Response to the

Review of the Small Amount Credit Contracts Laws Final Report March 2016

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The National Credit Providers Association (NCPA or the "Association") welcomes the opportunity to make comment on the final report of the Review of the Small Amount Credit Laws dated March 2016.

As the NCPA represents credit providers operating in the SACC market, and not in the leasing market, the Association seeks to make comment only into those recommendations which will have an effect on the businesses operated by the NCPA members. They are recommendations 1 to 10 inclusive and 19 to 24.

Of those 16 recommendations, the Association supports the acceptance of 6 of them, would possibly support a further 3 with the supply of further information and consultation on what is proposed, and does not support the introduction of 7 of the recommendations as stated. The NCPA position is summarised as follows:

Recommendation	**NCPA position**
R1 – Affordability	Not supported / Alternate recommendations provided
R2 – Suitability	Not supported
R3 – Short term credit contacts	Supported
R4 - Direct debit fees	Not supported / No Amendment required
R5 – Equal repayments and sanction	Supported
R6 – SACC Database	Supported
R7 - Early repayment	Supported
R8 – Unsolicited offers	Not Supported
R9 – Referrals to other SACC Providers	Not supported
R10 – Default fees	Not supported
R11 – R18	No comment
R19 – Bank Statements	Clarification needed
R20 – Documenting suitability	Clarification needed
R21 – Warning statements	Supported
R22 – Disclosure	Not supported
R23 – Penalties	Supported
R24 – Avoidance	Clarification needed

SACC – Small Amount Credit Contract

MACC – Medium Amount Credit Contract

NCCP – National Consumer Credit Protection Act and related instruments

PRELIMINARY MATTERS:

A. (Removed 29th June 2016)

B. Principles of best practice regulation

The NCPA has also considered the Panel's recommendations against COAG's Principles of Best Practice Regulation, 2007. That document requires the consideration of a number of principles when determining whether regulation should be imposed upon the relevant industry Those principles require:

1. Establishing a case for action before addressing a problem.
2. A range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed.
3. Adopting the option that generates the greatest net benefit for the community.
4. In accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that: -

    a. the benefits of the restrictions to the community as a whole outweigh the costs, and

    b. the objectives of the regulation can only be achieved by restricting competition;

5. Providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear.
6. Ensuring that regulation remains relevant and effective over time.
7. Consulting effectively with affected key stakeholders at all stages of the regulatory cycle.
8. Government action should be effective and proportional to the issue being addressed.

It is the view of the NCPA that the report does not put the minister in a position where the Principles of Best Practice Regulation will be satisfied.

Does the Report *Establish a case for action before addressing a problem*?

There are, in the NCPA's view, some minor changes in the legislation that require "house-keeping" changes to the legislation to increase consumer protection, and we support those changes as common sense changes.

At the other end of the scale, in the Final Report, there are significant proposed changes without any reference to any market failure to establish the case for change or the reason given for change is not even related to the Recommendation. It is a fact that there is not one submission to the initial and interim consultation papers which provides one factual statistic about issues that warrant significant change proposed in any Recommendation.

In recent years it appears that consumer advocate groups have ceased publishing statistics about issues in the SACC and MACC products because, we say, of the success of the consumer protections in the NCCP Act.

Despite the independent requests of the NCPA and CHERPA to the Panel for the various advocate groups to publish statistics on issues that relate to cases in regard to SACCs and Consumer Leases respectively, it is clear from the Final Report that no such supporting statistics have been provided by any advocate group.

On the other hand, statistics directly from the Credit Investment Ombudsman (the EDR scheme of choice for SACC and MACC providers) independently shows that the complaint rate for <u>both</u> SACC and MACC was 0.00027 per cent in the CIO 2015 Annual Report on operations – hardly a statistic that screams major change is required.

C. Key Recommendation to protect ALL consumers left out - *Responsible borrowing*.

There are two parties to a legally binding credit contract. However, inconceivably, there is still no recommendation for a legislative requirement or consequences for consumers who fail to provide accurate details in a credit application. Once a consumer fails in the first application, because there is no legislative requirements or constraints to borrow responsibly (e.g., resistance or consequences), they learn to modify their behaviour (i.e., modify application information) and try repeatedly with various lenders until their modified behaviour and modified information gets them credit.

The mechanism to create responsible consumer borrowing behaviour is missing. Obviously, fining a consumer for a misleading credit application is problematic.

D. Terms of Reference not complied with in the Final report.
– consideration of mandatory matters for each Recommendation is missing.

