

Our Ref: FSA.387844  
Your Ref:



18 February 2020

By Email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Sirs

**Submission in relation to National Consumer Credit Protection  
Amendment (Small Amount Credit Contract and Consumer Lease  
Reforms) Bill 2019 (No. 2) ("Bill")**

**Background**

1. The Bill is identical to the *National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017* introduced by the Government on 23 October 2017.
2. As part of the Government's consultation on its Bill, Piper Alderman made a submission by letter to Treasury dated 3 November 2017, a copy of which is **Appendix A**.
3. In summary, the submission noted that the current drafting of section 323A of the Bill is in conflict with the intention stated in the Government's Exposure Draft Explanatory Materials (**EM**), being that section 323A should apply to *non-regulated* credit contracts. As currently drafted the section applies to *regulated* credit contracts. The submission included proposed amendments to section 323A to address the issue.
4. As part of the Government's consultation, the Consumer Action Law Centre (**CALC**) also identified this issue with the drafting of section 323A and proposed similar amendments to section 323A, at page 13 of its submission.
5. Our proposed amendments and CALC's proposed amendments are set out in **Appendix B**. Either of these amendments would, if adopted, cure what appears to be a drafting error in section 323A and bring the section in line with the intention stated in the EM.

**Consequences if section 323A is not amended as proposed**

6. Left uncorrected, the current drafting of section 323A mandates regulated credit providers *not to avoid* the Small Amount Credit Contract (**SACC**) provisions of the National Credit Code (the **Code**)

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and, as a consequence (which would seem unintended), favours SACC over non-SACC credit contracts thereby promoting the offering of more expensive products to consumers.

7. Non-SACC credit contracts regulated by the Code are subject to an annual cost rate cap under section 32A of the Code. The effect of this cap is to limit the cost of credit to the equivalent of a 48% per annum effective interest rate. By contrast, section 31A of the Code provides costs concessions for SACCs. The effect of these concessions is that the amount that can be charged to a consumer under an SACC is far in excess of the amount that can be charged to a consumer under a non-SACC credit contract for an equivalent duration.
8. Accordingly, section 323A as it currently stands in the Bill would encourage regulated credit providers to offer much more expensive products (i.e. SACCs) to consumers than non-SACC products. This is because the section, as drafted, applies to *regulated* contracts, rather than being limited in its application to *non-regulated* contracts. Our suggested amendment to subsection 323A(1), or CALC's suggested amendment which we equally support, will avoid this by limiting its application to non-regulated contracts that are contrived to not be regulated by the Code to avoid being a regulated SACC.
9. Similar concerns apply in relation to consumer leases. A defining characteristic of a consumer lease under the Code is the absence of any right or obligation for the lessee to purchase the leased goods. In contrast, a lease with an obligation or option to purchase the goods will result in the lease being treated as a sale of goods by instalments and be deemed to involve credit regulated by the Code and subject to the 48% annual cost rate cap. For the same reasons as above, section 323A as currently drafted would encourage regulated lessors to offer more expensive products to consumers (i.e. consumer leases), rather than alternative products (such as sale by instalments) which would give consumers the security of a promise of title to goods or an option to acquire title to goods. Again, our suggested amendment to subsection 323A(1), or CALC's suggested amendment, will avoid this by limiting its application to non-regulated contracts that are contrived to not be regulated by the Code to avoid being a consumer lease.

Yours faithfully  
**Piper Alderman**

Per: 

**Florian Ammer**  
Partner

## Appendix A



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Your Ref:

3 November 2017

By Email: [REDACTED]

Financial Services Unit Manager  
Business Services Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Attention: Ruth Moore

Dear Ms Moore

### Small Amount Credit Contract and Consumer Lease Reforms

We refer to the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017 (**Bill**) and to the Exposure Draft Explanatory Materials (**EM**). We also refer to our telephone conversation on 31 October 2017.

The amendments to the *National Consumer Credit Protection Act* 2009 (Cth) (**Credit Act**) proposed by the Bill may affect a large number of credit providers who offer legitimate products to consumers which are regulated by and comply with the Credit Act. In this context, we wish to raise the following in relation to what we expect is an unintended consequence of the Bill as currently drafted.

#### Section 323A

The EM, at [5.16] on page 52, states that 'business model avoidance' occurs where a provider structures products it provides so that they are not regulated by the Credit Act and so are not subject to any of the requirements of the Act. It appears from the EM that section 323A(1) is the provision which is intended to address such conduct.

#### Section 323C

The EM, at [4.49] on page 58, states that 'internal avoidance' occurs where the provider offers a regulated credit contract or consumer lease but structures the contract, or includes certain terms, to avoid requirements of the Credit Act. It appears from the EM that section 323C(1) is the provision which is intended to address such conduct.

#### Distinction between sections 323A and 323C

There appears to be a distinction between 'business model avoidance' and 'internal avoidance'. The former avoids a contract being subject to the Credit Act altogether to avoid being a SACC or consumer lease. The latter applies to contracts which are subject to the Credit Act but which seek to avoid a provision of the Credit Act applicable to SACCs or consumer leases. The distinction is reflected in subsection 323A(4) which refers to the other party to

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the contract (not being the consumer) not being a licensee (see subsections (4)(c)(i), (4)(c)(ii) and (4)(d)). Were it not for this distinction, there would appear to be no reason for the existence of the two sections.

**Suggested amendment to section 323A(1)**

Consistent with the above and our telephone discussion, we understand that it is the intention that section 323A is to apply only to unregulated credit contracts. However, section 323A(1) as currently drafted would in our view apply to all existing and future regulated credit contracts which are already covered by and comply with the Credit Act, or is at least not sufficiently clear, on its face, that it does not apply to such contracts. To address this, we suggest that section 323A(1) be amended as follows:

- "(1) A person must not (either alone or with others) enter into, or carry out (to any extent), a scheme if it is reasonable to conclude that a purpose of the person doing so is to prevent a contract (the **contrived contract**) ~~covered by the following paragraphs from being regulated by the Act so as to avoid~~ being a small amount credit contract or a consumer lease, where:
- (a) the contract is between a consumer and either the person or someone else who is or was connected with the person; and
  - (b) the contract is connected with the scheme."

Please feel free to contact the writer on [REDACTED] [REDACTED] or Elaine Cheung on [REDACTED] [REDACTED] should you wish to discuss the above.

Yours faithfully  
**Piper Alderman**

Per: [REDACTED]  
**Florian Ammer**  
Partner

1. Amendments to section 323A (proposed by Piper Alderman)

"(1) A person must not (either alone or with others) enter into, or carry out (to any extent), a scheme if it is reasonable to conclude that a purpose of the person doing so is to prevent a contract (the **contrived contract**) covered by the following paragraphs from being regulated by the Act so as to avoid being a small amount credit contract or a consumer lease, where:

- (a) the contract is between a consumer and either the person or someone else who is or was connected with the person; and
- (b) the contract is connected with the scheme."

2. Amendments to section 323A (proposed by CALC)

"(1) A person must not (either alone or with others) enter into, or carry out (to any extent), a scheme if it is reasonable to conclude that a purpose of the person doing so is to prevent a contract (the **contrived contract**) covered by the following paragraphs from being a regulated small amount credit contract or a regulated consumer lease:

- (a) the contract is between a consumer and either the person or someone else who is or was connected with the person;
- (b) the contract is connected with the scheme."