term than SACCs, which commonly run for a period of 3 months.

We submit that the proposed affordability mechanism be adapted to deal with this difference between leases and SACCs. Rather than limiting rental repayments to 10 per cent of the consumer's net income, this should be reduced to 5 per cent. This would recognise that 10 per cent of a consumer's income over 4 years is a substantial amount of money compared with the same amount over 3 months for a typical SACC. For lower income Australians, taking 10 per cent of their income over 4 years is likely to leave them without sufficient money to live on and will not deliver financial inclusion. This is particularly so when one considers that the market for SACCs and consumer leases largely overlaps – meaning that under the SACC Review's current recommendations, low income earners could be committing up to 20% of their income to servicing SACC and consumer lease repayments. In our view, this is an unaffordably high percentage, and would not have the intended effect of promoting financial inclusion.

Other recommendations

The following comments relate to two other key recommendations:

Unsolicited sales and marketing:

We strongly support the proposed recommendations and believe that there needs to be much better alignment of the regulatory approach to unsolicited sales across all consumer products, including SACCs and consumer leases.

For example, section 156(1) of the NCCP Act prohibits credit canvassing at home, but not in other contexts and this does not apply to consumer leases. Section 992A of the Corporations Act regulates the hawking of financial products, but this is also limited: the prohibition doesn't apply to expenses-only funeral products and there can be limited remedies available when there is a breach.

In the context of the Review of the Australian Consumer Law (**ACL**), we are recommending a complete prohibition on unsolicited sales. This should be replicated for all credit and financial statements, and include all forms of communication (whether in person, phone or by electronic means). We refer to our forthcoming submission to the ACL Review.

In terms of the definition of unsolicited, we believe that there must be measures to prohibit lenders from obtaining invitations or consent to contact through ulterior means. For example, lenders are likely to bundle consents in terms of contracts, or through tick boxes on loans of applications. This could be dealt with by a provision which states that a consumer is not taken to have invited the provider or provided consent unless that they have done so for the predominant purpose of entering into negotiations to obtain a loan or lease. This is similar to section 69(1A) of the Australian Consumer Law which extends the definition of unsolicited consumer agreement in a similar way.

Avoidance:

We believe that any anti-avoidance mechanisms must be drawn broadly. We are also aware of concerns that such a provision would require referral of powers from state and territory governments. Attached is an advice from Brind Zichy-Woinarsky QC regarding the bases on which the Federal Parliament could enact anti-avoidance measures without the for further referrals of power

Please contact Zac Gillam, Senior Policy Officer on 03 9670 5088 or at zac@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE

Gerard Brody
Chief Executive Officer

Zac Gillam
Senior Policy Officer

Attachments:

1- Consumer Action submission to initial Discussion Paper.
2- Consumer Action submission to SACC Review Panel Interim Report.
3- Brind Zichy-Woinarsky QC advice re: anti-avoidance provisions.

Re: The Enactment of an Anti-avoidance Provision in the Australian Consumer Credit Regime

Memorandum of Advice

1. I am asked to advise whether the Commonwealth parliament has sufficient legislative power to enact a general anti-avoidance provision in the *National Consumer Credit Protection Act 2009* (Cth) ("the Act").
2. I am instructed that the credit industry, notably the payday lending industry and consumer lease industry, has a long history both in Australia and overseas of developing schemes to avoid consumer protection regulation. As a consequence, the Consumer Action Law Centre has for many years called for an anti-avoidance provision, similar to that to be found in Part IVA of the *Income Tax Assessment Act 1936* (Cth). Such a proposal was included in the exposure draft of the *National Consumer Credit Protection Amendment (Credit Reform Phase 2) Bill* 2012 ("the Bill"). The proposed amendment is contained in Schedule 6 to the Bill. Subsequent to the change of the Commonwealth government in the 2013 election, the Bill did not progress beyond the submission of public comments on the exposure draft.
3. I am instructed that the Consumer Action Law Centre has been informed by Treasury that such an anti-avoidance provision would require an additional referral of powers from the States. Treasury has further advised that the relevant Council of Australian Government ("COAG") agreement expired on or about 1 July 2012, and the current government is not willing to revisit the issue with the States. Accordingly, it is the view of Treasury that without a further referral of power an anti-avoidance provision would have to be based on a patchwork of constitutional powers relying upon interstate trade and commerce or corporations powers, and that this would end up with credit providers avoiding the anti-avoidance provision.
4. I am further instructed that Treasury have foreshadowed the removal of two exemptions to the application of the Act, which have been used by some lessors to avoid the application of the Act. Treasury apparently has taken the view that the application of the Act to contracts which were previously excluded from the Act is similarly not subject to a referral of power from the States. Accordingly, Treasury is looking at other Commonwealth legislative powers, such as those identified in the preceding paragraph.

