

**Senate Inquiry – National Consumer
Credit Protection Amendment (small
amount credit contract and consumer
lease reforms) Bill 2019**

Submission by Legal Aid Queensland

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to Treasury's Consultation on the draft legislation implementing Small Amount Credit Contract and Consumer Lease Reforms.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Consumer Protection Unit lawyers provide advice and representation in consumer law matters, including clients who have legal problems as a result of small amount credit contracts or consumer leases.

We understand that the Bill replicates Government's exposure draft legislation released in 23 October 2017.

We refer to the report of the Senate Economics References Committee into Credit and financial services targeted at Australians at risk of financial hardship which recommended:

"Recommendation 2 1.21 The committee recommends that the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017 exposure draft released by Treasury be introduced, and passage facilitated by the government."

This submission repeats the views put forward in our previous submission on the draft legislation.

LAQ sees the following effects on consumers as a result of SACC and consumer leases:

- (a) consumers become repeat or roll over SACC borrowers - This process sees them obtain a new SACC loan as soon as their existing loan finishes with the same or different providers or sees them obtaining multiple SACC loans at the same time;
- (b) consumers paying SACC or consumer lease contracts instead of rent, utilities or other bills;

- (c) consumers entering into unaffordable or unsuitable SACC or consumer lease contracts which place them into financial hardship;
- (d) consumers defaulting on unaffordable loans;
- (e) companies producing wholly inadequate documentation about their decisions to issue a SACC loan or consumer lease;
- (f) consumers being approached about further credit or leases when they are already in financial hardship; and
- (g) the packaging of consumer lease contracts where consumers lease minor consumer products, for example a kettle, iron and pillow.

LAQ supports the introduction in the draft legislation of:

- (a) a requirement that SACC's have equal repayments spread over equal loans - this requirement will prevent SACC lenders setting up contracts where the payments under the loan reduce over time. These contracts unnecessarily extend a consumer's contract for the apparent purpose of earning the SACC lender extra fees and interest;
- (b) a prohibition on SACC providers charging monthly fees on the residual term of the loan when the loan has been paid out early - this prohibition prevents an unfair practice by SACC providers. It will also reduce the financial pressure placed on vulnerable consumers by SACC loans because the prohibition will reduce the fees and charges payable by the consumer;
- (c) a prohibition on SACC providers from making unsolicited credit invitations and offers to current and previous SACC consumers - LAQ supports this prohibition. LAQ regularly sees vulnerable consumers, in extremely difficult financial circumstances, accepting new and unaffordable SACC loans after being approached by a SACC provider. These unsolicited loans always worsen the vulnerable consumer's circumstances and often lead to them being unable to pay their rent or afford food and other necessities; and
- (d) the proposed regulations that will cap SACC repayments at a maximum of 10% of a consumer's net income. This amendment will ensure that vulnerable consumers have enough money to pay for necessities.

Case Study

A young person entered three small amount loan and one unregulated small amount loan agreements. Two loans were with the same lender the other loan was with a different lender. Repayments under the loans represented over 90% of his weekly wage as a trainee. His parents are supporting him with daily living expenses including fuel to enable him to get to work. He was required to make a case to each credit provider that the loans were irresponsible. A cap on SACC repayments of 10% of net income will make this situation is less likely to occur in the future. If the cap is breached, the consumer will only have to show that the cap was breached not that the loan was unaffordable which has a subjective element to it.

Consumer Lease Reforms

LAQ supports the introduction in the draft legislation of:

- (a) a cap on lease payments that applies to all consumer leases - LAQ regularly assists consumers who have entered into consumer lease contracts which, over the term of the contract, required them to pay up to four times the value of the good being leased. This change will address some of the financial hardship issues that high cost leases cause vulnerable consumers.
- (b) the requirement that lessors of household goods obtain and review 90 days of a consumer's bank statements before agreeing to a lease with a consumer - LAQ regularly assists consumers entering leases that they have no financial capacity to meet. Requiring 90 days of bank statements to be considered will provide consumer lease providers with an improved financial picture of vulnerable consumers and should mean that fewer inappropriate consumer leases are entered into with vulnerable consumers.
- (c) the proposed regulations that cap lease repayments at a maximum of 10% of a consumer's net income - this amendment will ensure that vulnerable consumers have enough money to spend on paying for basic necessities.
- (d) the prohibition on door to door selling of consumer leases for household goods - LAQ supports this prohibition. Over the years LAQ has seen the most vulnerable consumers in our society placed in dire financial circumstances as a result of the door to door selling of goods including through consumer leases.
- (e) the requirement that consumer lease providers disclose the difference between the base price of a good and the total amount that will be paid for it under the lease - many consumers are unaware of the true cost of goods purchased through consumer leases. This new requirement will go some way to addressing this information asymmetry.

