Min-it Software

SACC Panel Review Consultation –

Review of Small Amount Credit Contract legislation and Consumer Leases

Submission following release of Final Report

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Overview on the Panel's Final Report, observations and recommendations

When we wrote our response to the Interim Report by the Panel, we commenced by saying we have a number of major concerns. Now that we have the Panel's Final Report, we can honestly state that those concerns have been amplified. The Panel has acted on very little that industry has put forward. Other industry groups are also saying the Panel has overwhelmingly taken side with the consumer advocacy groups that are determined to shut the industry down by any means. Consequently, the industry consensus is this outcome was pre-determined and that Government has merely gone through the motions of engaging in a sham consultation.

Notwithstanding that the Review of the Small Amount Credit Contract Laws Final Report issued March 2016 is 105 pages, when the former Assistant Treasurer, the Hon Josh Frydenberg MP announced the terms of reference and set the review in train for Small Amount Credit Contracts (SACC's) and consumer leases in his Media Release[1] on 7 August 2015, it is unfortunate that the Panel appointed by the former Minister appear have struggled to take into account at least four of the required specific issues as they apply to those that actually provide the finance, namely:

competition;

fairness;

innovation; and

access to finance.

Whilst the Panel may well have considered these aspects from a consumer

[1] Australian Government, The Treasury 2015. Media Release "*Review of the small amount credit contract laws*" issued 7 August 2015. Available online http://jaf.ministers.treasury.gov.au/media-release/037-2015/ accessed 11 May 2016.

protection perspective, relying on statistics that relate to or correlations based on data from either the time prior to the implementation of the Enhancements Act, the CoreData 'research' that pertains in reality to no more than 5 or 6 large internet lenders that could provide some meaningful data out of the 23 of the National Credit Providers Association ("NCPA") members that did or to the data provided by Credit Corp Financial Services Pty Ltd ("Credit Corp"), it would appear the data provided we supplied to it on behalf of many non-internet lenders, together with that supplied by others, showing the increased costs incurred by the industry since 2013 have been totally dismissed. We have to wonder why, particularly when it was true, easily verifiable and provided to the Panel in good faith.

The Panel has stated it has "taken account of the various concerns expressed regarding the data referred to in the interim report. While it does not consider that all of the concerns expressed are justified, the Panel is cognisant of the limitations of the data available and has taken these into account when drawing its conclusions[2]". If that is the case, we must question how it could then make some of the recommendations it has, given its requirement to take into account the specific provisions of the terms of reference. The Panel had the opportunity of contacting those of us that had questioned the data or raising issues that may have required some clarification but chose not to do so.

As a result, we note that some of its observations are somewhat speculative, in at least in one instance, totally inaccurate, one contradictory and then there is some confusion as to the meaning of a term. These will be outlined in further detail under the respective recommendations.

[2] SACC Final Report, page 9.

Competition

We had already stated in our submission dated 22 January 2016 that Credit Corp uses a fully automated system and the information provided to the Panel by it should be taken as applying purely to that credit provider as they are unrepresentative of the industry as a whole.

Just because one credit provider claims to be able to do something doesn't mean the rest should or even can follow suit and remain viable. Amazing Loans said years ago that it could survive under the NSW 48% all-inclusive cap yet then failed. As we also stated in that same submission, we suggest Credit Corps' SACC clients are actually cross-subsidising those that borrow higher amounts and that given its core business, there may be other cross-subsidisation occurring. Credit providers that provide such claims generally have an ulterior, anti-competitive motive. Credit Corp no longer provide the product it supplied data on, presumably because of the pejorative term 'payday' ASIC applied to all SACCs. ASIC's use of this term has undoubtedly caused a lot of damage to some lenders who have seen their banks pull all financial accounts, demand repayment of home mortgages and overdrafts and close them at short notice.

If the Liberal and National Coalition parties are returned to Government and the current Assistant Treasurer retains her present Ministerial positions, Treasury would appear to have an issue with balancing the demand from consumers for SACCs and consumer leases and the need to keep people in jobs given she is Minister for Small Business.

The vast majority of credit providers are those that lend their own money; there are relatively few that are either listed on the stock exchange or who are subsidiaries of overseas lending entities with substantial financial backing.

These are the people that have their family homes on the line to raise the lending capital required; most of the bigger banks will now not lend to such companies. Both the SACC and consumer leasing sectors survive not because they are seen to be expensive by those that use them but because of demand. It is only those that can have the income capacity to not need to use them that have the ideological viewpoint that they are evil and should be exterminated. The proof of this statement can be found in the Consumer Action Law Centre ("CALC")'s submission to the Financial Systems Inquiry dated 31 March 2014 where they state:

> "[t]he option proposed by consumer advocates was a cap on costs which would be low enough to make short term loans unviable, driving lenders to provide loans of longer terms, with more repayments of a lower amount per repayment. A cap on costs was introduced in 2013, but it was not low enough to drive this kind of change."[3]

As one of our clients commented to us about the Final Report, the Panel have set themselves up akin to Marie Antoinette. Instead of demanding these consumers eat cake, however, they want to impose a lower standard of living on those that use these products the most in the name of consumer protection. Another believes the Panel's recommendations are simply part of a preordained Orwellian plan; Government control of the masses through financial means. Whilst they may not express it in exactly these same terms, both reflect the sentiment held by many of our clients. In particular, we have found that those that offer MACC's most concerned because of the flow-on effects some of the proposals may have. The Panel's Final Report is, unfortunately, silent on what any unintended consequences it might have considered.

3 Consumer Action Law Centre, 31 March 2014. FSI submission, page 13. Available online http://consumeraction.org.au/wp-content/uploads/2014/03/Consumer-Action-Law-Centre-submission-Financial-Systems-Inquiry-Terms-of-Reference-March-2014.pdf viewed 23 November 2015

Both the Liberal and National Coalition and Labor parties have stated they will actively support small businesses and the creation of jobs[4] yet the Panel has seemingly rejected the information we provided that shows:

- hardly any lender other than Credit Corp could survive on a 10% of net income protected earnings scheme; and
- limiting default fees to the actual cost incurred or a maximum cap of $10.00 per week isn't realistic.

Treasury's own records will show much of this was discussed some years ago when consultation on the Enhancements Bill was occurring. If the majority of SACC lenders decide that they cannot make a profit if these recommendations are accepted and passed by Parliament and they then withdraw from the market, regardless of the Panel's thoughts on financial inclusion, there would be a decrease in access to finance for a great many consumers. If that is the case, how does that benefit the consumer?

Section 335A (2) of the National Consumer Credit Protection Act ("NCCP Act") required that the "review must be undertaken by 3 persons who, in the Minister's opinion, possess appropriate qualifications to undertake the review". Whilst we note that all three Panel members have substantial "top end of town" backgrounds, it is a great pity that the opportunity for having at least one member of the Panel that has actually run their own profitable small business was lost when the former Minister selected them as we would regard this as one of the more appropriate qualifications required. Equally, we feel it would have been useful had Treasury seconded Mr. Christian Mikula back from ASIC as a Secretariat member. Given his previous roles as Manager, Consumer Credit

[4] ABC, Federal Election 2016. "Election 2016: Where the parties stand on the big issues", updated as at Friday, 12 May at 4.42pm. Available online http://www.abc.net.au/news/2016-05-13/election-2016-policy-big-issues/7387588 accessed 14 May 2016.

Unit and then later as Senior Adviser to the Disclosure and International Unit, Retail Investor Division of Treasury, he could have provided the Panel with a wealth of information and knowledge relating to the earlier consultations with stakeholders. This is particularly so when we are aware a number of Secretariat members were replaced part way through the review and so he could have provided a high degree of continuity to it.

Industry representatives expected the Panel to have some knowledge on the industry and the prior discussions and consultations we have had with Treasury leading up to the introduction of the Consumer Credit Legislation Amendment (Enhancements) Act 2012 ("Enhancements Act"), and those that have occurred since over the past 4 years but it is obvious this has not occurred. As a result, it would appear assumptions have been made without knowing the full facts.

Fairness

Fairness is defined as a freedom from bias or injustice and has a quality of even-handedness. It is highly unfortunate this cannot be said of the Panel's recommendations when viewed as a whole as they are so skewed towards consumer protectionism at the expense of any other consideration that the Panel decisions can hardly be considered fair. The credit provider taking the risk of non-payment and having to comply with a high degree of regulation has been relegated to last place.

We are not saying that some improvements aren't required as there are still lenders and lessors in the industry that cause detriment but we have yet to see the regulator take the appropriate action. This was an opportunity for the Panel to consider just which companies were causing the issues and looking to see how they could be brought into line rather than taking the typical, heavy-handed

response and seeking to apply draconian outcomes against all by applying the sledgehammer approach to crack a small nut. Most clients feel that the regulator already has sufficient power to stop the few that have been causing the most detriment but it has chosen not do so. It is to be hoped the fact that these are all well-funded entities has nothing to do with its decision not to take that action.

Such action in the past has led to many using ‘work-arounds’ or what some see as the use of loopholes in order to survive when all Government had to do is look at the dozen or so large internet SACC lenders and some of the lessors that have cause the most detriment. For example, the author produced evidence to the Secretariat in February, and was assured the information would be passed onto the Panel, that showed it has been around a dozen or so major internet-based lenders that have repetitively avoided their legal obligations to comply with the NCCP Act that have caused most issues for SACC consumers. The regulator has not taken these large, financially well-backed lending corporations to task as many in the industry expected. Some of our clients claim that by ASIC failing to act on complaints, citing the need to prioritise, these lenders have been somewhat protected by the regulator’s willful blindness.

We made the point and produced evidence to the Secretariat members to show that not all credit providers are the same. The majority of credit providers that are doing the right thing and operating within the intent of the law should not be penalised to the extent that, should the 10% protected earnings recommendation be made law, they may well be no longer able to stay viable. It is highly unfortunate the Panel has taken this approach.