Item 4 of the terms of reference stated that "*The review will make recommendations that take into account:*

- competition;
- fairness;
- innovation;
- efficiency;
- access to finance;
- regulatory compliance costs; and
- consumer protection.

Despite the direct instructions in the terms of reference that all Recommendations will take into account the above principles, disappointingly, the Final Report is all but devoid of commentary and how any consideration of these mandatory matters were taken into account for each Recommendation.

Without any specific commentary on each mandatory principle for each Recommendation, it leaves the reader to ponder, which, if any of these mandatory principles were in fact considered by the Panel.

The Association has responded on the basis that if no commentary is made by the Panel on these mandatory principles, then there were no issues raised for either the consumers or lenders.

E: Perception is not reality when it comes to SACC users.

– Key information not considered by the Panel.

Available to, but not considered by, the Panel from the CoreData report, is that by the end of 2016, 72% of all consumers who take out a SACC will be full-time employed consumers, not dependent on Centrelink. This is based on a near straight linear trend of 2 years of data from the CoreData research project. Based on this trend, it is anticipated that this value will continue to increase to around 77% of all SACC consumers by December 2017. The SACC product has become a mainstream product under the NCCP and is not, as is often assumed, used in the majority by consumers 'on Centrelink' or low income consumers, or as a 'last resort' means of accessing credit. Full-time employed consumers use SACC products as a lifestyle-choice of access to credit in 2016.

F: Validity of Industry Statistics

The Final Report relies extensively on research by DFA. DFA reported as a result of its research model, the average number of SACCs taken out by consumers during the 12-month period to 20 July 2015 was 3.64 and that 30% of households with a SACC consumer had more than one SACC concurrently. Apart from one SACC lender, this information is starkly different to the experience of the majority of lenders.

The DFA report, as was pointed out to the Panel's Secretariat, was data obtained by DFA as part of a household "omnibus survey" over a period of 10 years. The number of households interrogated over the 10 years was 26,000, and the questions relating to credit were simply some of a large range of questions relating to diverse topics, which were then normalised to ABS Census data at a postcode level, then subjected to segmented analysis by key household characteristics.

The responses were provided by one member of the household, based on the age of the primary householder, not necessarily (and one would assume, often not) the borrower. It was not a survey of 26,000 households on a particular topic (as was claimed) but was a collection of information from 26,000 households over a period of 10 years where some of these households were asked for information about lending.

Additionally, as was advised to the Secretariat, this information was not obtained by DFA, but was purchased from a third party supplier from information obtained by telephone interviews where the interviewee was asked about the consumer habits of members of their household over the previous 12 months.

The data provided to the Panel by the CoreData survey report, on the other hand, was a direct analysis of information from the credit providers' software systems and not distorted at all by having to rely upon recollection of other household members and provided by telephone query months or years after any loan. The CoreData report related to information from in excess of 1.7 million consumers, 2.4 million SACC contracts, and 3.5 million SACC applications over a period of two years.

The results of the CoreData report are significantly different from that obtained from the DFA report and, NCPA respectfully asserts, is of much better quality, accuracy, and relevance to the report.

Recommendation 1 – Affordability (not supported – Alternate recommendations provided)

The NCPA does not support this recommendation as drafted to:

- Extend the protected earnings amount to all consumers for SACCs
- Reduce the total amount of SACC repayments to 10% of net income.

This Recommendation fails to understand the pricing structure and related cost impact on consumers.

This Recommendation fails to understand the broad consumer segments that licenced credit provider's service and the consumer demand for managing the cost of credit by repaying debt in a time frame suitable to their individual circumstances.

NCPA Recommendation:

- Extend the 80% protected earnings amount (20% max SACC repayment cap) to all consumers who receive 50% of their income from any type of government benefit.
- No PEA for all remaining (working) consumers.
- Keep the presumptions of unsuitability and let ASIC use the powers they have.

- Increase the 20% establishment fee to 25% and move mandatory 3rd party fees outside the cap[1].

The NCPA supports measures to protect consumers reliant on Government income, however extending these protections to all consumers would restrict access to credit by extending repayment terms.

Consumers could elect to repay early, but having contract terms longer than actual repayment terms is a practice that ASIC has clearly demonstrated as unacceptable in the SACC market.

The response to this recommendation was supported by surveying consumers about this recommendation.

Responses from working consumers have a very strong and united opposition to this proposal.