Background

5. In 2009 the Commonwealth passed the Act. This was pursuant to the National Credit Law Agreement 2009 ("the Agreement"), which was signed by the Commonwealth and each of the States and Territories on 7 December 2009. By reason of clause 2.2, each of the Commonwealth, States and Territories became bound by the Agreement from that date.
6. The Agreement provides for the enactment by State parliaments of State Referral Legislation, the enactment by the Commonwealth parliament of the National Credit Law [which is the Act] in reliance on the referrals, and the amendment from time to time of the National Credit Law in accordance with this Agreement and the State referral legislation.[1]
7. Clause 5.1(1)(c) specifically provided that the legislative scheme agreed to "*involves...the amendment from time to time of the National Credit Law in accordance with this Agreement and the State Referral Legislation.*"
8. In 2010 the Victorian Parliament passed the *Credit (Commonwealth Powers) Act* 2010 ("the Victorian Act"). Subsection 1(a) of the Victorian Act identifies that its purpose is to "*adopt the National Consumer Credit Protection Act 2009 of the Commonwealth (as amended) and the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 of the Commonwealth, and to refer certain matters relating to the provision of credit and certain other financial transactions to the Parliament of the Commonwealth for the purposes of section 51(xxxvii) of the Constitution of the Commonwealth.*"
9. This form of referral of power by the States and territories pursuant to section 51(xxxvii) of the Constitution by reference to identified text or texts is not novel[2]. It was done, for example, in a similar manner in the case of corporations[3] and terrorism[4].
10. In the Digest to the Bill, it is stated that "*[a]s a way to avoid these problems* [of ensuring the Commonwealth has power], *section 51(xxxvii) of the Constitution allows a State or States to adopt a Commonwealth law. In that case at least one State must*

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[1] The Agreement Part 5.1.

[2] Generally see: "*New Directions in Co-operative Federalism: Referrals of Legislative Power and their consequences*" by Pamela Tait S>C., Solicitor-General for Victoria (as she then was), 18 February 2005, at [28] to [30]; "*After a Referral: The Amendment and Termination of Commonwealth Laws relying on s 51(xxxvii)*", by Andrew Lynch, (2010) 32 SLR 363, at pp.364 and 369

[3] Corporations (Commonwealth Powers) Act 2001 (Vic).

[4] Terrorism (Commonwealth Powers) Act 2003 (Vic).

have referred a matter to the Commonwealth. The Commonwealth is then empowered to enact a law about that matter which will also apply in the referring State. Once that has occurred, any other State or States can adopt the new Commonwealth law by passing a State law setting out the extent of the adoption and annexing the relevant Commonwealth law."[5]

Relevant Provisions of the Victorian Act

11. The following definitions contained in section 3 of the Victorian Act are relevant for my immediate purpose:

> "***amendment reference*** *means the reference under section 6(1)"*
>
> **"*Commonwealth Credit instrument*** *means any instrument (whether or not of a legislative character) that is made or issued under the National Credit legislation;"*
>
> "***Commonwealth Credit instrument*** *means any instrument (whether or not of a legislative character) that is made or issued under the National Credit legislation."*
>
> *"**express amendment** of the National Credit legislation means the direct amendment of the text of the National Credit legislation (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by another Commonwealth Act or by an instrument under a Commonwealth Act, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the National Credit legislation;*
>
> *"**National Credit legislation** means—*
>
> > *(a) the National Consumer Credit Protection Act 2009 of the Commonwealth; and*
> >
> > *(b) the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 of the Commonwealth—*
> >
> > *as in force from time to time;*
>
> *"**referred credit matter** means a matter relating to either of the following—*
>
> > *(a) credit, being credit the provision of which would be covered by the expression "provision of credit to which this Code applies" in the relevant version of the National Credit Code;*

[5] At p.4.