None of the Panel appear to have ever been personally affected by restrictions such as they propose imposing on others, so one wonders, for example, if

Government were to legislate that the charge out rate for any solicitor was, say, to be capped at $200 per hour so that more consumers could afford legal advice, would Stephen Cavanagh have thought differently about the impost suggested on restricting lenders ability to recover costs when his own company's current charge out rates will be well above this hourly rate? Equally, now that Danielle Press has been appointed CEO of Myer Family Co, if Government were to restrict retail margins to, say, no more than 32% (on the basis of being equivalent to a 20% establishment fee and a 4% per month inventory turnover rate of 3 months) as a means of making goods more affordable for the vulnerable in society, would she be equally as happy to see such imposts given that Myer Holdings gross profit margin since 2010 has always been higher than 40%[5]? Would Catherine Walter, when she was a director at NAB[6], have been equally as happy had Government restricted ADI's to charging no more than say 1.25% above the Reserve Bank Cash Rate as a means of protecting not just the vulnerable in society but all borrowers as the number of home loans are increasing? These may be hypothetical questions but we would argue that if each would oppose them and argue instead for the application of free market economics because they could not be profitable, they have been hypocritical in making their recommendations when they have not taken the time to actually understand the dynamics of the industry. The Panel was offered the opportunity of visiting a number of lenders but chose not do so.

Treasury may be interested to learn that we are already aware of both lenders and credit specialist lawyers working on ways around the Panel's suggestions should they ever become law. Surely, it would be better for Government to have a viable industry operating legitimately that can provide competition without

[5] ShareFundamentls.com, 2016. *Detailed profitability analysis for Myer holdings Ltd (ASX:MYR.AX)*. Available online http://www.sharefundamentals.com/InvestmentAnalysis/Fundamentals_Profit/myer-holdings-limited/MYR.AX/ accessed 15 May 2016.

[6] ABC, 2004. Transcript of radio programme AM on 01 September 2004. Available online http://www.abc.net.au/am/content/2004/s1189565.htm accessed 12 May 2016.

looking to employ anti-avoidance measures than one that drives such action or, if legitimate credit providers exit the industry, force consumers to look at unlicenced lenders.

Access to finance

As we pointed out to Treasury some years ago, Reifner, Clerc-Renaud and Knobloch, citing research undertaken on behalf of Policis, found that consumers in the EU states that had more interest rate cap restrictions had a greater propensity to use loan sharks.[7] The authors went on to say that it "*is likely that the existence of interest rate restrictions excludes some customer groups from credit access (which might or might not be an explicit objective of the introduction of interest rate restrictions)*[8]".

We suggest that given the former Minister expressly wanted the panel to take into account 'access to finance', by recommending additional lending restrictions such as the 10% protected earnings regime to all SACC borrowers that will likely lead to an inability to access finance from legitimate SACC lenders, we question how the Panel decided to take this approach. Pushing consumers in to longer terms and higher overall cost in a trade-off for lower repayments may not suit everyone. Did the panel even consider this as an unintended consequence? If so, the Final Report makes no mention of it.

Prior to meeting with the Secretariat in February, both we and the Finance Industry Delegation provided the Secretariat with the results of a small survey we undertook separately. Ours used a much smaller number of respondents but both surveys provided near identical results. These were that:

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[7] Reifner, U, Clerc-Renaud, S and Knobloch, RA M, 2010. "Study on interest rate restrictions in the EU - Final Report - Project No. ETD/2009/IM/H3/87, IFF/ZEW, page 35.available online http://ec.europa.eu/internal_market/finservices-retail/docs/credit/irr_report_en.pdf viewed 11 November 2011.

[8] Ibid 6, page XV.

1. Not one client could survive on a 10% net of income amount for a protected earnings restriction across all clients;
2. Approximately 18% of clients indicated they could survive on a 20% net of income amount for a protected earnings restriction across all clients. This increased to 26% if the protected earnings amount was set using a gross figure ;
3. Approximately 35% of clients indicated they could survive on a 25% net of income amount for a protected earnings restriction across all clients. This increased to 38% if the protected earnings amount was set using a gross figure; and
4. Approximately 45% of clients indicated they could survive on a 30% net of income amount for a protected earnings restriction across all clients. This increased to 70% if the protected earnings amount was set using a gross figure.

Treasury should note that the percentage of income allowed for by the ADI's on their personal loans is typically 27 – 36% of gross income. The results of our small survey are therefore in line with those results but they do also indicate some are struggling right now because of the increased costs the Panel does not want to grant relief for.

As we have said in our response to Recommendations 1 and 15, we would now only agree to a 20% of net income protected earnings amount for Centrelink beneficiaries as an absolute minimum in light of seeing the Panel's other recommendations. It seems clear the Panel has selected a similar outcome but then applied it to all SACC and consumer lease clients by splitting it straight down the middle so there are two quite separate 10% caps allowed. One would apply to SACCs and the other to consumer leases. It is important that consumers be given choice and freedom to

decide how they use their money. ASIC has noted that there is general compliance with the current requirement of 20% of gross income but there is no evidence of the need to extend a reduced protected earnings scheme to all consumers as the Panel recommends.

Whilst there are some consumers that undoubtedly use both SACCs and consumer leases, our clients inform us there is a significant number of clients that only use consumer leases. In the main, these are women and if they need a cash advance, they have used the Centrelink cash advance system rather than getting a SACC.

If a consumer wants to use their entire protected earnings amount that way, it should not be for Government to dictate they cannot. Fixing the maximum amount that a consumer can pay for leased goods to 10% of net income must not be seen as part of a social engineering experiment that has Orwellian overtones or as an extension of the Government's Basics Card programme to all consumers. It appears to us the Panel has elected to do this as it would be much easier for the regulator to police. We suggest that is not a good enough reason.

One client has suggested that if the Panel are really concerned about possible detriment and convinced the 10% of net income figure should be applied to all SACC consumers, then Treasury must also consider whether this should be applied universally to all consumers, including those offered by ADI's, except for home loans.

Innovation

Given his stated experience with consumer credit regulation, Steven Cavanagh[9] would be well aware the current SACC legislation is very restrictive and that the Panel's recommendations, if implemented, would further inhibit any innovation possible. It is therefore difficult to see how the Panel could not be aware that the recommendations it has made do not fulfil all the former Assistant Treasurer's objectives.

Koopman, Mitchell and Thierer state that "*[p]rotecting consumer welfare has long been one of the principal rationales for economic regulation. Under the traditional "public interest theory" of regulation, regulation is sought to protect consumers from externalities, inadequate competition, price gouging, asymmetric information, unequal bargaining power, and a host of other perceived "market failures.*" [10] They claim that "*the historical analysis of regulation demonstrates, in practice, regulation does not always live up to the normative goals of those who seek it in the "public interes*t." The mere fact academics or policymakers claim that well-intentioned regulation will protect consumers does not mean it actually will do so"[11]. As a result, "regulations often become formidable barriers to new innovation, entry, and entrepreneurship[12]". In other words, more regulation equates to less innovation and less competition and from experience, any innovation starts to centre on avoidance measures. This is not what either the industry wants or consumers need.

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[9] HWL Ebsworth Lawyers, 2016. Stephen Cavanagh background available online http://www.hwlebsworth.com.au/component/k2/item/100-stephen-cavanagh.html viewed 9 May 2016

[10] Koopmjan, C, Mitchell. M and Thierer, A, 2015. "T*he Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*", The Journal of Business, Entrepreneurship & the Law, Volume 8, Issue 2, page 532, published 15 May 2015. Available online http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1130&context=jbel accessed 12 December 2015

[11] Ibid 10, page 533.

[12] Ibid 10, page 537

Stakeholder participation

When the then Minister announced the SACC Review, at point 6, he stated the panel should "conduct consultations with stakeholders, and hold public meetings where appropriate"[13]. From anecdotal evidence, we are aware that Panel may have met just three, and no-doubt, carefully selected, consumers. As some would argue the consumers that use these SACC lenders are the principal stakeholder in this review, it is a great pity the panel did not follow the lead of the Victorian Government years ago when it conducted its own enquiry into payday loans and met many consumers in public meetings held around Victoria[14]. On that basis, as the Panel failed to convey any of its suggestions to those that will be affected prior to issuing its Final Report, does it really know what those that use SACCs or consumer leases want or have they relied on the carefully selected case examples of the desperate and vulnerable provided by the consumer advocates to show what they want? We are not saying there are not those that have suffered financial distress as a result of using SACCs or some consumer leases, as ASIC's own report Rep 447 on the latter shows, but as the current Minister has said, the current Government believes people are responsible for their own decisions[15]. No one forced these consumers into taking on the debt. As we have already said, we agree some borrowers do need help to stop them getting further into debt but the fact that more people are using SACCs or consumer leases doesn't mean they all need protecting by limiting their borrowing abilities as the Panel has stated.

[13] Ibid 1.

[14]Department of Justice, Consumer Affairs Division, 2009. *Small amount lending inquiry 2008*. Available online https://www.consumer.vic.gov.au/library/.../small-amount-lending-inquiry-2008.pdf accessed 05 May 2016.

[15] ABC *Television, 2016. 7*.30, Interview between Leigh Sales and Kelly O'Dwyer, 4 April 2016 where the Minister said "We of course believe in accountability and in people taking responsibility for their actions, but also providing them with information by which they can make positive choices. But at the end of the day, people are responsible for their own decisions. That's a fundamental tenet." Transcript available online http://www.abc.net.au/7.30/content/2015/s4437077.htm viewed 5 May 2016.

Regulatory approach

We are concerned to see the Panel push for more regulation through bureaucracy than parliamentary oversight. We and other industry group representatives have repeatedly advised Treasury that industry needs consistency and based on its actions to date, we are unconvinced the approach suggested will deliver this.

The continual tinkering with the legislation is creating uncertainty and destroying business confidence.

Google action

Of course, some of this may all be academic given the announcement by David Graff, Google's Director of Global Product Policy on 11 May 2016 that it would be "banning ads for payday loans and some related products from our ads systems[16]" with effect from 13 July. Google has taken upon itself to become the international regulator for 'payday loans' after collaborating with more than 200 members of a coalition led by The Leadership Conference on Civil and Human Rights over the last several months. The coalition, whose members are entirely US-based, voted unanimously in December 2013 to urge US states, Congress, and US federal agencies to increase regulatory oversight and enforcement of payday lenders[17]. It is amazing that Google can interfere and essentially

[16] Google Public Policy Blog, 2016. "*An Update to Our AdWords Policy on Lending Products*" advice posted by David Graff, Director, Global Product Policy, 11 May 2016. Available online http://googlepublicpolicy.blogspot.com.au/2016/05/an-update-to-our-adwords-policy-on.html viewed 11 May 2016.