Their responses can simply be summarised and paraphrased as, "*I work; I earn my own money*; *I can spend my own money how and when I want. What right do politicians have to tell me how many loans I can have if I can afford them? Tell me who it is so I don't vote for them; nanny state government, do they think I'm stupid?"*

No case was made by any submission to the Panel. No market failure was identified nor any statistics provided in any report to or by the Panel that having a PEA for working consumers is required. Noting the consumer sentiment above, it is significant that by the end of 2017, it is estimated by the CoreData statistics that close to 77% of SACCs provided will be to working consumers.

10% is not viable for lenders.

The NCPA cannot support a reduction to 10% of net income as this change will close most small to medium SACC providers, limiting the access to credit for many consumers who rely on the shop front outlets for this, plus several of the larger players have stated they would simply exit the SACC market. This situation would effectively legislate drastically reduced competition and create a financial exclusion vacuum. Independent financial records of lenders can be supplied, in confidence, should they be requested to support this statement.

[1] The establishment fee increase and 3rd party fee exemption is not only warranted, but essential in the context that there is no automatic CPI increase mechanism and that there will be further mandatory costs imposed on all ACL holder this year by way of a new ASIC cost recovery fee and possible costs for comprehensive credit reporting in the very near future.

10% not workable for consumers

This concept would be like legislating that consumers can only repay 10% of their net pay on their credit card bill and only 10% on car loans, knowing full well, that if a consumer did not have a car loan, they cannot use that freed-up 10% portion of their income to pay their credit card down and save costs and fees or access another credit card if they could afford to do so.

10% costs consumers more

By limiting repayment amounts, the loans will be longer than they need to be and cost consumers more in monthly fees.

This concept also causes tension in the NCCP, which states a consumer has the right to repay any loan out early should they be able to afford to do so.

No failure of current 20% cap on SACC repayments:

No case was made that the current 20% level causes debt spiral or financial exclusion. No market failure was identified nor any statistics provided to show that having a PEA of 80% (max 20% SACC repayments) for consumers who receive 50% or more of their income from Government benefits was detrimental to these consumers, let alone sufficient for it to be extended to all consumers.

Background considerations to Recommendation 1

The Report says that the objectives of Recommendation 1 are to:

- Promote financial inclusion by ensuring that consumers do not enter into unaffordable SACCs that absorb too large a proportion of their net income.
- Limit the possibility of debt spiral where an increasing percentage of the consumer's income is used to meet repayments under a loan contract.

The NCPA asks whether the recommendations meet these objectives?

There was a considerable amount of financial data available to the Panel in the preparation of the Report, but that data does not seem to have been considered or at least, has not been accepted.

Just as some consumers will never smoke, gamble, or support NSW in a footy match (their chosen behaviour), there are consumers who will never want to take out a consumer lease, just as there are consumers who will never want a SACC loan, but instead prefer to lease or vice versa. It is fundamental that a consumer's behaviour and choice cannot be controlled in a free market such as Australia. The NCPA suggests that it is illogical to attempt to make rules assuming that consumers will adopt particular behaviours. To do so will disadvantage various consumer segments.

The position of the NCPA is that the adoption of this recommendation as stated will do nothing to enhance SACC consumer protection but will most likely, lead to the opposite occurring.

Negative outcomes for consumers

The statistics available to the NCPA show that the average repayment from Government income consumers is about 16% of a consumer's net income, whereas for employed persons this is about 35% of their net income. The effect of this recommendation on non-Government income recipients will therefore be very significant with the effect of greatly reducing the amount of credit otherwise available to them.

If only 10% of a consumer's income was available to service loans, this would have one of two effects:

a. the amount of credit available to a consumer would be reduced as the repayments would be limited over a given period of time meaning that the amount of the loan would be reduced, or
b. the length of the loan would be extended to ensure that the repayments remained under the 10% cap. The result of this would be that the ultimate cost to a consumer would be increased.

Knowing that providing a consumer less than their required amount will never meet the consumer's objectives, this policy will see consumers modify their behaviour and seek higher value MACC loans until they access the credit they need. This has the very real potential of consumers over-extending the amount of credit they access at any one time just so that they can access the credit they might otherwise have accessed in smaller amounts at any one time but repaid with a larger proportion of their income.

The government may well be able to legislate supply, but they will never legislate demand.

The table which appears on page 65 of the Report notes that the income of a single adult receiving a government allowance is $648.00 per fortnight. Under the current arrangements the maximum amount that can be used for SACC repayments is therefore $129.60 per fortnight, or $64.80 a week. Under the proposal contained in recommendation 1, the maximum amount which could be used for SACC payments would be $32.40 per week.