> *(b) consumer leases, being consumer leases each of which would be covered by the expression "consumer lease to which Part 11 applies" in the relevant version of the National Credit Code;*
>
> ***"relevant version of the National Credit Code** means the text of Schedule 1 to the National Consumer Credit Protection Act 2009 of the Commonwealth as originally enacted, and as later amended by the National Consumer Credit Protection Amendment Act 2010 of the Commonwealth;*
>
> ***"relevant version of the National Credit legislation** means—*
>
> *(a) the National Consumer Credit Protection Act 2009 of the Commonwealth as originally enacted, and as later amended by the National Consumer Credit Protection Amendment Act 2010 of the Commonwealth; and*
>
> *(b) the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 of the Commonwealth."*

12. I should immediately note, as it becomes of importance in this matter, that the definition of "express amendment" in the Victorian Act specifically contemplates the "*insertion, omission, repeal, substitution or relocation of words or matter*". The question asked of me very much depends on what is meant by those words. As a matter of statutory interpretation that is not the problem, rather it is the context of the referral to which they relate that may cause a problem.
13. Subsection 4(1) of the Victorian Act provides that the "*relevant version of the National Credit legislation is adopted within the meaning of section 51(xxxvii) of the Constitution of the Commonwealth.*"
14. Subsection 6(1) of the Victorian Act provides that, subject to section 7 (which for my immediate purpose is irrelevant) "*any referred credit matter is referred to the Parliament of the Commonwealth but only to the extent of the making of laws with respect to such a matter by making **express amendments** of the National Credit legislation.*" [My emphasis]
15. Section 9 of the Victorian Act is also relevant, it is as follows:

> *"For the avoidance of doubt, it is the intention of the Parliament of the State that—*
>
> *(a) the National Credit legislation may be **expressly amended**, or have its operation **otherwise affected**, at any time after the commencement of this Act by provisions of Commonwealth Acts the operation of which is based on any legislative powers that the Parliament of the Commonwealth has on account of a reference of any matters, or the adoption of the relevant version of the*

National Credit legislation, under section 51(xxxvii) of the Constitution of the Commonwealth; and

(b) the National Credit legislation may be ***expressly amended****, or have its operation* ***otherwise affected****, at any time after the commencement of this Act by provisions of Commonwealth Acts the operation of which is based on legislative powers that the Parliament of the Commonwealth has apart from a reference of any matters, or the adoption of the relevant version of the National Credit legislation, under section 51(xxxvii) of the Constitution of the Commonwealth; and*

(c) the National Credit legislation may have its operation affected, otherwise than by express amendment, at any time by provisions of Commonwealth Credit instruments."

16. Attention should also be drawn to section 10 of the Victorian Act. It permits the "amendment reference" to be terminated without termination of the adoption of the relevant version of the National Credit legislation. The "amendment reference" means (as defined) the power under section 6(1) of the Victorian Act. I am not instructed that the "amendment reference" has been terminated, and accordingly it is a power still referred to the Commonwealth with respect to any "referred credit matter".
17. It is also necessary to have some consideration of the provisions of the Act and the National Credit Code ("the Code"). The definition of "Commonwealth Credit instrument" in the Victorian Act is "*any instrument...issued under the National Credit legislation*", which in effect is the Act as in force from time to time. The Act establishes the Code: Schedule 1 to the Act. The Act defines the Code as meaning means *Schedule 1 to this Act, and includes: (a) regulations made under section 329 for the purposes of that Schedule; and (b) instruments made under that Schedule.*" The Code itself provides that a power to make an instrument[6] includes a power to amend or repeal the instrument[7] and authorizes a wide variety of statutory instruments to be made with respect to the Code[8].
18. Further, the scheme and operation of the Act are very dependent upon the Code[9]. This is clear from the very definition of "referred credit matter" in the Victorian Act. Section. 5 of the Act defines a "credit provider" as having the "*the same meaning as in section 204 of the National Credit Code and incudes a person who is a credit provider*" because of section 10 of the Act [which is basically concerned with