[17] MarketWatch, Inc., 2016. "*Google follows Facebook in banning payday loan ads*", 13 May 2016. Available online http://www.marketwatch.com/story/google-follows-facebook-in-banning-payday-loan-ads-2016-05-11 viewed 14 May 2016.

overrule any Parliament that provided legitimate rights to corporations to act in specific ways it saw fit anywhere in the world.

The effect of the ban is to:

1. define personal loans – being lending money from one individual, organisation or entity to an individual consumer on a non-recurring basis. Google are making a distinction between money lent for a general reason as against the financing the purchase of a fixed asset or to improve the consumer's education;
2. require the home page (or the landing page from any referring site) for all personal loans (including those of lead generators, aggregators and affiliates) to show:
   a. the minimum and maximum periods permitted for repayment;
   b. the maximum Annual Percentage Rate (APR), which includes the interest rate plus fees and other costs for a year; and
   c. an example of the total cost of a representative loan, including all applicable fees.
3. not permit any personal loans to be advertised (such as using its Adwords programme) where full repayment is required within 60 days. This applies globally; and
4. for the US only, any personal loans where the APR is over 36%[18].

Google is as confused as to what an APR really is as the Panel. The 36% is not an interest rate and nor is it an APR. The 36% is a flat percentage fee that may be applied to the value of any amount borrowed over a certain period of time. It is not a daily reducing interest rate as it contains no interest but if the fee to be applied were equivalent to an interest rate, it would have a Comparison Rate of 1878%.

[18] See Appendix 1.

Any consumer searching using the Google browser for the term 'payday' will, at this stage, will not be affected as organic search engine optimisation will still find them. It is only the advertising that comes up now at the top of the search page(s) that will be and that's where the rub will be. Those lenders willing to spend more for the click-throughs using Google Adwords on advertising generally get to the top of the first page. Given Google's market dominance, it's well-known that first page websites get 91.5% of Google traffic. Most people just don't bother going beyond the first page. If a website is on the second page you only get to share 4.8% of the traffic along with all other websites on the page. With page 3, it shrinks lower to 1.1%[19].

For credit providers lending only for home loans or vehicle loans and the like, these stringent requirements will not affect them but any credit provider that offers a general finance product for any amount where the term exceeds 60 days will be seriously affected as they will be required to show all the details as shown in point 2 for each loan type.

The author is aware of a number of credit providers (who are neither FAA members nor Min–it clients) that have a business model where the loan term is set at 4 weeks or less. Almost all of them are totally internet-based and these lenders will be particularly affected by Google's ban that will prohibit advertising loans of less than 60 days duration, even though it is perfectly legal to do so here in Australia. It will be difficult for them to legitimately advertise they offer loans for greater than 60 days but then push clients into shorter term loans without being misleading or deceptive.

Advertising has huge impact on the larger lenders' profitability. The author is aware of one lender that had an issue with Google some years ago when it

[19] Mr-SEO, 2016. "*The Importance of First Page Rankings*" Available online http://www.mr-seo.com/seo-articles/importance-first-page-rankings/ viewed 15 May 2016

banned its advertising due to the lender's failure to disclose an APR on two pages as it required. Google refused to accept that under Australian law, the lender was not required to disclose a Comparison Rate for SACC loans. In just two days, this lender saw a drop in enquiries of 84% and by the end of the first week, it had risen to 91%. The lender made changes to the site over the next week but it never recovered and subsequently entered into administration.

In contrast to these larger lenders that are almost wholly reliant on internet advertising and click-throughs, whilst some of our clients advertise this way, some are still reliant on limited local advertising, word of mouth recommendations and there will, no doubt, be some repeat business gained from previous clients. The vast majority of FAA members and our clients are predominantly bricks-and-mortar based.

For that reason, how this change by Google will affect the Australian SACC landscape is unknown but unless the lenders that advertise change their business models and lengthen the terms of their SACC's to comply with the advertiser's demands by July 13, they may have considerable difficulty remaining viable. For many, that will mean the Panel's wishes could become fulfilled without any legislative intervention.

Suggestions not considered?

It is disappointing that some of the other suggestions put forward to stop some of the poor conduct have not been taken up by the Panel or whether or not they have been brought to Treasury's attention and may be included in any future legislative amendments.

For example, we suggested it might consider strengthening s.131 (2) (a) by adding three words, shown in red bold font, as follows:

(a) the consumer will be unable to comply with the consumer's ***existing*** *financial obligations* ***and those*** *under the contract, or could only comply with substantial hardship, if the contract is entered or the credit limit is increased in the period covered by the assessment;"*

The author has also previously suggested amending the definition of a SACC so that it is no more than $1,200 for a term of 3 months. This is based on discussions he had with consumer groups in 2012, whilst consultation was under way on what was to be contained in the NCCP Enhancements Act. We suggested defining a SACC as an unsecured loan of no more than $1,200 for 12 weeks but it was conditional on them accepting that an interest rate cap of 48% for MACCS and Other loans was unviable. Whilst they were very interested in this proposal, ultimately, as a result of their entrenched attitude to the ideology of 48%, they refused.

The international average for a payday loan is no more than A$600 and most have terms of no more than 12 weeks or 3 months, we consider it outrageous of ASIC to label all SACC contracts as 'payday loans'. As we stated in our initial submission to the Panel, a $2,000 loan for 12 months has never been regarded as one and is well outside of the internationally recognised criteria.

Whilst we have no data for FAA members, for loans of the typical 'payday' amount, $400 or less, most clients provide SACCs on terms of 6 weeks with a number of clients having terms of between 10 - 12 weeks. For loans of $1000 or less, they are provided on terms between 20 – 26 weeks and for loans of $2000 or less, the loan term is between 40 – 52 weeks.

There is an inextricable overlap between SACC's and MACC's that amending one cannot be done without amending the other, but given Google's recent

advertising policy change, we make the following recommendations to Treasury to present to the next Minister:

1. redefine the SACC in s.5 of the NCCP so that it becomes, in effect, a true "payday loan", being an unsecured loan with a term not exceeding the greater of 26 weeks or 6 months where the credit limit does not exceed $1,2000; and
2. amend the definition of a Medium Amount Credit Contract ("MACC") in s.5 of the NCCP so its current lower credit limit of $2,001 is replaced by $1,200.01. This would allow a transitional mechanism and allow the lender a fee of $400 which, together with interest, would almost equate to the amount they'd make if applying the current SACC fees.

This would reward credit providers for supplying credit at the higher end of the current SACC definition with longer term loans which could be secured if necessary.

We will now comment on each recommendation.

Small Amount Credit Contracts (SACCs)

Recommendation 1 - Affordability

Extend the protected earnings amount regulation to cover SACC's provided to all consumers. Reduce the cap on the total amount of all SACC repayments (including under the proposed SACC) from 20per cent of the consumer's gross income to 10 per cent of the consumer's net (that is, after tax) income. Subject to these changes being accepted, retain the existing 20 per cent establishment fee and 4 per cent monthly fee maximums.

The idea promoted by the NCPA when it suggested a protected earnings amount was to satisfy the consumer advocacy group demands to protect those desperate and vulnerable consumers that need protecting from themselves. ASIC has noted that there is general compliance with the current requirement of 20% of gross income but there is no evidence of the need to extend a reduced protected earnings scheme to all consumers as the Panel recommends.

Very clearly, the Panel have not listened to industry that such a move would make it unviable. If Treasury has supplied the Panel with modelling to show that credit providers can remain viable in accordance with the wishes of Parliament, then it must immediately provide industry with the data. Just as when Christian Mikula confirmed Treasury had not done any modelling to show the 20/4 model was sufficiently viable to ensure the industry could continue, we strongly suspect this is yet another instance where it will not exist.

In our submission to the interim report dated 22 January 2016, we said our clients advised us very loudly that reducing the protected earnings amount to 10% net rather than gross for all borrowers would cause them to leave the industry. This was without any default fee being capped (Recommendation 10).

10% is simply too restrictive. Other industry groups said the same thing, so we must conclude the Panel has taken side with consumer advocacy groups that are determined to shut the industry down by any means.

Now we have seen the full amount of restrictions the Panel has recommended, at very best, the protected earnings amount needs to be not less than 20% of net income for all Centrelink beneficiaries. As the author stated in Melbourne, the rate of declined application for our clients is already between 70 to 95% whereas Cash Converters said theirs was 40%. Our own clients' estimate many more clients will be turned down because of their commitments under leases created prior to any cap coming in. Put simply, **none** of our clients can cope with Government making the cap 10% of net income for all clients and any protection should be applied only to those that need it.

Longer term loans create cashflow difficulties for the lender due to the lower repayment amount and if there is default, then this exacerbates the issue. The vast majority of our clients are small businesses. Defaulted payments are a serious cause of financial stress for small credit providers, as most have mortgaged their home to fund the business. We do not need the Panel to create even more of a nanny state than we have now as not all lenders operate unscrupulously. Many of our really good, long-standing clients that had been lending for many years without issue decided to leave the industry when New South Wales and more particularly, Queensland, introduced their interest rate caps. Reducing cash flow, limiting default fees together with limiting lending will see many leave the industry and tip some over the edge. Whilst we can appreciate the Panel wanting to protect consumers, the Panel has clearly not considered exactly how many of those are really vulnerable out of the total the industry assists, what effects its recommendations will have on the lenders or, if

it has, we suggest it hasn't taken into account the other specific aspects the review requires.

The ideology of forcing SACC consumers to have longer term loans may not be what the consumer wants. Many SACC consumers are used to working around short, fixed repayment periods as they can best manage their income that way. These consumers are generally not ignorant of the total cost of borrowing and they will see that forcing them to take a longer term but end up paying more overall is not suitable compensation for a lower repayment amount. Many borrowers can afford to pay more than 10% and as we said in the submission dated 22 January 2016, many of our clients already keep the total the consumer repays for all loans to a maximum of around 20% of net income.