Using the maximum allowable payment over a 20 week period, under the present arrangements, the maximum a consumer could borrow in these circumstances would be approximately $900. Under the new arrangements the maximum a consumer could access under the same term is about $470.

Using the maximum allowable payment, the amount which a consumer would be required to repay for a $1,000.00 SACC would be $1,440.00 on a 20% calculation, and $1,680.00 on a 10% calculation.

In both cases, therefore, the consumer is disadvantaged; in the first case by limiting the amount the consumer can access, and in the second case by increasing the total amount repaid.

In circumstances where there is no evidence that the 20% PEA amount is not working, introduction of a 10% limit would significantly and adversely impact the consumer.

Relevance of 10% value?

The Report notes that a 10% amount would be consistent with the Centrelink Code of Operation (https://www.humanservices.gov.au/corporate/publications-and-resources/code-operation). A value that has absolutely no relevance to loan repayments under the NCCP.

That Code is referenced at note 23 on page 15 of the Report. The Code, however, is not one which relates to setting of the quantum of payments for loans. It refers to a situation where a Commonwealth payment pursuant to an entitlement is paid into an account held by an ADI or similar is in debit and therefore the recipient may not be able to access any of those funds. This Code is said to be a "non-legally binding statement of best practice" and does not prevent an ADI obtaining the agreement of a consumer to allow the ADI to retain a greater proportion than 10% of the recipient's income.

The difference between this Code and the SACC situation is that in no circumstances would a SACC lender be in a position where any part of the Centrelink benefit be made available to the credit provider without the consent of the consumer, and the maximum amount, in any event, which could be retained would be 20%. The circumstances referred to in the Code are those where the consumer would lose 100% of the payment.

In addition, the NCPA is concerned that there is no consideration of the actual difference between gross and net pay particularly in circumstances where tax is a significant consideration. Because of the nature of the consumers, the difference between 20% of gross and 10% of net is very significant.

As stated above, the case for recommended change has simply not been made out and fails the PBPR1 test.

Recommendation 2 – Suitability (not supported)

The basis of the NCPA's concern in relation to this recommendation is that it is predicated on the acceptance of recommendation 1.

Whilst it is conceded that there is much support in the submissions, including from ASIC, that the rebuttable presumptions should be abolished, and that a PEA is easier to measure and to determine when there is any breach, for the reasons stated in Recommendation 1, the linking of the abolition of the rebuttable assumptions to a reduction of the 20% PEA to 10% cannot be supported. Hence the NCPA cannot support the removal of the rebuttable assumptions where it is tied to a reduction of an unviable PEA of the type discussed. Given the investment industry has made to understand and comply with the Responsible Lending Obligations, the NCPA advocates the retention of the current system rather than the introduction of the new one.

Recommendation 3 - Short-term credit contracts (supported)

The NCPA supports the continuation of the prohibition on payday loans.

Recommendation 4 - Direct debit fees (not supported - no amendment is necessary)

The NCPA does not support this recommendation. It appears that the Panel has misunderstood the effect of Class Order 13/818.

Historically, it should be noted that in the week or so before the commencement of the Enhancements Act (due to commence on 1 July 2013), one of the Association's members raised with Treasury the fact that the provisions in the Enhancements Act may have an unintended consequence in that wording in the proposed section 31B of the Code together with Regulation 79AE would have the effect of preventing a third party direct debit provider from collecting a fee from a consumer in respect of a service provided by that direct debit provider to the consumer.

As a result, and to overcome the issue (as was described in paragraph numbered 2 on page 2 of the Explanatory Statement issued with ASIC Class Order 13/818), ASIC Class Order 13/818 was issued on 28 June 2013, and commenced 1 July 2013.

The Report says that "ASIC's class order 13/818 [CO 13/818] currently allows SACC providers to charge a consumer a separate fee for direct debit processing in some situations on top of any fees or charges permitted within the SACC cap." In fact, that is incorrect.

Paragraph 9 of CO 13/818 provides that a person who has been introduced to a debtor by credit provider (in this case a third party DDR provider) does not have to comply with section 31B of the Code to the extent that "the subsection would prohibit the person from requiring or accepting payment by the debtor of a direct debit processing fee or charge".

However, paragraph 12 of the CO defines "direct debit processing fee or charge" as, amongst other things, a "fee or charge … charged to the debtor by a person *other than the credit provider* under the contract under a written agreement between the debtor and the" DDR provider (emphasis added). In other words, if the fee or charge is payable to the credit provider, it is not exempted by CO 13/818.