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[6] Defined in s.204 of the Code to include a statutory instrument.
[7] Section 214 of the Code.
[8] Section 215 of the Code.
[9] In this regard it is of interest that many of the proposed amendments in the Bill are to the Code.

assignments from an original credit provider]. It is the Code which effectively identifies a transaction as one which does or does not fall within the legislation. For example, sections 3 and 4 of the National Credit Code define the meaning of "credit" and the "amount of credit", the meaning of "credit contract" respectively for the purposes of the National Credit Code. Section 5 and section 6 of the National Credit Code set out the "provision of credit" to which the National Credit Code does or does not apply respectively.

19. Thus it can be seen the Victorian parliament in passing the Victorian Act clearly contemplated and provided for the Commonwealth to bring about amendments to the Commonwealth legislation it was, in effect, approving when it referred it to the Commonwealth under section 51(xxxvii) of the Constitution. Further, the Victorian parliament contemplated and referred power to amend to the Commonwealth, and not only by statutes but also by instruments.

The terrorism legislation precedent

20. In form this referral of power is similar to that adopted by the States and Commonwealth when the Commonwealth repealed and enacted a revised Part 5.3 of the *Criminal Code* (Cth) ("the Criminal Code"), which is concerned with terrorism. The revised legislation was supported by legislation passed by each of the States referring certain powers relating to terrorist acts to the Commonwealth. The relevant referring legislation there, similarly, provided for the referral of the matter by reference to the text of legislation (which the Commonwealth was "empowered" to enact by the reference) which was a schedule to the Act. The referring legislation also empowered the Commonwealth to make "express amendments" to that legislation.
21. Subsequently, in 2005 the Commonwealth enacted further legislation dealing with the subject of terrorism. This legislation introduced Division 104, which provides for control orders for "suspected" or "potential" terrorists, into the Criminal Code,. The constitutional validity of Division 104 of the Criminal Code was the subject of the challenge in *Thomas v Mowbray.*[10] Unfortunately, in that case only two of the seven Justices saw it necessary to consider whether Division 104 of the Code was a valid

[10] (2007) 233 CLR 307; [2007] HCA 33.

enactment of the Commonwealth pursuant to section 51(xxxvii) of the Constitution[11]. Both Kirby J and Hayne J considered this issue and came to contrary conclusions.

22. It should be noted that neither justice expressed any view suggesting that the referral of power under section 51(xxxvii) of the Constitution by this method did not achieve its purpose. The issue on which they disagreed was simply whether the referral made by Victoria (the Terrorism (Commonwealth Powers) Act 2003 (Vic)) empowered the Commonwealth to pass the amendments made in 2005.

23. Kirby J concluded that Division 104 was not supported by section 51(xxxvii) of the Constitution.[12] Hayne J concluded that the provisions met the description of laws with respect (inter alia) to the head of a referred legislative power pursuant to section 51(xxxvii) of the Constitution.[13] In part the nub of the disagreement was the reasoning of each Justice with respect to the term "express amendment" as used in the legislation relied upon to support Division 104. It is necessary therefore to consider the differences in their reasoning.