Table 4 fails to indicate that no consumer earning DFA's average amount of $1219.00 per fortnight will ever be able to qualify for a maximum SACC of $2000.00. In fact, the maximum obtainable would be $1850 over 12 months. If a consumer doesn't want a longer term loan or might take a small loan amount, even though it is less than what has been applied for, then the lender will have to decline the application because of unsuitability. This is not providing the access to finance the former Assistant Treasurer demanded the Panel consider.

Most SACC lenders charge the maximum 20% Establishment Fee and 4% Permitted Monthly Fee simply because of inadequate returns. That is not going to change. In the past, and particularly prior to the NCCP Act, there were various avoidance schemes being used in NSW, ACT and Queensland; reducing the protected earning amount for everyone to 10%produced will lead to this recurring or forcing many to seek loan sharks; we suggest consumers do not want to return to the bad old days. There are a number still operating and the regulator has not seen fit to prioritise any action against them.

The Panel has “acknowledged that SACCs can be useful for consumers when they are used as an emergency source of funding for one-off expenses and that, while the cost of SACCs is high relative to alternate sources of finance, in emergency situations the benefits of having access to credit can justify the relatively high costs, provided the consumer can afford them”[20]. If a SACC consumer already has another SACC but needs additional funds urgently, an absolute prohibition could be harmful to the consumer’s welfare or that of the consumer’s family. Who in Government is going to take responsibility for any adverse outcome arising as a result of the SACC provider having to comply with the law?

Equally, consumers already provide adverse comment about the need to provide some of the documentation required but lowering the protected earnings to 10% is more than likely to lead to violence for the credit provider’s staff. As they have a duty of care, in order to ensure their health and safety, they may have to invest is substantial security to prevent this. All this has to come out of the already low return credit providers make. The returns are not as great as what the consumer advocates think they are. If the Panel has not been shown any modelling to see this, then they have failed to properly consider all the options.

[20] SACC Final Report, page 12

Recommendation 2 - Suitability

Remove the rebuttable presumption that a loan presumed to be unsuitable if either the consumer is in default under another SACC, or in the 90-day period before the assessment, the consumer had had two or more SACCs.

This recommendation is made on the condition that it is implemented together with Recommendation 1.

We agree with the Panel's assessment that the rebuttable presumption has not been effective but there are many lenders that have tried to adhere to both the actual wording of the legislation and the intent, unlike the dozen or so large internet based lenders that have consistently ignored the provisions and have effectively lent in breach of responsible lending requirements. These lenders were listed in Appendix 1 of our submission to the Interim Report and we ask Treasury to provide this to the Minister.

However, as we do not agree with the Panel's Recommendation 1, we must disagree with the condition they suggest be imposed.

Recommendation 3 - Short term credit contracts

Maintain the existing ban on credit contracts with terms less than 15 days.

We agree with this finding as industry participants are adhering to it.

Recommendation 4 – Direct debit fees

Direct debit fees should be incorporated into the existing SACC fee cap.

As the initiator of the original ASIC Class Order (CO13/818), it is apparent that the Panel have not appreciated that the borrower enters into a totally separate contract with the third party provider to pay the credit provider the repayment due.

Many credit providers' financial institutions have refused to allow them the ability to process direct debits using an .aba file via the bank's own payment processing systems. Whereas the banks typically charge between $0.05 - $0.10 per debit, the only other way that direct debits can then be processed is via a third party provider. Typically these providers charge between $1.10 - $1.65 (inc. GST) per debit but it can be higher. It is inequitable that some credit providers have access to banking facilities that are not available to others and so to provide some equity, I raised this issue with Christian Mikula as the then Manager of the Consumer Credit Unit a couple of times. It was as a result of these discussions and a follow up by Phil Johns, CEO of what is now the National Credit Providers Association ("NCPA") just prior to the commencement of the Enhancements Act provisions that ASIC created the Class Order exemption. As a third party cost, I sought only cost recovery, not a profit.

Unfortunately, as the initial Review notes, "ASIC has noted that most SACC providers are charging consumers a fee for direct debit services with some lenders utilising complex corporate structures to suggest it is not the credit provider charging the fee. ASIC has seen examples of consumers being charged up to $3.50 per transaction." I stated in our original response dated

14 October 2015 that this was never the intention as no genuine third party provider charges more than $1.65 (including GST) per transaction.

In the submission dated 14 October, I pointed out that I had previously suggested to Treasury that ASIC could easily amend the Class Order and apply a cap on the direct debit fee charged to be no more than this amount and requiring the third party direct debit provider to be PCI compliant. Annual PCI compliance audits are mandatory and are a significant cost to the debit providers. Requiring PCI compliance would have the effect of removing most contrived entities out of the current Class Order requirement but it suggested waiting for this review to be completed. Many of our clients feel that by allowing such entities to exist and continuing to charge amounts higher than $1.65, ASIC has given these credit providers an unfair financial advantage, particularly when they are not at true cost.

The Panel's objective in "ensuring the integrity of the current SACC cap by ensuring that all amounts chargeable to consumers under a SACC arrangement are included within the one cap"[21] may well have been the original intention but it is totally unfair to the credit provider who cannot ameliorate these costs when compared to those that have access to cheap direct debit facilities themselves.

The Panel would probably not have known that industry did not have any opportunity of reviewing the final draft bill prior to the then Minister presenting it to Parliament. Industry saw it only after it was a *fait accompli*. After I raised the matter, I have no doubt Treasury officials discussed the matter with the then Minister before giving approval for the ASIC Class Order to be raised.

[21] SACC Final Report, page 24

I raised the question of direct debits in the original consultation meeting at Melbourne but as there was no mention of the Panel's intent in in the Interim Report, we are surprised it has taken this view. The Panel has clearly failed to consider the element of fairness for many credit providers. Whilst factually true that the Annual Cost Rate does not apply to SACC's, their comment "providers of SACCs and medium amount credit contracts are provided a concession to this annual cost rate"[22]" is incorrect. As an industry representative that was personally involved and who had discussions with both Treasury and the then Assistant Treasurer who introduced the Enhancements Bill into Parliament, the Hon Bill Shorten MP, it was never raised that the SACC fee structure was to be seen a concession in any of the discussions on the Enhancements Act and we can find no mention of it being so in Hansard.

We would remind Treasury that when the Enhancements Bill was passed, Parliament wanted short term lending to be accessible, affordable and as competitive and transparent as possible. This point was raised by the Hon Bert van Manen MP who said the changes the Minister had made represented "a significant concession to both industry and opposition concerns with the original bill. The original government proposals did not strike the right balance between appropriate consumer protection and making sure that short-term lending remains available, accessible, affordable and as competitive and transparent as possible. The proposed government amendments address many of the concerns raised by stakeholders during the parliamentary committee process.

These included concerns that the proposed caps on fees and interest charged on payday and small-amount loans would be uneconomic and would lead to many current participants withdrawing from the market. Many of the businesses that could close down are small, family owned and operated businesses. The

[22] SACC Final Report, page 25

reduction in availability of payday and small-amount loans could result in many people not having access to the existing finance they rely on to meet unexpected expenses. The banks have not participated in payday and small-amount lending for some time, because it is uneconomic for them to do so."[23]

Nothing has changed and to impose the direct debit fee as an additional and significant expense rather than being recoverable as a third party fee will make offering SACC's uneconomic for some credit providers, particularly as the Panel have suggested extending out the term. Longer terms mean more payments and more fees that would have to be absorbed if the Panel's recommendations were accepted. Another option is available to Government and that is to force the banks to make direct debiting facilities available to all credit providers so they can all obtain the same low rates. Given some of the Big 4 banks have already started refusing to accept these businesses as clients, this is hardly going to happen and the status quo position must remain if Parliament's wishes are to be maintained.

[23] Parliament of Australia, 2012. Hansard 26 June 2012, page 7946. Available online http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/b9c79f46-7f3a-4739-acb9-ec8d676c1b6b/toc_pdf/House%20of%20Representatives_2012_06_26_1144_Official.pdf;fileType=application%2Fpdf#search=%22chamber/hansardr/b9c79f46-7f3a-4739-acb9-ec8d676c1b6b/0000%22 viewed 17 May 2016

Recommendation 5 – Equal repayments and sanctions

In order to meet the definition of a SACC, the credit contract must have equal repayments over the life of the loan (noting that there may be need for limited exceptions to this rule).

We are in total agreement with the requirement for SACCs to have equal repayments over the life of the loan, possibly apart from one final payment which may differ slightly, while still allowing consumers the ability to pay off a SACC early.

However, we do take issue with the statement "[c]redit providers who elect to offer contracts with unequal repayments would not be entitled to have the benefit of the concessional cap available to SACCs but would be subject to the 48 per cent APR cap applicable to other credit contracts, calculated in accordance with the formula in section 32B of the National Credit Code." [24] This appears to be in direct conflict with the panel's recommendations on avoidance (see recommendation 24) and is confusing.

It would appear that the Panel is saying if a credit provider offers:

a) an unsecured loan; and
b) on a term of no more than 12 months but greater than 15 days; and
c) that is not provided by an ADI; and
d) for an amount of no more than $2,000; and
e) has unequal repayment amounts (other than, say, just one being the final payment)

that contract would not be defined as a SACC because the definition under

[24] SACC Final Review, page 28.

s.5 of the NCCP Act would be amended. If that is what Government was to legislate for, we can accept that.

In doing so, however, all the consumer protections for a SACC would not apply and the Panel states the credit provider would be subject to an Annual Cost Rate of 48%. It effectively becomes an "Other" loan type and the credit provider will be able to charge interest and/or fees and charges so that it does not exceed the Annual Cost Rate amount.

Although the Panel might be happy for this to occur, under recommendation 24, it then states one of the objectives is to "[m]inimise consumer detriment resulting from businesses which are avoiding compliance with cost caps and additional responsible lending and conduct requirements". [25] This could well be regarded as an avoidance measure and goes to highlight exactly how difficult it is to define avoidance.

Industry needs certainty and consistency to ensure regulatory compliance and it is unfortunate this example in the Panel's recommendation doesn't provide it.

[25] SACC Final Report, page 94

Recommendation 6 – SACC database

A national database of SACCs should not be introduced at this stage. The major banks should be encouraged to participate in the comprehensive credit reporting regime at the earliest date.

We agree with this finding but there should be no compulsion or Government ‘encouragement’ to require the major banks or any financier to participate as suggested as the ability to decide whether or not to participate already exists.