If recommendation 4 was accepted, this would mean that the credit provider would need to include in its SACC fee cap, a fee or charge paid by the consumer to a third party in respect to which not only does the credit provider not have any input, but in relation to the quantum of which the credit provider has no control and which is payable pursuant to a contract between the consumer and the DDR provider outside the credit contract.

As the law currently stands, any fee or charge paid to the credit provider where that credit provider has a direct debit arrangement with a bank, even in circumstances where the fee paid is simply to recompense the credit provider for any fee charged to it by the bank, must be included in the SACC fee cap.

The only way an ACL provider of a SACC could comply with this Recommendation with certainty, would be to 'price fix' the service with an unrelated DDR provider company to ensure they did not breach the cap. This type of arrangement of course, has its own complications with other laws and is not condoned.

If the requirement to include the DDR fee in the fee caps was to be included under the provision for "twice the adjusted credit amount limit" on recoveries, it creates an unworkable situation which would prevent lenders from collecting loans by Direct Debit in the case the debtor had reached the 2 times credit advanced debit spiral cap, which limits the fees a lender can change. If no further fee can be charged, the lender's bank or external direct debit firm certainly is not going to provide that service free of charge, effectively preventing the lender from collecting an outstanding loan.

If, as it appears to be the case, the intention is not to permit a credit provider to collect any "profit" from the provision of a DDR facility to a consumer, that is in fact the present law and no amendment is necessary.

Recommendation 5 - Equal repayments (supported)

The NCPA supports the introduction of this recommendation. However, the NCPA believes that should a consumer wish to vary the quantum of the repayment, then the consumer should have the unfettered ability to do so, noting the consumers right to payout any credit contract early to save on fees, charges, and/or interest.

Recommendation 6 – SACC database (supported)

The creation of a SACC database has been the subject of considerable time consuming investigation both by lenders, the NCPA, and ASIC. The NCPA at this point in time supports the position in the Report in that a national SACC database should not be introduced.

As was suggested in the principal submission of the NCPA, a simple, cheap and effective alternative would be to require the use of a unique identifier for all SACC electronic payments through the DDR system. The NCPA would be happy to further consult in relation to this proposal.

Recommendation 7 - Early repayment (supported)

The NCPA supports the recommendation. It simply sets out what the NCPA believes is majority industry practice at present. Most in the industry operate under this arrangement in any event and the original suggestion that lenders operate under any other circumstances came from Treasury itself.

Recommendation 8 - Unsolicited offers (not supported)

In its present form, the NCPA is unable to support this recommendation. The process of offer does not create the incorrectly claimed issue of debt spiral and there is no research that even suggests that this is the case since the introduction of SACCs.

The Report relies heavily on a similar provision relating to unsolicited credit card limit increase offers. The credit card restrictions were, as is noted in the Report, "… to assist consumers to actively choose whether to increase the credit limit rather than being prompted to do so by written letters from the credit provider".

The effect of that regulation is simply to cause credit card companies, not to offer increased credit card limits, but to write to consumers suggesting to them that they may like to make an application for a credit card limit increase.

The proposed recommendation would simply result in the communication between the credit provider and the consumer, not being an offer, but being an invitation to the consumer to make an application. For all intents and purposes, they would be the same.

Further, the practice of most SACC providers is to maintain a continual flow of communication between the lender and the borrower. This is essential so that the borrower is always aware of their obligations, when payments are due, and importantly when payments are going to cease or who to contact if the consumer has difficulty in making payments. A standard term in this flow of correspondence is to ask the consumer to make contact with the credit provider if there is any matter they wish to discuss.

The problem most SACC providers would have is in the definition of what is an “offer”. Would a letter telling the consumer that if the credit provider can do anything to assist them in the future be an “offer”? Would a letter saying “if you ever need more money, don’t forget us” be an offer?

The proposal at present, in the view of the NCPA, is simply too broad and too hard to administer. Without further definition as to how this will work, the NCPA is unable to make further comment.

The prohibition on advising pre-approved loan amounts is supported by the NCPA.

Recommendation 9 – Referrals to other SACC providers (not supported)

The NCPA does not support this recommendation. The recommendation appears to be predicated on the incorrect information the panel has that it is only applications that are rejected which are sold or referred and that the cost of buying a lead is borne by the consumer Both assertions are far from factually correct.