Reforms applying to small amount credit contracts and Consumer Leases

LAQ supports the introduction in the draft legislation of:

- (a) restrictions being placed on the use or disclosure of account statements that are received in conjunction with a SACC or consumer lease - this restriction will address the risk of this personal information being misused by providers to market further products to vulnerable consumers; and
- (b) the requirement that SACC and consumer lease providers must document their assessments as to whether a SACC or consumer lease is not unsuitable for a consumer. In our experience, consumers have difficulty in obtaining information about a lender's assessment of suitability. This requirement will improve the transparency of the lending assessments made by SACC and consumer lease providers.

LAQ does not support the explicit recognition of family violence as a reasonable cause of financial hardship as LAQ does not support definitions that could narrow the interpretation of financial hardship. Currently there is no explicit list of circumstances that are causes of financial hardship in the National Credit legislation. As a result, financial hardship is currently interpreted widely by credit providers and consumer lawyers assisting vulnerable consumers. LAQ is concerned that creating a list of reasonable causes of

financial hardship might unreasonably restrict the application of financial hardship. In LAQ's submission this change to the legislation would be a backward step and does not need to be made.

We also note that this issue is already dealt with by:

- (a) The Australian Financial Complaints Authority Approach to Joint Facilities and Family Violence - <https://www.afca.org.au/news/information-for-consumer-advocates/> and
- (b) The Australian Bankers Association Industry Guideline on Financial abuse and family and domestic violence - https://www.bankers.asn.au/images/uploads/ArticleDocuments/207/ABA_Industry_Guide_line_-_Financial_Abuse_and_Family_and_Domestic_Violence%20Nov%202016.pdf

Anti-avoidance measures

LAQ supports the introduction in the legislation of Anti-avoidance measures that:

- (a) prohibit business models that are designed to avoid a contract being regulated as a SACC or consumer lease under the National Consumer Credit legislation;
- (b) prohibit internal models that are designed to avoid a contract being regulated as a SACC or consumer lease under the National Consumer Credit legislation; and
- (c) regulate indefinite term consumer lease contracts under the National Consumer Credit legislation.

There has been a variety of avoidance schemes by businesses which have had the sole purpose of reducing the consumer protections available to vulnerable consumers. LAQ supports the prohibitions and regulation that are designed to put a stop to these practices.

We highlight the importance of the Australian Securities and Investment Commission having strong product intervention powers¹ that can be used to prohibit loan structures particularly for small amount loans that attempt to avoid regulation by the NCCP. This ensures that small amount lenders operate on a level playing field and that consumers are protected when borrowing money for personal purposes. However, these product intervention powers on their own are not sufficient in providing a systemic response to avoidance practices. The restriction on exercising the product intervention power is that ASIC needs to be satisfied that the financial product "*will or is likely to result in, significant detriment to retail clients*"

In September 2019 ASIC² took action under its product intervention powers to prohibit lenders using the short-term credit facility exemption in s6(1) of the National Credit Code unless the cost of that facility including any collateral fees and charges was less than or equal to the amount proscribed in s6 of the National Credit Code.

A firm using the exemption to charge an effective interest rate of 1000% has taken legal action challenging the making of the ASIC order. LAQ has observed in its advice work that on ASIC issuing the product intervention order against the firm's business model, the firm changed to a new model so as to avoid the effect of ASIC's order. The effect of the new business model is that they continue to charge fees resulting in an effective interest rate of up to 1000%, whilst claiming that the lending is either unregulated or exempt from regulation.

¹ 1023D(3) of the *Corporations Act 2001*.

² <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-250mr-asic-makes-product-intervention-order-banning-short-term-lending-model-to-protect-consumers-from-predatory-lending/>

It is critical that the anti-avoidance measures are enacted in full so that lenders cannot avoid the legislation by business models and practices in response to ASIC exercising its product intervention power

Proper Resourcing for legal advocacy for vulnerable consumers

LAQ submits that in addition to the proposals in the Bill, it is also important that consumers are provided with adequate support to access their legal rights. This support can be provided by providing additional funding for specialist consumer credit, debt and insurance lawyers at Legal Aid Commissions and specialist community legal centres, together with financial counsellors.