As we advised the Panel, the vast majority of SACC lenders do not engage in credit reporting due to significant cost considerations and noted with interest that the Australian Retail Credit Association (“ARCA”) was the main promoter in its submission of comprehensive credit reporting. We trust the Panel saw through its vested interest.

As we advised the Secretariat and noting the Panel has made mention in its Final Report, the Finance Industry Delegation submission[26] contained a suggestion that bank statements could identify the loan type debited by using the spare characters on an .aba file. We would again like to clarify that the .aba file format is a file format that is subject to strict positioning of characters on each line.

Whilst we agree this would be an easier way of rapidly identifying direct debits that relate to SACC’s, not all third party providers would have sufficient spare characters to show “SACC”, for example, as the identifier. The Panel has suggested further consultation should be undertaken by the Government on this option. Treasury should note this suggestion requires considerable discussion with the Australian Bankers Association as the file

[26] Finance Industry Delegation, 2015. “*Review of the small amount credit contracts*” submission, page 67.

format specification would need amending.

Recommendation 7 – Early repayment

No 4 per cent monthly fee can be charged for a month after the SACC is discharged by its early repayment. If a consumer repays a SACC early, the credit provider under the SACC cannot charge the monthly fee in respect of any outstanding months of the original term of the SACC after the consumer has repaid the outstanding balance and those amounts should be deducted from the outstanding balance at the time it is paid.

We are in total agreement with this recommendation but the way it is worded, it is confusing. We brought to the Panel's attention the practice of some lenders that charge all the monthly fees upfront and many do not refund any of the permitted 4% monthly fees when there is early repayment and suggested this is detrimental to the consumer. We believe that notwithstanding the intent, as there is no legal definition of 'outstanding balance' in the NCCP Act, some credit providers may seek to avoid some of this provision. We suggest this will require very careful drafting in order to ensure the intent is made clear.

Recommendation 8 – Unsolicited offers

SACC providers should be prevented from making unsolicited SACC offers to current or previous consumers.

This matter was not raised in either the original or Interim Report consultations and nor was it brought up at the Melbourne meeting. Given there has been no consultation on this, we note all the concern the Panel has made has been expressed only by consumer advocacy groups.

The Panel has not stated what exactly an 'offer' is. If it is a pre-approval offer to an existing consumer, the credit provider may well be in breach of responsible lending obligations as well as the SPAM Act 2003 if no consent has been provided by the consumer.

We suggest this is not a matter for the Panel on which to make any recommendation. That act is administered by Australian Communications and Media Authority ("ACMA") and any action should be left with that Agency.

Recommendation 9 – Referrals to other SACC providers

SACC providers should not receive a payment or any other benefit for a referral made to another SACC provider.

Where a credit provider has received an application, carried out an assessment **and** rejected it, either through the consumer not meeting responsible lending obligations or the loan simply isn't suitable for the consumer, then we are of the opinion those leads should not be passed on in any form at all, even if the consumer has provided consent.

There may be valid reasons for a SACC provider to on-sell a lead, however, such as when:

1. the consumer wants a MACC and the SACC provider only offers SACC's; or
2. if the SACC provider doesn't want to accept a longer term SACC application; or
3. the applicant is not local and the SACC provider will only deal with a locally-based consumer.

We see all these instances as perfectly acceptable and it is not as clear cut as the Panel have made out.

As we stated in our submission dated 22 January 2016, the Interim Report states it believes the average cost of acquisition is around $200. If this includes failed leads and any other advertising costs (such as TV, radio, Google Adwords, etc.), the suggested $200 may well be too low. Anecdotally, we have been advised the average fee being paid by many lenders is over $120 (plus GST). However, when one considers the total income receivable is $112.00 for a typical $400 loan over a term of 5 - 6

weeks, taking into account the lenders fixed costs to generate the loan contract, it will take many loans just to recover this fee and another before the lender actually starts to make a profit. The credit provider may have already incurred costs such as a bank statement fee and those mentioned above, so in such circumstances, we don't see this as disadvantaging the consumer; it's simply a means of the credit provider recovering some of its costs from a willing lender.

Finally, we make comment on the Panel's objective of ensuring the cost of buying a lead is not borne by the consumer. Considering that the Panel has one specialist consumer credit lawyer as a member, he would know there is no opportunity of this occurring. The credit provider is limited in what it can legally charge by virtue of s.31A (2) and s.31A (3) of the National Credit Code ("NCC"). We know of no instance whatsoever of any consumer somehow paying for the lead supplied.

Recommendation 10 – Default fees

SACC providers should only be permitted to charge a default fee that represents their actual costs arising from a consumer defaulting on a SACC up to a maximum of $10 per week.

The existing limitation of the amount recoverable in the event of default to twice the adjusted credit amount should be retained.

In our submission to the Interim Report, we stated that implementing a periodic payment cap by applying an arbitrary amount the lender can charge without any reference to its costs may either drive many out of the industry, resort to recovering some costs as enforcement costs or overseas. When the UK decided to cap dishonour fees for payday loans at no more than £15, it did so only after the Financial Conduct Authority reviewed the books of every UK payday lender and ascertained a fair and reasonable amount to charge and the author asked if the Panel was going to recommend the same to the Minister. It is remarkable that the UK's £15 cap, although currently equivalent to A$30, has been closer to $34.00. based on earlier exchange rates.

The Panel has, to our knowledge, not undertaken any review of the actual costs credit providers incur when a consumer defaults and it appears to have simply plucked the $10 per week figure that Credit Corp charged on Wallet Wizard's Small Cash Loan[27]. As we have previously stated, information provided to the Panel by Credit Corp should be taken as applying purely to that credit provider alone as they are unrepresentative of the industry as a whole.

[27] Finder.com.au, 2016. "*Wallet Wizard Small Cash Loan Review*". Available online http://www.finder.com.au/small-cash-loan viewed 16 May 2016

The Final Report on page 41 incorrectly attributes a comment the author made to the Secretariat staff on 24 February where it states, at footnote 81, that “the Financiers Association of Australia suggested that SACC providers generally charge a one-off default administration fee of $30-$35, a $10 letter fee plus $1.50 postage.” What I said was our clients generally charge a one–off default administration fee of $30-$35 which includes up to $10 for a letter fee but that one client had recently asked us to add a new fee of $1.50 to cover postage on Default Notices due to the increase in postage by Australia Post but this was currently an exception that may become more widely used in the future.

Treasury might be interested to know Credit Corp no longer offers its Small Cash Loan product and now offers its Smart Loan product instead for loans of between $500 and $5,000. This is a continuing credit offering that effectively circumvents the SACC protections for loans of less than $2,000. We note that one FAA member was taken to task for offering a similar product by a Senior ASIC Officer but doubt Credit Corp will have the same trouble.

Even if the Smart Loan product was still offered, given Credit Corp’s core business is debt collection, we question whether or not the Panel looked to see whether, when the consumer cannot pay the debt, if and when Credit Corp transfers the debt to its receivables management business section and recovers additional fees for doing so. We are of the opinion that the Panel should have looked at what other SACC lenders use for default fees if it wanted to apply a cap on what is charged rather than a debt collection company with a finance arm as it is atypical of the industry.

Additionally, the Panel’s Reports appear to have given no consideration that they looked at the impact any fee cap would have on lenders offering contracts other than SACC’s - i.e. Medium Amount Credit Contracts (“MACC”), Other and Continuing Credit. Many of our clients offer at least two of these in addition

to SACC's and it would be highly discriminatory to have differentiated unascertainable fees for these other loan types. If the fee amount reflects cost recovery, then it should be allowable. To expect any business to reduce a fee below what it costs to administer and collect the debt is preposterous.

Having said that, as we pointed out to the Panel, fees such as Nimble's $5 and $7 per day depending on contract amount are nothing more than penalties and unenforceable under common law. The regulator already has the power to act on such unfair contract terms.

As the author is and has been a member of the Australian Institute of Credit Management for almost 17 years and prior to the GFC, wound up NZ's largest credit provider that went into both Liquidation and Receivership as well as having lectured in credit management, the author questions the experience of any of the Panel members in actual debt recovery when it claims that the use of technology enables debt collection. Sending an SMS does **not** collect debt; all it may (or equally, may not) do is prompt a response from the consumer. The Panel's comment is discourteous to credit management professionals. Debt collection is regarded as a skill and if debts could simply be collected like this, just about every Australian company would not be incurring significant salary costs and other expenses for those they employ to do so.

Consumer Leases

Recommendation 11 – Cap on cost to consumers

A cap on the total amount of the payments to be made under a consumer lease of household goods should be introduced. The cap should be a multiple of the Base Price of the goods, determined by adding 4 per cent of the Base Price for each whole month of the lease term to the amount of the Base Price.

For a lease with a term of greater than 48 months, the term should be deemed to be 48 months for the purposes of the calculation of the cap.

Whilst it is pleasing to note the Panel decided to recommend a higher cap than that allowed in general for credit products, we disagree with the Panel's recommendation as to how the cap should be calculated. The objectives are all based on consumer protection at the total expense of the lessor. If the lessor doesn't make enough return on capital, it won't stay in business and that would mean consumers will not be able to access the goods that they need through leases and one of the Panel's objectives will be unfulfilled.

The Final Report states the 'recommended cap provides a concession to the standard credit contract cap to cover these additional costs, similar to the concession provided to SACC providers to recover the costs of establishing a SACC over a relatively short time period " [28]. We do not accept the view expressed; there never was a concession afforded to SACC providers. The 20% Establishment Fee and 4% Permitted Monthly Fee were derived by simply doubling what had originally been proposed by the then Assistant Treasurer. Christian Mikula confirmed Treasury had not done any modelling to see if the 20/4 model was sufficiently viable to ensure the industry was able to continue.

[28] SACC Final Report, page 91

In view of this falsehood, for the Panel to consider a 48% Annual Cost Rate was pandering to the consumer groups' argument that a lease should be regarded as a loan. However, we are of the opinion that a 4% a month rate is too low. In Table 9, industry has suggested rates of between 1.8 – 2.4 times the Base Rate for up to 1 year to 2.5 – 4 times the Base Rate for 4 years. There is relatively little difference between the rates suggested by two; the Australian Finance Conference and CHERPA and we fail to understand why the Panel has not looked at recommending either of these two.