24. In *Thomas v Mowbray* the referring Act defined "terrorism legislation" as "*the provisions of Part 5.3 of the Commonwealth Criminal Code enacted in the terms, or substantially in the terms, of the text set out in Schedule 1 and as in force from time to time.*"[14] The definition of "express amendment" contained in the relevant legislation in *Thomas v Mowbray* is, (subject, naturally, to the words describing the subject matter of the referral legislation) although not absolutely identical, in effect the same as the definition contained in the Victorian Act. It is in the following terms:

> ***"express amendment"*** *of the terrorism legislation or the criminal responsibility legislation means the direct amendment of the text of the legislation (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by Commonwealth Acts, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the legislation."*[15]

25. It needs also to be noted that in *Thomas v Mowbray* the relevant State legislation referring the power to the Commonwealth defined "terrorism legislation" to mean *"(a) the matters to which the referred provisions relate, but only to the extent of the*

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[11] Ibid, per Gleeson CJ at [6]; per Gummow and Crennan JJ at [154]; per Callinan J at [582] and [601], (although His Honour did doubt the validity of section 100.8 of the Code, but which has no relevance for my current purposes – see at [602] to [607]; per Heydon J at 650].

[12] Ibid at [203]: see generally [184] to [207].

[13] Ibid at [457]: see generally [446] to [457].

[14] *Terrorism (Commonwealth Powers) Act 2003* (Vic), section 3.

[15] Ibid.

making of laws with respect to those matters by including the referred provisions of Part 5.3 of [the Code] enacted in the terms, ***or substantially in the terms****, of the text set out in Schedule paragraph 1 and as enforced from time to time; and (b) the matter of terrorist acts, and actions relating to terrorist acts, but only to the extent of the making of laws with respect to that matter by making express amendments of the terrorism legislation or the criminal responsibility legislation..*"[16] (My emphasis.) I note, at this point, that the definition of National Credit legislation does not contain any words or form of words to the effect of "*substantially in the terms*". Although, that appears to have played some part in the reasoning of Kirby J, that issue does not presently arise.

26. It is also necessary to recognize that in *Thomas v Mowbray*, Kirby J opined that the Commonwealth "*relied heavily on one precedent said to be analogous, namely the reference of power from the State Parliaments*" to support the enactment by the Commonwealth of the *Corporations Act 2001* (Cth).[17]
27. Given the definitions in the referring Victorian Act of "terrorism legislation" and "express amendment", Kirby J saw the issue as whether "*the meaning of express amendment extends to the insertion of an entire new Division, in this case Div 104*".[18] Kirby J did not accept the Commonwealth's argument that it clearly did.[19]

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[16] Ibid.

[17] Ibid, per Kirby J at [190] ff. Despite Kirby J's assertion to this effect the summary of argument in the CLR does not appear to support it: see Ibid at p.318 in particular. I have reviewed the relevant part of the transcript of argument in the High Court hearing and whilst the Commonwealth did refer to the precedent of the *Corporations Act 2001*, it was in the context of explaining how the like terms of the referral contained a like power to make an"express amendment" (in the corporations matter) had permitted the introduction of significant new divisions in the *Corporations Act 2001*. But, so the argument went, it would not permit a like provision being enacted in a different new piece of stand-alone Commonwealth legislation. The transcript of argument (on 10 February 2006) reveals the following submission on behalf of the Commonwealth:

The purpose of those words, your Honour, is clear if you go to tab H in the volume and across to page 5 - this is the explanatory memorandum accompanying the corporations reference. At the top of page 5, the last sentence of the indented words: "This ensures that the matters covered by the second reference cannot be the source of power for other Commonwealth legislation." We say that is the sole purpose of the qualification on the express amendment power, but it is not designed to prevent amendment of the referred text whether that amendment take the form of simply repeal of the subsection and substitution of the new subsection, the insertion of the new sections or the insertion of new divisions, such as occurred here, provided the law can still be characterised as coming within the subject matter referred."

I take the view Kirby J has overstated the Commonwealth's reliance on the analogy.

[18] 233 CLR 307 at [189].

[19] Ibid at [189].