The reverse is in fact the norm, i.e., rejected consumer leads generally are not sold to other lenders. In addition, most lead generation companies will not accept rejected loans back into their pool of leads. As fees for a SACC loan are limited to the Establishment and Monthly fee, no additional cost is borne by the consumer as claimed, regardless of whether the lender pays 50cents or $50 for a lead.

All Lenders are not alike

The broad spectrum of consumers that enter SACC has led to lenders having a focus in particular market segments (e.g. location, loan purpose) or distribution channels (i.e. online, retail outlets or stores). The efficient referral of customers from one lender to another is an important feature for to deliver access to credit. Additionally, the ability to do this costs lenders and is broadly done on a cost recovery basis.

Many lenders adopt their own particular lending profiles. For example, lenders may decide that they will not lend to applicants who reside in particular states; who fall below certain ages; are not employed; have been resident in the same premises for less than six months; who have notations on their bank statements showing direct debits being taken by a particular third party DDR supplier; and the like.

That is not to say that any of these applicants may not be perfectly adequate borrowers; it is just that lenders choose not to lend to those particular classes of borrowers for specific reasons.

To explain, in the case of the DDR supplier mentioned above, many lenders have discovered that a particular DDR supplier when requested by a consumer to suspend or terminate one DDR authority in respect to a particular payment by a consumer (which may be completely unrelated to a loan – it may be a gym membership, or a payment to a Christmas hamper supplier), the supplier terminates all DDR authorities in respect to the consumer, whether or not that is what the consumer intended. Some lenders therefore choose not to engage with such borrowers.

Other lenders may decide that they wish to lend to borrowers who have had stable living arrangements. As a result, some may determine that if a consumer has not resided at their current address for a period of more than, say, three months, they will not look at the application any further. Of course, the fact that a person has lived at an address for less than three months does not mean that their living arrangements are not stable; however, that is the choice made by the lender.

In every other respect these applications may be entirely competent. Rather than require the consumer to search for another lender, with the consent of the consumer, (and it is only with the consent of the consumer that this can occur) the consumer's details may be passed on to another lender. The referring lender has incurred cost in harvesting the application and therefore is entitled to be recompensed for that cost.

The alternative is, of course, that the consumer would apply and receive an indication from the lender that the lender cannot assist. It would not be a refusal; the consumer will not have been declined. There would have been no assessment made at all. The consumer would then be required to go through the whole process again with another lender.

The proliferation of lenders on the Internet would not make this task particularly onerous for a borrower, but nevertheless, it is a task in which the borrower could be assisted by a lender who would not be prepared to lend for the reasons set out above.

The suggestion in the Report that one of the aims of the recommendation is to ensure that the cost of purchasing a lead is not borne by consumers is weakened when the fact is the 20% and 4% credit fee limits are in fact almost universally applied across the industry (described as a “floor” in the Report). The cost of acquiring the lead, like all costs, is therefore covered in the Establishment and Monthly fee structure.

Recommendation 10 - Default fees (not supported)

The NCPA does not support the recommendation which limits the amount of default fees to a maximum of $10 per week.

The Report quite rightly criticises some lenders who charge default fees as an overdue fee on a daily or weekly basis. The NCPA would support any recommendation which strengthens the prohibition on such fees.

However, the NCPA notes that under the legislation, lenders are required to take certain action when a default in a payment occurs. This includes the requirement for a credit provider to serve a notice under section 87 of the Code, and, before any action can be taken, to deliver to the consumer a notice under section 88 of the Code and the various Privacy Act and Privacy (Credit Reporting) Code requirements.

The legislation on one hand cannot say you must do ‘X, Y & Z’ and then legislate that it must be done below cost.

It is the view of the NCPA that a credit provider should be entitled to recover the actual costs arising from the breach of the contract by the consumer. One lender has calculated that a default in a payment by a consumer will take the credit provider at least 35 minutes of staff time to undertake the necessary internal processes associated with the default; a cost that would be well in excess of the proposed $10 maximum fee impost. Many SACCs require weekly payments. Limiting the fees to $10 per week in circumstances where a credit provider takes a conservative, yet detailed, approach will mean that either credit providers will lose more money as a result of the default, or will not treat the defaults with the care currently undertaken.

Additionally, for those credit providers who take a far more “relaxed” attitude to defaults and do very little, a maximum fee will, as it has with the 20% and 4%, simply become a “floor”. This could become simply another weekly fee which some credit providers might see as being an entitlement.