The 2.92 times RRP may not provide sufficient return for some high value goods on longer term leases and the Australian Finance Conference's option of "1 x "cash price" per annum for terms in excess of 24 months is more in keeping with the financial return required to stay viable.

The Panel clearly does not understand that leasing involves stepping into the personal shopping environment, where the consumer demands both a product and service together with the assistance they need when things go wrong, both in their personal lives and with the product.

Treasury must immediately provide industry with the modelling it has shown the Panel so that we can ascertain that limiting financial return to the lessor, particularly on longer term leases so that "a lessee with a consumer lease should never be required to pay more than 2.92 times the Base Price of the goods to lease them"[29] is not based on the Panel's ideology.

[29] SACC Final Report, page 53

Recommendation 12 – Base price of goods

The Base Price for new goods should be the recommended retail price or the price agreed in store, where this price is below the recommended retail price.

Further work should be done to define the Base Price for second hand goods.

We have no comment to make on this as most rental companies have suggested using this. We agree there needs to be some further consultation on how own-brand and second-hand goods are valued.

We are very concerned, however, at the Panel's final statement that to "improve visibility, ASIC may wish to investigate the prices that lessors pay to acquire their goods, to determine whether using the RRP as the Base Price is overly generous"[30]. Regardless of how 'overly-generous' is established, it takes no account of different distribution channels and product differences. Technology goods have notoriously low retail profit margins whereas other goods may have much higher ones. Depending on what ASIC regards as reasonable, this recommendation is a clear indication of the Panel's determination to pander to consumer groups who want to see everything as cheap as possible without any thought for the consequences. We remind Treasury that a business that does not make a profit does not employ staff and does not last long in the market.

[30] SACC Final Report, page 55

Recommendation 13 – Add-on services and features

The cost (if any) of add-on services and features, apart from delivery, should be included in the cap. A separate one-off delivery fee should be permitted.

That fee should be limited to the reasonable costs of delivery of the leased good which appropriately account for any cost savings if there is a bulk delivery of goods to an area.

In the example given to Recommendation 14, we have provided an example of the installation fee for an air conditioning unit. At the time the lease is executed, it is likely that installation costs are likely to be, though not always, added to the contract in the same way charging for a delivery cost would be for lower value goods except that these costs are likely to represent a substantial percentage of the total lease cost. Whilst we have asked the question are such goods to be considered 'household goods' in that section, no consumer would want to have to take out a loan, for example, to pay for installation of a leased item. The consumer is obtaining a system made up of the air conditioner and the installation costs. The Panel does not appear to have considered such leases as the submitters to the review may not provide such services or even deal in this type of good.

We are of the opinion that items to be affixed to a dwelling, which includes plumbed in fridge-freezers and well as air conditioning installations, should be able to include installation and other associated costs in the lease costs as chargeable add-ons.

Additionally, we would make the point any one-off delivery fee should be applied per item and not per lease but do accept that if multiple items are delivered at any one time, the delivery fee should take that into account.

Recommendation 14 – Consumer leases to which the cap applies

The cap should apply to all leases of household goods including electronic goods.

Further consultation should take place on whether the cap should apply to consumer leases of motor vehicles.

The Panel has stated "[s]ome submissions suggested a cap should apply to all consumer leases of household goods" [31] and cites in the footnote, these came from CHERPA's submission to the interim report p.7, Thorn's submission to the interim report p.4, and the Australian Finance Conference's additional submission p.4. We can find no such evidence in either Thorn's or the Australian Finance Conference's submissions; only CHERPA's does. We have no issue with a cap applying to such goods.

CHERPA's members are predominantly whitegoods and furniture retailers and so they generally deal with lower value household goods. Most household goods leased will have an individual value of less than $5,000 but from the Final Report, the Panel appears to have given little thought to high value leased goods apart from motor vehicles.

The questions we must now ask now, though, are:

a) what constitutes "household goods"?; and
b) are goods not considered to be household goods to have no cap?

We are aware of a number of companies that rent high value goods, such as specialized air-conditioning units and other items such as solar storage batteries where the retail value is almost always well in excess of $10,000 on terms generally between 5 and 7 years. Some of the associated hardware is

[31] SACC Final Report, page 58

technologically new but has a cost around $20,000. Typically, the term 'household goods' is used to mean tangible and movable personal property used in a dwelling, so is an item that is to become a fixture a household good or not as the NCCP Act does not define the term? Aside from any other consideration, these units are often rented by consumers because of technology lifespan concerns but they want to do so over terms of up to 10 years in order to make it affordable. The Panel's recommended maximum cap of 2.92 times Base Price may not provide sufficient return to make it economic and so this will limit technology uptake. Again, the Panel appears to have taken a one-size-fits-all approach as there is no mention of any consideration of these factors.

We are still of the opinion that any cap should apply to all consumer leases of household goods but equally, any multiple must allow for a reasonable rate of return rather than some notion of what consumer advocates or the Panel "think" should be imposed. Alternatively, Treasury might care to define what the term "household good" means and confirm the cap does not apply to those goods. .

We agree that there should be further consultation on leasing motor vehicles and the like.

Recommendation 15 - Affordability

A protected earnings amount requirement be introduced for leases of household goods, whereby lessors cannot require consumers to pay more than 10 per cent of their net income in rental payments under consumer leases of household goods, so that the total amount of all rental payments (including under the proposed lease) cannot exceed 10 per cent of their net income in each payment period.

The same basic comments we made for recommendation 1 also apply here. Whilst our clients all try to ensure that payments for any individual consumer lease contract do not exceed 10% of gross – not net – income, the issue arises where the consumer already has another lease. In such circumstances, they further self-impose a maximum monetary cap based on whether the consumer is either working or is a Centrelink beneficiary.

Though the consumer advocates will argue at least some of these consumers will need protecting, this is hardy providing the access to product some can afford to pay. They forget that the longer the consumer has the product, the greater the risk factor for servicing and repair. If an item doesn't work, regardless of whether or not it is under manufacturer's warranty, the consumer will stop paying the rental due. If the lessor has to go and collect the item and have it repaired, vehicle running costs and staff time and repair costs all have to come out of any profit.

At very best, the amount needs to be not less than 20% of net income for all Centrelink beneficiary clients and even then, they estimate many clients will be turned down because of their commitments under leases created prior to any cap coming in. Put simply, **none** of our clients can cope with Government making the cap 10% of net income for all clients and any protection should be applied only to those that need it.

As we have said earlier, the Panel's recommendation of limiting the maximum amount that a consumer can pay for leased goods to 10% of net income must not be seen as a social engineering experiment or an Orwellian method of controlling who can and who can't have a good or some other product or service. These consumers are people with dignity and attempting to control what they can and can't have in their lives is demeaning. Many of the consumers that take up leases are women that have suffered violence against them and this recommendation may be seen as discriminatory and contrary to the Convention on the Elimination of All Forms of Discrimination against Women as well as the International Covenant on Economic, Social and Cultural Rights to which Australia is a signatory.

Recommendation 16 – Centrepay implementation

The Department of Human Services consider making the caps in Recommendations 11 and 15 mandatory as soon as practicable for lessors who utilise or seek to utilise the Centrepay system.

The Panel's recommendation that the Department of Human Services consider making the caps it recommended in Recommendations 11 and 15 mandatory for lessors who utilise Centrepay as soon as practicable because they can do so before any legislation is passed is akin to what Google has done to payday loan lenders recently. That international company also seeks to enforce policies which are not in law here in Australia. Google's actions are as despicable as the Panel's recommendation. We do not yet know the incoming Government's position on this matter; Parliament has not yet passed any change limiting any lessor's financial return to those suggested by the Panel and is yet another example of the Panel's intent on increasing regulation by bureaucracy.

The Panel has also clearly not understood that lessors almost never supply a copy of the consumer's lease with each application they lodge to Centrepay. To enforce it would mean, assuming Centrepay wanted to follow the Panel's recommendation. Centrepay staff would need to get a copy of the lease document in every instance and check it to ensure it complies. All this takes resources and Centrelink is trying to cut costs; one example of this is its recent decision to remove the phone number its 'customers' can call to obtain a benefit advance. This may lead to another unintended consequence; the imposition of a fee being charged by Centrepay on lessors. Lessors already cannot pass on the $0.99 per debit charge and if Centrepay tried to impose a similar restriction on any new fee, this is a further erosion of profitability. Some may try to a find some loophole or manipulate costs by which they could recover it. Again, neither the industry needs this kind of action nor does the consumer need it.

Recommendation 17 – Early termination fees

The maximum amount that a lessor can charge on termination of a consumer lease should be imposed by way of a formula or principles that provide an appropriate and reasonable estimate of the lessors' losses from early repayment.

As we stated in our submission dated 22 January 2016, we believe the regulator could have easily have taken action against all of those lessors that charge an early termination fee amounting to all or almost all of the remaining lease payments on the basis of it being an unfair contract term. We remain of the opinion that such early termination fees amount to a penalty and are unenforceable under common law. It is disappointing that the Panel has not recognised this and noted that equally, the regulator already has the power to take action, albeit under legislation other than the NCCP Act. It is to be hoped now that they have been given the funding from Government, they will act on it.

We welcome the Panel's approach in suggesting a regulation that prescribes principles for the calculation of a maximum amount payable on early termination of a consumer lease but we do not agree with the use of any formula. The problem with formulae is they do not take into account all the circumstances and there are inevitable distortions. The Panel's Final Report makes no mention of the differences we highlighted to it, namely:

1. where the good is returned because the lessee no longer needs it; or
2. where the lessee wants to acquire the good prior to termination of the lease.

Whilst the Panel has proposed a mechanism to account for acquisition, it is totally silent on what should occur where goods are returned. In our submission dated 22 January 2016, we said that prescribing a maximum here could incur a loss for the lessor and gave an example. That example was based on a fridge-freezer that cost our client to purchase $2,200.00 and which they leased for a

term of 3 years. The lessee moved but found they could not take the fridge freezer with them so they wanted to return it when the lease had not yet run 12 months. After a field call to the client that cost $66.00 (including GST) to ensure it was worth uplifting, as the client was located some 134 km away in a rural area, a commercial delivery company was arranged to pick it up and return it to the lessor at a cost of $250.00 (including GST). The fridge –freezer was then found to require substantial cleaning and that took 2.0 hours of a staff member's time. Based on that staff members' hourly rate, that amounted to $50.00. With other communication and courier costs involved in arranging to collect it, store and advertise the item for sale, these additional costs amounted to another $72.00.