28. Firstly, Kirby J compared the terrorism referring legislation with that used by the Victorian Parliament in the corporations power referral to the Commonwealth and noted that terrorism referring legislation was far more specific (by reference to the specific text of the Commonwealth legislation) than in the corporations referral (by reference to the texts of proposed Bills for Commonwealth Acts tabled in the New South Wales Parliament.[20] This was an important distinction to Kirby J in that it affected "*the definition and specification of the State legislative power that was surrendered by the referral to the Federal Parliament*".[21] And although the Corporations referral permitted "express amendments" by the Commonwealth, that was very different to the terrorism referral since the term "express amendment" in the terrorism legislation "*was qualified not only by the matters referred but also by the specified form of the legislation to which only express amendments could be made*".[22]
29. Kirby J then turned to the specific terms and context of the referring Victorian Act. Again, Kirby J contrasted the difference between the specific text of the legislation being a Schedule to the referring Victorian Act whereas in the corporations' referral the Victorian legislature had defined the "Corporations Legislation" by reference to provisions tabled in the Parliament of another State[23]. It was this specificity of referral[24] that was of importance in assessing whether the legislation enacting Div 104 was an "express amendment" for the purposes of the Criminal Code provisions pursuant to the referral of terrorism to the Commonwealth and the referring Victorian Act.
30. Accordingly, Kirby J conclude Div 104 was not supported by section 51(xxxvii) of the Constitution because of two limitations inherent in the definition of "express amendment". Firstly, Div 104 "*must constitute an express amendment of*" the text of the Commonwealth Act in Schedule 1 of the Victorian Act. Secondly, the express amendment "*must be a direct amendment*" of that same text. Although an express amendment included the "*insertion of text*", that term needed to be read restrictively because it must be read ejusdem generis with the preceding words "direct amendment"[25]

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[20] Ibid at [190] to [194].
[21] Ibid at [194].
[22] Ibid [197].
[23] Ibid at [195].
[24] Ibid at [199].
[25] Ibid at [204].

31. Ultimately, Kirby J concluded that Division 104 "*did not amount to a direct amendment of the terrorist legislation [but] rather it was an addition to the scope of...the Code by federal law alone.*" Kirby J saw an important distinction between the power referred by reference to the specific text of the Commonwealth legislation and which related to "*the regulation, definition and punishment of terrorist acts*" and Division 4 of the Code which related "*the prevention of terrorist acts and the control and detention of particular persons in order to protect the public from potential terrorist acts.*" [26]

32. Hayne J rejected the contention that Division 4 of the Code introduced into the Code an entirely new regime that would have effect otherwise than as part of the text referred.[27]

33. Firstly, Hayne J noted that what was referred to the Commonwealth was both the text of the legislation (section 4(1)(a) of the referring Act) and the matter of terrorist acts, and actions relating to terrorist acts by making express amendments to the specified text (subsection 4(1)(b) of the referring Act). Further His Honour identified that subsection 4(3) of the referring Act specifically "*provided that the operation of each of paras (a) and (b)... is not affected by the other paragraph.*" Accordingly, His Honour concluded that the matter of terrorist acts, and actions relating to terrorist acts (subsection 4(1)(b) of the referring Act) was not to be confined by reference to the specified text.[28]

34. Hayne J then turned to the meaning of the definition of "express amendment". His Honour accepted the Commonwealth's argument[29] that the term permitted "*amendment by the insertion of new matter so long as that new matter falls within the description of a law with respect to the matter referred (terrorist acts, and actions relating to terrorist acts)...*"[30]

35. In my opinion the reasoning of Hayne J is to be preferred. The reasoning of Kirby J, in my opinion, ignores the natural and ordinary meaning of the words used by Parliament.

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[26] Ibid at [205].
[27] Ibid at {449] - [450].
[28] Ibid at [451].
[29] See the argument set out at footnote 11 above.
[30] 233 CLR 307 at [454].

36. It is to be remembered that the starting point for discerning the meaning of a statute is its words and context. As was said in *Project Blue Sky Inc v Australian Broadcasting Authority*[31]:

> *"The primary object of statutory construction is to construe the relevant provision so that it is* ***consistent with the language and purpose of all the provisions of the statute****. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. ...*
>
> *A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions."* [my emphasis]

The High Court recently referred to, and relied on, this very passage in *Independent Commission Against Corruption (NSW) v Cunneen*[32].