Furthermore, if implemented as proposed, two key factors have not been considered by the Panel. Firstly, if the consumer also has a non-SACC loan with the same lender, then the consumer will be charged different default fees, for effectively the same default event on two credit contracts, and secondly, as the requirements for SACC defaults incur the most work, then it only follows that every other ACL holder for every other credit product must have lower default fees imposed by the Minister. To do otherwise, would clearly lead to a lack of market neutrality.

Recommendation 19 – Bank statements (clarification needed)

In general terms, the NCPA supports the continuation of the requirement to obtain 90 days of bank statements at the time of doing the assessment.

As the NCPA disclosed in its principal submission, there are two ways of obtaining bank statements. The first way is to request the consumer to obtain those statements. If the consumer did not have the statements on hand, they would generally have to go to the bank and obtain copies of a statements. Banks charge significant fees for production of such statements. In the NCPA submission, it was noted that the cost to obtain the paper statements varies widely with general costs being in the order of $4.00 to $7.50 per statement with anecdotal evidence being that some institutions charging as much as $30.00 per statement. The requirement to obtain three months' worth of statements means that the cost is not insignificant.

The other way of obtaining the information is electronically. That could be obtained by the consumer and passed onto the credit provider by the consumer accessing their own Internet banking portal and producing the documents. Many credit providers are wary of this taking place as there have been numerous cases reported where the information supplied by consumers this way has been altered by the consumer to present a completely different picture to that which is the case. Some consumers forge documents to make their position look better.

The result is that a number of credit providers simply will not accept electronic bank statements provided by the consumer and insist upon the consumer using one of the third party bank statement suppliers (such as bankstatements.com.au and Credit Sense Australia Pty Ltd) to obtain the information where the consumer has no input into the documents between the bank and the credit provider.

This necessarily involves a fee and because of some of the responsible lending obligations, this fee is seen by many lenders as a compulsory fee which the NCPA suggests should be able to be passed on to the consumer. Without these bank statement providers, the additional time and effort and cost to the consumer to obtain the information is considerable.

In relation to the suggested prohibition on using information obtained from bank statements for purposes other than compliance with responsible lending obligations, the NCPA has some concerns in respect thereto. The NCPA has no concern about a prohibition on using the information in bank statements for third-party benefits such as to sell data to associated companies where the bank statement information may be used to put offers to consumers for other services such as insurance; a so-called "big data" use. The NCPA would support any action by the OAIC or ASIC to take action against anyone found using the data in this method.

However, the NCPA believes that the data in a bank statement may be used to benefit the consumer by allowing its information to be accessed after the assessment is made in circumstances where the consumer has, for example, made a hardship application, or where the credit provider needs to look at historical data to establish that spending patterns or the probability that a proposed repayment schedule will be adhered to. Further, the information in a bank statement may be able to be used by a credit provider to recover, in a responsible manner, a delinquent debt.

The NCPA supports further negotiation between ASIC and the third party bank statement providers to overcome any difficulties that might be seen as a result of borrowers using these facilities to obtain bank statements.

It is the view of the NCPA that a requirement that consumers be required to retrieve their own bank account statements, as was suggested by some of the submissions, would be unworkable both from the point of view of the credit provider and the consumer.

Recommendation 20 - Documenting suitability assessments (clarification needed)

The NCPA is unsure as to whether or not it is the intention of this recommendation that the "documented" suitability assessment be provided to the consumer at the time of the assessment. The NCPA has no difficulty in accepting a recommendation which simply requires the credit provider to retain records of the matters referred to in the dot points on page 82 of the Report. The NCPA would have difficulty in accepting a recommendation which requires the information to be collated into a "document" in the physical sense, and then delivered to the consumer.

There is already an obligation pursuant to sections 132 and 155 of the Credit Act to provide such a statement when requested. If the intention of the recommendation is simply to make clear what information needs to be provided when that statement has been requested, the NCPA supports the recommendation.

At present, the information for the production of the section 132 or 155 statement is harvested from information held electronically. The NCPA sees this recommendation as simply defining what information to be provided in that statement rather than a requirement that the statement be delivered in every case, whether or not it has been requested.

Recommendation 21 - Warning statements (supported)

The NCPA supports the acceptance of recommendation 21.

Recommendation 22 – Disclosure (not supported)

This recommendation is not supported by the NCPA. The recommendation refers to the disclosure of an APR. It is probably not an "APR" which the recommendation is aimed at but to the "annual cost rate" or possibly the "comparison rate".

There are three measurements of the cost of a loan in the Credit Act. The first is the "annual percentage rate". The second is a "comparison rate", and the third is the "annual cost rate".

None of these rates have ever been used by a consumer to work out the dollar cost of a loan.