In total, it cost this lessor $438.00 to pick up and dispose of the item which was eventually sold for $840.00. Without the claim for depreciation, this could have been a substantial loss to the lessor. We are not suggesting these kinds of costs apply in every event but it does go to show that what might seem unreasonable isn't necessarily the case.

The principal here should be that the maximum amount that can be charged on termination be limited to actual and reasonable costs. In many cases, there are no additional costs and so having to itemise and justify these as a claim, in the same way that must be done for the sale of goods after repossession, would be appropriate.

Recommendation 18 – Ban on the unsolicited marketing of consumer leases

There should be a prohibition on the unsolicited selling of consumer leases of household goods, addressing current unfair practices used to market these goods.

As our current lessor clients do not engage in this practice, we have no comment to make on it.

Combined Recommendations

Recommendation 19 – Bank statements

Retain the obligation for SACC providers to obtain and consider 90 days of bank statements before providing a SACC, and introduce an equivalent obligation for lessors of household goods.

Introduce a prohibition on using information obtained from bank statements for purposes other than compliance with responsible lending obligations.

ASIC should continue its discussions with software providers, banking institutions and SACC providers with a view to ensuring that ePayment Code protections are retained where consumers provide their bank account log-in details in order for a SACC provider to comply with their obligation to obtain 90 days of bank statements, for responsible lending purposes.

We support the use of the bank statement requirement to obtain and consider 90 days of bank statements before providing any loan or lease.

We note that the recommendation to introduce a prohibition on using information obtained from bank statements for purposes other than compliance with responsible lending obligations is based on one submission from a consumer advocacy organisation. Their submission on this point seems centred around on-selling leads and if the Privacy consent allows for this, then no law will have been broken. If the lead generator is provided with the copy of the bank statement obtained by the credit provider selling it, it will still be used by any purchaser for assessing responsible lending obligations. Neither Financial Rights Legal Centre nor any other consumer advocacy group has provided any evidence to show bank statements are being used for marketing purposes.

We suggest this is not a matter for the Panel on which to make any recommendation. It is entirely a matter for the Privacy Commissioner to consider and then, only if subject to a breach of the Australian Privacy Principles.

We make no comment on the Panel's recommendations to ensure ePayment Code protections are maintained.

Recommendation 20 – Documenting suitability assessments

Introduce a requirement that SACC providers and lessors under a consumer lease are required at the time the assessment is made to document in writing their assessment that a proposed contract or lease is suitable.

The NCCP requires all credit providers undertake a suitability assessment in order to provide a consumer credit contract or consumer lease. Failure to undertake the assessment carries fine of a 2,000 penalty units (cf. s.128 for a lender and s.138 of the NCCP Act for a lessor).

We note the Panel has stated that "[a]lthough a requirement to document suitability assessments was not widely supported by industry in their submissions, the Panel does not expect the cost of compliance with this requirement to be significant" [32] predominantly basing this claim on the NCPA's submission that "most SACC providers use software packages to manage database activities, and these software packages record the decision-making process electronically[33]". As a software supplier to the industry, we can state categorically this is untrue; not all software packages record the assessment decision-making details and besides ours, we know of three other systems that also do not. It is true that the largest internet-based lenders are using such systems or CRM systems linked to lending software such as ours but they make up a tiny proportion of the industry. The Panel's expectation that the cost of compliance would not be significant is therefore without foundation.

Unfortunately it is also the case that it is these very lenders that are the ones breaching responsible lending and loan suitability requirements. As we have previously stated and provided documentary evidence of some of these to the

[32] SACC Final Report, page 81
[33] Ibid 26

Secretariat, given ASIC has said none of these automated systems are good enough to ensure compliance, why has the Panel put faith in systems that are already non-compliant? They can't get it right now.

The Panel's recommendation would also have far-reaching effects on credit providers offering contract types other than SACC's.

We do, however, welcome the Panel's statement that it considers the "assessment could be undertaken and documented in a standardised way that is largely consistent with existing practices" [34] and we would hope this would be by way of a Regulation form. This is partly because it will assist credit providers generally in what they do but more importantly, it will provide them with a safe harbor regime in the event of any ASIC investigation.

[34] SACC Final Review, page 83.

Recommendation 21 – Warning statements

Introduce a requirement for lessors under consumer leases of household goods to provide consumers with a warning statement, designed to assist consumers to make better decisions as to whether to enter into a consumer lease, including by informing consumers of the availability of alternatives to these leases.

In relation to both the proposed warning statement for consumer leases of household goods and the current warning statement in respect of SACCs, provide ASIC with the power to modify the requirements for the statement (including the content and when the warning statement has to be provided) to maximise the impact on consumers.

The Final Report states "[s]ubmissions generally agreed that the warning could be more effective" [35] but having re-read the industry submissions, it is only the consumer advocacy groups that generally agree. The footnotes appear to confirm this as they are all from such organisations. The bias that these groups display toward the industry, which they would like to see shut down or regulated to the point of non-viability, should not be forgotten by Treasury. The Panel's comments are misleading and deceptive.

"Generally" means 'predominantly' or 'substantially' and with the possible exception of the submission from Forresters Community Finance which suggested incorporating the warning into the loan application process itself and the Finance Industry Delegation which said they generally weren't effective, the other industry submissions do not support this statement. The industry submissions state that they have no information as to their effectiveness, a subtle but substantial difference.

[35] SACC Final Report, page 84.

Credit Corp's submission dated 15 October 2015 even goes so far as to state that ASIC's Moneysmart website is "not an appropriate resource for consumers, and has a number of critical weaknesses" [36].

The warning statements are generally not taken notice of because SACC consumers and lessees see it as just another piece of paper to be read. Consumers don't even want to read their contracts, never mind an information sheet they are forced to either view or have it read to them by Government. Consumers taking out MACC and Other loan types don't even want to see it and the credit providers that provide other contracts besides SACCs see it as unnecessary bureaucracy. These are the credit providers that actually do not offer SACCs in the main but they can do so purely as a service.

It also flies in the face of the current Assistant Treasurer's statement that people need to be responsible for their own actions[37].

It would appear the Panel wants to see more regulation through bureaucracy than parliamentary oversight as we note the Panel has proposed granting ASIC the ability to modify the warning statements. The industry has witnessed inconsistent application of the law by ASIC, including failure to act. There is a general consensus that its regulatory approach is more geared to large corporations than small businesses and so the suggestion it could make changes based on content and appearance and even personalization is alarming. The current warning is regulated and the regulation covers such things like placement, font size, etc.

Although not part of their brief, it would appear the Panel is also contemplating requiring the warning to be given for all loans as it gives the example of *Did you*

[36] Credit Corp Group Ltd, 2015. "*Review of the small amount credit contract laws*" submission, 15 October 2015, page 22. Available online http://consumercredit.treasury.gov.au/content/downloads/SACC-submissions/Consultation-Paper/Credit_Corp.pdf viewed 15 May 2016

[37] Ibid 15.

know—a typical consumer who borrows $x takes y time to repay the loan and pays $z in interest and fees". Neither SACC nor consumer leases contain any interest whatsoever; we fail to understand why it has suggested this phraseology unless it has made undocumented proposals recommending it apply to all credit contracts.

Recommendation 22 - Disclosure

Introduce a requirement that SACC providers and lessors under a consumer lease of household goods be required to disclose the cost of their products as an APR.

Introduce a requirement that lessors under a consumer lease of household goods be required to disclose the Base Price of the goods being leased, and the difference between the Base Price and the total payments under the lease.

The Panel state they want the "APR" shown but we are confused. Like the term "default', there are a number of meanings that can be associated with it.

Section 17(4) of the National Credit Code requires credit contracts contain "the annual percentage rate or rates under the contract." This is the Nominal Annual Percentage Rate used to calculate the repayment. For a consumer lease, SACC and other fee–based loans, the annual percentage rate required to be stated is 0%.

Consumer advocacy groups internationally, however, use the term to mean the Effective Annual Percentage Rate ("EAPR") or, in the UK as of March 2016, it's now called the Annual Percentage Rate of Charge ("APRC"). In the UK, we would also point out that the term Representative Annual Percentage Rate ("RAPR") or Representative Annual Percentage Rate of Charge ("RAPRC") are not necessarily what the consumer will actually get. These terms are an advertised rate that 51% or more of people who are accepted for the loan will get.[38] The UK also has Typical APR ("TAPR") and is the rate at least 66% of applicants will be offered as a result from an advertisement[39]. There are no

38 Moneyfacts.co.uk, 2016. "What is an APR(C)? " Available online http://moneyfacts.co.uk/guides/credit-cards/what-is-an-apr240211/ viewed 17 May 2016.

39 Quora.com, 2016. "What is the difference between typical and representative APR?" Available online https://www.quora.com/What-is-the-difference-between-typical-and-representative-APR viewed 16 May 2016.

similar definitions here.

In the US, APR for payday lenders is taken to mean the ad valorem rate that may be applied to the loan amount, which is why Google, as it knows this is not an international definition, has chosen to restrict only US lenders to a 36% maximum APR. The 36% is a flat percentage fee that may be applied to the value of any amount borrowed over a certain period of time. If the fee to be applied was applied as an interest rate instead, it would have a Comparison Rate of 1878%. In any true sense, it is not an interest rate and nor is it an APR in the more widely accepted sense either.

The EAPR and APRC are effectively the same as the Comparison Rate here in Australia but overseas jurisdictions use differing formulae to the one used here in Australia to calculate it. Neither the NCCP Act, National Credit Code or NCCP Regulations define Comparison Rate but this term is calculated using the formula contained in Regulation 71.

The intention of the Comparison Rate is to provide the equivalent annualised interest rate that would be applicable, taking into account all fees and charges associated with the financial product together with the nominal amount of interest (if any) included. A Comparison Rate is not, however, an annual percentage rate that can be used to calculate a repayment amount.

It is well known that short term loans do not provide an effective and true measure of the Comparison Rate as there is an inherent distortion in-built as the formula assumes the term will be for at least one year. Treasury will be aware the Comparison Rate was originally designed to compare long term mortgage products.