37. I do not accept the "text specificity" distinction Kirby J relies upon in his comparison between the Corporations referral and the terrorism referral, and which is an essential part of his reasoning. In my opinion it is an illusory distinction. Whilst the documents containing the text being referred are clearly different, it is not the descriptor of the document or documents (be it a Bill or an Act) but the text contained in that document or documents that is the important thing: it being the specified text identified as being referred. Similarly, the difference between a Schedule to the State Act and an identified documents in the Parliament of another State: again it is the specified text identified that is being referred. If I am correct in that, then his basis for concluding the term "express amendment" did not permit the enactment of Div 104 does not exists.
38. I have already opined that the Victorian parliament clearly contemplated the Act would need amending and referred the power to that.[33] The term "express

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[31] (1998) 194 CLR 355 at 381-382 [69]-[70] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28, recently applied in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [24] per French CJ and Hayne J; [2012] HCA 56 and in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 88 ALJR 847 at 855 [42] per French CJ, Hayne, Crennan, Kiefel and Keane JJ; 312 ALR 537 at 546; [2014] HCA 34.

[32] (2015) 89 ALJR 475; [2015] HCA 14.

[33] See paragraph 19 above.

amendment" clearly contemplates that the Commonwealth may amend the terrorism referred legislation by the insertion (or by omission, repeal, substitution or relocation) of words or **matter**. The reasoning of Kirby J gives no consideration to the word "matter", which is clearly to be contrasted with the word "words". Clearly, as is identified by Hayne J, the Victorian Parliament in referring the terrorism power to the Commonwealth was including the power to amend the legislation by including an additional matter or matters providing such are within the definition of "terrorism legislation".

39. Further, Kirby J does not appear to have considered, let alone dealt with, the effect of section 4(3) of the referring Victorian Act that "*[t]he operation of each paragraph of subsection (1) is not affected by the other paragraph.*" As I have noted in paragraph 33, this was a matter that Hayne J considered, and considered relevant in determining what had been referred. In my opinion, it cannot be said that the matters covered by Division 4 of the Code were not matters that fell within the description of the matters referred by subsection 4(1)(b) of the referring Victorian Act: namely, terrorist acts, and actions relating to terrorist acts.

Proposed amendment to the Act

40. I turn then to consider the matter upon which I am asked to opine having regard to the decision of Hayne J in *Thomas v Mowbray*.

41. Immediately it should be noted that the Victorian Act contains section 9, of which there was no equivalent in the referring Act on *Thomas v Mowbray*. That section must be read as part of the context of the Victorian Act and, importantly, as giving context to the definition of "express amendment".

42. The Exposure Draft of the Bill with Commentary contains the following with respect to the proposal about which I am asked:

> *"This Schedule introduces amendments intended to provide a systematic response to avoidance practices, rather than individual responses being developed that address a specific practice after it has come into use in the credit market.,*
>
> *In summary, the amendments operate as follow:*
>
> - *a person is prohibited from beginning or carrying out a scheme for the*
>
> *purpose of avoiding the application of a provision of the Credit Act;*

- *purpose is to be determined on the basis of objective factors, rather*
  than the subjective intentions of the person engaged in the scheme;
- *a number of factors are listed as being relevant to the assessment of purpose, including:*
  - *any representations made to consumers (paragraph (i)), which would include whether products are advertised as credit or loans; and*
  - *any change in the conduct of a person following amendments to this Act (paragraph (l)), which would include changes in practices or structures to mitigate or avoid the effect of amendments;*

- *a scheme is presumed, other than for criminal proceedings, to be for*
  the purposes of avoidance where it is a scheme of a type prescribed by
  regulations or ASIC by a legislative instrument (with this approach taken to provide greater regulatory consistency in respect of particular
  avoidance techniques, by allowing for the onus to be placed on the providers of the scheme, rather than ASIC positively having to establish
  the purpose in respect of each provider for similarly structured schemes)."