Section 5 of the Credit Act defines "annual percentage rate" as having the same meaning as in section 27 of the Code. Section 27 defines "annual percentage rate" as being the "rate specified in the contract as an annual percentage rate". It is to be noted that under a SACC, a credit provider is not permitted to charge anything other than a permitted establishment fee or permitted monthly fee. As a result, there can be no "annual percentage rate" for a SACC.

There appears to be no definition of "comparison rate" in the Credit Act. However, Part 10 of the Code requires a comparison rate to be used in certain circumstances. Section 166 of the Code makes provision for the Regulations to provide for the calculation of the comparison rate. Regulation 100 of the *National Consumer Credit Protection Regulations 2010* provides the formula for the calculation of comparison rates. Except in one major respect (the addition of the variable "F"), that formula is the same as the formula set out in section 32B of the Code for the calculation of the annual cost rate.

It appears therefore, that this recommendation is suggesting that credit providers who lend using SACCs be required to disclose the cost of their products as either a comparison rate or an annual cost rate.

The NCPA is of the view that the provision of such information is *less than no use* to a consumer. An annual rate is only useful where the loan is for a term of one year or more. By definition, a SACC term can only be between 16 days and one year. To require the description of the loan in annual terms is the same, the NCPA suggests, as requiring hoteliers to advertise their room rate not as $195.00 per night, but $71,175.00 per annum, or car parking, not at the rate of $13.00 per hour, but $113,880.00 per annum.

The fact is that annualising the cost leads to clearly unhelpful information. For example, a $500.00 SACC payable by two equal monthly instalments (total repayment $640.00) has an annual rate of 217.95%. A $500.00 SACC payable by four equal monthly instalments (total repayment $680.00) has an annual rate of 162.53%. Therefore, the higher cost loan has the lower annual rate. This is counter intuitive and very confusing.

Similarly, a $250 loan at an annual rate of 30% repayable by three equal weekly instalments will have a total repayment of $252.89. The same loan, at the same rate, payable by three equal monthly instalments will have a total repayment of $262.60. The same loan amount at the same annual rate can have entirely different repayment amounts. This information would not be helpful to consumers.

A $100.00 loan for one day with a repayment of $101.00 the day after the loan was taken out has an annual rate of 365%. $1.00 interest on a $100.00 loan equating to an annual rate of 365% would not be the expectation of most consumers.

Annual rates do not provide sufficient information to enable a consumer to make an informed decision. A statement of the total amount to be repaid would provide a consumer with sufficient information to make an informed decision.

The suggestion that a loan which has limited and fixed fees be described by reference to an annual rate simply does not assist borrowers.

A major Commonwealth research project on this topic known as the “O’Shea P, Ministerial Council for Consumer Affairs, Simplification of Pre-Contractual Disclosure in Consumer Credit: Experimental Research and Redesign (March 2010) Uniquest, found that ***the Total Cost of Credit disclosure is far more useful and informative to a consumer than a Mandatory Comparison rate could ever be.***

> The consumer testing also discovered that *the effect on borrowers* ***of a single bulk sum estimate of what their credit will cost them*** *will have a salutary effect on their decisions about:*
>
> - *whether to borrow in the first place;*
> - *how much to borrow; and*
> - *over what term.*

Recommendation 23 – Penalties (supported)

The NCPA supports the introduction of this recommendation.

Recommendation 24 – Avoidance (clarification needed)

A recommendation not within the Panel’s terms of reference.

Issue quoted by the Panel related to pre-SACC’s under the UCCC, not the NCPA.

The NCPA sees the need for there to be a “level playing field” amongst participants in the industry sector. The Association does not, and will not, support participants who deliberately structure business models to operate outside the ambit of the Credit Act. However, the NCPA does have concerns about how such anti-avoidance legislation would work.

In circumstances where there is a legitimate model which does not fall within the Credit Act (for example where fees and charges fall below the limits prescribed in section 6(1) of the Code), the NCPA would not want to see a regime where by an administrative act of the Regulator, a determination could be made that a particular model would, notwithstanding section 6, fall within the Credit Act. Further, if a lender (licensed or not) had an arrangement which fell inside section 6(4) of the Code, and no relevant regulation had been made, it would not be an appropriate use of such a power to determine that the lender was using the provisions of section 6 simply to avoid the Credit Act.

It would not be an appropriate anti-avoidance measure for ASIC, for example, to have the power to say that it did not like a particular business model, and therefore make a determination that it avoided the operation of the Credit Act.

<<END>>