To confuse things even more, however, under s.32A of the National Credit Code ("NCC"), lenders must not exceed 48% as an Annual Cost Rate for all

loan types except SACC's. The Annual Cost Rate has a formula defined by s.32B of the NCC that is similar to, but not identical to, that of the Comparison Rate. The Annual Cost Rate is also not an annual percentage rate and cannot be used to calculate any repayment.

For a Panel that the former Assistant Treasurer appointed on the basis on possessing appropriate qualifications to undertake the review, this lack of precision in defining meaning is highly unfortunate. Based on the Final Report wording, we believe the Panel members are actually using the term APR to mean the Annual Cost Rate rather than either the Nominal Annual Percentage Rate or the Comparison Rate. The NCCP Act does not require any credit provider to refer to the Annual Cost Rate and it appears to be a complete departure from the Comparison Rate disclosure requirements under Regulation 97; we are unsure why this is.

Regardless of this, however, almost all credit providers will struggle to provide the Annual Cost Rate or even calculate the correct Comparison Rate on every contract. The complexities of the formula are such that you cannot use Microsoft Excel® to calculate it and it took us over 18 months to be able to compute the Comparison Rate and since then, we have modified it to calculate the Annual Cost Rate on the fly. We are one of the few software providers able to do so and for many credit providers, particularly lessors, the regulatory compliance costs to allow for this may be huge. Some will find it impossible and have to change systems.

We would also make the point that there has been absolutely no consultation on this recommendation. It was not raised as an option in either the original consultation or the Panel's Interim Report. We find it highly disappointing that the Panel has chosen to introduce it in this manner.

The recommendation to introduce a requirement that lessors under a consumer lease of household goods be required to disclose the Base Price of the goods being leased, and the difference between the Base Price and the total payments under the lease should present limited difficulty but lessor's systems will require modification.

As far as the Panel's other suggestion in regard to consumer leases that "[f]urther consultation is recommended to determine whether the pricing information could be disclosed at an earlier point in time than when the consumer is presented with the contract document, and, if so, the way in which it should be displayed" [40] could present lessors with enormous difficulties. This is particularly the case if the Annual Cost Rate has to be provided prior to any purchase and the exact Base Price is unascertainable at the time of enquiry.

40 SACC Final Report, page 159.

Recommendation 23 - Penalties

Encourage a rigorous approach to strict compliance by extending the application of the existing civil penalty regime in Part 6 of the National Credit Code to consumer leases of household goods and to SACCs, and, in relation to contraventions of certain specific obligations by SACC providers and lessors, provide for automatic loss of the right to their charges under the contract.

The NCCP Act already contains significant civil and criminal penalties and whilst we see no reason as to why the existing civil penalties applying to consumer credit contracts should not be applied to consumer leases, we do not agree with the need to further extend the application of the existing civil penalty regime in Part 6 of the National Credit Code.

The major provisions of s.111 of the NCC already apply to SACCs, apart from some sections that specifically do not relate to SACC's such as s.17(4), s.17(5), s.17(11), s.17(15A), s.23(1), s.32A(1) and s.32AA(2) . As a SACC is a fee-based loan, there is no requirement to disclose either annual percentage rates of interest or default rates of interest or an Annual Cost Rate. Section 17(5A) applies only to reverse mortgages.

Section 114(1A) applies specifically to SACC's and allows a Court to impose for a contravention of a key requirement is an amount not exceeding the sum of the following amounts:

(a) the amount of the permitted establishment fee payable in relation to the contract;

(b) the total amount of the permitted monthly fees payable in relation to the contract based on the term of the contract when it was made.

Additionally, s.114 (2) gives the Court the ability to impose a greater penalty if the debtor or guarantor satisfies the court that the debtor has suffered a loss. The amount of the penalty is to be not less than the amount of the loss. In event

of a breach, the NCCP Act already allows for a civil penalty of 2,000 penalty units and that is currently equal to a maximum $1.8m penalty for a corporation.

For a SACC, this means that considering the maximum amount that a debtor can repay is twice the Adjusted Credit Amount, for a typical payday loan of $400, the credit provider would have to execute and collect the maximum amount possible from 4,500 SACC's just to pay the fine. In reality, it will be a far greater number that is required, simply because most lenders never even get to the point of collecting twice the adjusted credit amount on every contract.

For a consumer lease, it is much harder to calculate the number of leases that would need to be written but we suggest in either case, the penalty would amount to a far greater loss than the Panel's recommendation of automatically losing the income from their charges under a SACC or the additional rental over the Base Price for a consumer lease.

Consequently, we are unsure why the Panel has made this recommendation at all.

Recommendation 24 - Avoidance

The Government should amend the Credit Act to regulate indefinite term leases, address avoidance through entities using business models that are not regulated by the Credit Act, and address conduct by licensees adopting practices to avoid the restrictions on the maximum amount that can be charged under a consumer lease of household goods or a SACC, or any of the conduct obligations that only apply to a consumer lease of household goods or a SACC.

Under Recommendation 5 of this submission, we have provided an example of how a contract that has unequal repayments but would otherwise meet the definition of a SACC could be regarded as an example of avoidance as it allows the credit provider to not have to comply with the specific responsible lending requirements and loan suitability obligations applying to SACCs.

As we have previously stated, industry needs certainty and consistency to ensure regulatory compliance. The Final Report mentions the arguments put forward by both the regulator and one of the consumer advocacy groups, the Consumer Action Law Centre ("CALC"). We have no issue with either of the two examples given as we also made them but as we stated in our original submission dated 14 October 2015, we were extremely concerned about the provision relating to "carrying out a scheme for the purpose of avoiding the application of a provision of the Credit Act" in the original late 2012 consultation on anti-avoidance.

It is a natural phenomenon that every business structures its operations and creates products that are designed to maximise profit within any regulatory regime; credit providers are no different. It must also be remembered that Treasury did not undertake any modelling of the SACC fees and charges to see if the industry could remain viable and some would argue it is little wonder some

attempt to circumvent the legislation. Interestingly enough, it has been the larger lenders that have done this, not the small ones.

Case law relating to taxation has evolved to differentiate between avoidance and minimisation practices but over the years, the Australian Government has sought to blur the differences and has regarded minimisation as being identical to evasion. It took this same approach with the proposed anti-avoidance measures in 2012 and we asked the Panel to look specifically at the 2008 discussion paper by John McLaren titled "*The distinction between tax avoidance and tax evasion has become blurred in Australia: why has it happened*" [41]. It appears not to have done so.

We re-iterate what we said originally; businesses legitimately elect to conduct their business activities in such a way as to avoid various Code provisions or rely on express exemptions. The FAA stated in its own submission that if a particular product or practice is lawful, it should not be made unlawful by a regulator deeming it to be done for avoidance purposes. We agree.

We are aware that some ASIC officers have conveyed decisions to specific credit providers that a specific product or business practice should cease for reasons that can only be down to a personal view by the officer. Despite it being perfectly legal, the example we have quoted under recommendation 10 is one such example and we now see an ASX-listed credit provider follow suit. The regulator has called for more powers but the regulator should not be free to decide what is and what is not acceptable based on a whim or personal viewpoint of any individual. Any avoidance measures must be carefully considered so that legitimate practices are not caught.

41 McLaren, J, 2008. "The distinction between tax avoidance and tax evasion has become blurred in Australia: why has it happened", Journal of the Australasian Tax Teachers Association, 2008 Vol.3 No.2. Available online http://www.austlii.edu.au/au/journals/JATTA/2008/14.pdf accessed 18 January 2013.

We are extremely concerned, indeed alarmed would be more appropriate, that the Panel recommend that ASIC be given powers to minimise and prohibit anti-avoidance conduct "before it occurs"[42] . If that is the Panel's view, then there will be no innovation and little motivation for competitiveness as ASIC will likely view any attempt to move outside a fixed model concept it can cope with regulating as anti-competitive.

Finally, we note the Panel has made mention of the ability to "offer leases with an indefinite term or to offer leases with a four-month term that are regularly rolled over at the end of each four month term (as there are specific exemptions in relation to these two classes of leases under the Credit Act)" [43]. None of this is new; some of the major car hirers have been regularly engaging in the practice of rolling 4 month leases and there are still lessors offering indefinite leases using the same business model as Mr Rental[44].

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42 SACC Final Report, page 98

43 SACC Final Report, page 97.

44 ASIC Media Release, 2013. "*13-022MR ASIC accepts enforceable undertaking from Mr Rent*al" 12 February 2013. Available online http://asic.gov.au/about-asic/media-centre/find-a-media-release/2013-releases/13-022mr-asic-accepts-enforceable-undertaking-from-mr-rental/ viewed 17 May 2016.

Appendix

Copy of email sent to Google advertisers in Australia on 12 May 2016:

Dear AdWords Advertiser,

We're writing to let you know about a change to Google's advertising policies which might affect your AdWords account.

Around early July, the Google AdWords Financial Services Policy will change to include additional requirements related to personal loans. For this policy, we define personal loans as lending money from one individual, organisation or entity to an individual consumer on a non-recurring basis, not for the purpose of financing purchase of a fixed asset or education. If you don't promote personal loans, this change shouldn't impact you.

After this change, all promotion of personal loans, including by lead generators, aggregators and affiliates, must disclose on the landing page:

- minimum and maximum period for repayment
- maximum Annual Percentage Rate (APR), which includes the interest rate plus fees and other costs for a year
- a representative example of the total cost of the loan, including all applicable fees

Additionally, you won't be allowed to promote personal loans with the following conditions:

- All personal loans with repayment in full within 60 days (globally, including US)
- All personal loans with an APR over 36% (US only)

What you can do

If you advertise personal loans, please ensure that your ads and landing pages meet the following standards:

1. Contain all disclosures
2. Do not promote the following types of personal loans:
    - All personal loans with repayment in full within 60 days (globally, including US)
    - All personal loans with an APR over 36% (US only)

Advertisers will be required to comply with the new AdWords Financial Services policy around early July.

After the new policy goes into effect, you'll see details at https://support.google.com/adwordspolicy/answer/2464998

Yours sincerely,

The Google AdWords Team

You've received this mandatory email service announcement to update you about important changes to your AdWords account.

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