43. Thus it is fair to say that the proposal is not intended to create new or harsher restrictions on the provision of credit or the manner in which it was provided or who could provide it. Rather, it is a commonsense approach to attempt to prevent practices that are aimed at circumventing the operation of the Act. In other words, to make the current restrictions in the Act in its current form more effectual. That, in my opinion, falls squarely within the meaning of "express amendment" and clearly accords with the reasoning of Hayne J. in *Thomas v Mowbray*.

44. Once this is recognized, it follows in my opinion, not only from the reasoning of Hayne J in *Thomas v Mowbray* but also from accepted principles of statutory interpretation, that the proposal is within the scope of the powers referred to the Commonwealth by the Act.

45. Further, even if one were to consider the proposed legislation in accordance with the reasoning of Kirby J, my conclusion is not altered. Such a proposal can hardly be said, to adopt the language of Kirby J, to be the introduction of an addition to the scope of the Act by federal law alone. Rather, it is simply endeavouring to achieve the original purpose and intent.

46. Accordingly, in my opinion the proposed amendment contained in Schedule 6 to the Bill is within the power of the Commonwealth parliament.

47. I am also asked to consider a number of other matters:

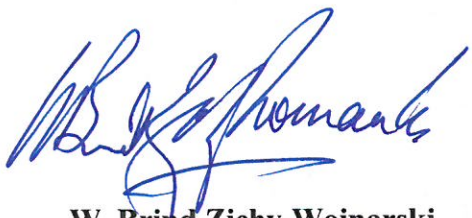
> "2. Whether an anti-avoidance provision could otherwise be introduced in the Act, for example based on the Commonwealth's heads of power under the Constitution (such as the Corporations and interstate trade and commerce powers);
>
> 3. Whether the States could introduce an anti-avoidance provision;
>
> 4. If the second or third approaches were taken, whether this is likely to create loopholes and reduce the effectiveness of the provision (i.e. lead to avoiding the anti-avoidance provision); and
>
> 5. Whether a distinction may be drawn between the Commonwealth's power to enact an anti-avoidance provision directed at:
>
> a. general avoidance measures that seek to avoid the application of the Act altogether, and
>
> b. internal avoidance measures where the contract is covered by the Act, but a scheme is implemented to avoid the application of one or more of the provisions of the Act (e.g. masking a credit contract as a lease to avoid interest rate caps)."

48. As to the second question asked of me: I am of the opinion it is highly unlikely to withstand constitutional challenge or that it would deal with the problem successfully. It must be remembered that to enact the Act, the Council of Australian Governments considered it necessary to refer the matter in the way in which it occurred. That not only demonstrated a desire for the issue to be dealt with on a national basis but that to achieve that constitutionally (at least in the way most likely to be constitutionally valid) there was a need to do it in the way it was done. It must also be remembered that a "credit provider" need not be a corporation or a real person who engages in interstate trade. That being so it is difficult to see how the use of the Corporations or interstate trade and commerce powers could cover the field. Accordingly, in my opinion the use of such powers is unlikely to be constitutionally valid or effective.

49. As to the third question: Undoubtedly, each State and Territory could pass such legislation but again I am of the opinion it is unlikely to withstand constitutional challenge. Firstly, I would suspect a challenge to any such legislation under sections 92 (free trade and commerce) and 109 of the Constitution (inconsistencies between a

Commonwealth law and a State law). Additionally, it may be difficult to achieve agreement between the States and Territories.

50. As to the fourth question: In my opinion such an approach would, even if it were to be found to be constitutionally valid, almost certainly fail to cover the field. Accordingly, it would reduce the effectiveness of the provision.
51. As to the fifth question: Given my answer to the primary question this question does not require an answer. However, for the reasons I have already expressed, in my opinion the Commonwealth has the power to enact an anti-avoidance provision. Whether it is done in either of the two ways proposed in the question is not to point.
52. I would be happy to discuss this matter further with those instructing me.



W. Brind Zichy-Woinarski

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Aickin Chambers
15th July 2015

Re: The Enactment of an Anti-avoidance Provision in the Australian Consumer Credit Regime

Memorandum of Advice