



Australian Finance Industry Association Limited
ABN 13 000 493 907
L11 130 Pitt Street Sydney NSW 2000
02 9231 5877 www.afia.asn.au

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

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Dear Committee

National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No. 2) (the SACC Bill)

The Australian Finance Industry Association (AFIA) welcomes the opportunity to provide a response to the Senate Committee's Inquiry into the SACC Bill. AFIA is committed to ensuring that all Australians have continued access to finance and is also committed to enhancing consumer protection.

AFIA Background

AFIA represents over 100 providers of consumer, commercial and wholesale finance in Australia. (For more information about AFIA, please see Annexure A to this submission). AFIA's role as an industry body is to drive industry leadership and represent members' views, facilitate self-regulation through industry codes, and to work with the Federal Government, financial regulators and other stakeholders to promote a supportive environment for industry.

Our guiding principles seek to build the settings to:

- Promote simple, convenient, innovative and affordable credit to finance Australia's future, including maximising access to credit for customers able and willing to service their commitments and minimising the likelihood or incidence of customers entering into unsuitable credit contracts;
- Foster competition and innovation in Australia's financial services industry, which enables our members to grow, expand and thrive as key participants in lending and other markets; and
- Generate greater financial and economic participation by consumers and small businesses in Australia's financial system and economy and improve social participation as a means to create financial wellbeing.

To do so, we focus on the key drivers that provide positive customer outcomes, foster competition and innovation within industry, and facilitate financial, economic and social engagement by both customers and industry.

Our Submission

The Explanatory Memorandum to the SACC Bill (**Explanatory Memorandum**) notes that the Bill replicates the Government's Exposure Draft legislation released on 23 October 2017. AFIA made a

submission in relation to the Exposure Draft dated 9 November 2017. AFIA also responded to the Senate Economic Reference Committee's Inquiry into the 'Credit and Financial Services Targeted at Australians at Risk of Financial Hardship' dated 9 November 2018 (**previous submissions**).

Within our previous submissions AFIA noted that it strongly supported the SACC Bill's intent to address concerns about SACC and the consumer leasing sectors and enhance consumer protection provisions in relation to SACCs and consumer leases – that support continues.

In November 2019, a number of consumer advocacy organisations, including the Consumer Action Law Centre published a report in relation to payday lending in Australia¹. The report (which notably focused on payday lending and not consumer leases) noted that the number of financially stressed households entering into SACC contracts continues to grow, which increases the risk of consumers entering into hardship. The report calls for amendments to the *National Credit Consumer Protection Act (2009)* (by way of the Bill) to enhance consumer protection provisions within the Act in relation to SACCs (and consumer leases). We note also, as is clearly indicated in the Explanatory Memorandum, that significant consultation has already been undertaken with respect to these proposed reforms including:

- an Independent Review into Small Amount Credit Contracts in 2015;
- the Exposure Draft legislation released on 23 October 2017; and
- the November 2018 Inquiry into 'Credit and Financial Services Targeted at Australians at Risk of Financial Hardship'.

As is consistent with our previous submissions, AFIA supports these reforms and the passing of the Bill (subject to the recommendations for refinements and for clarity of wording in the proposed legislation below).

Our Recommendations

In our previous submissions we noted certain concerns that the proposed legislation. Whilst these could be seen as minor, in order to assist consistency of approach and understanding amongst customers and financiers and because of the penalties for non-compliance, we ask that their inclusion be considered further. In summary, our recommendations are that:

(a) **cap on costs:**

- i. the cap should be clearly articulated in the amendments **as being GST inclusive** in all cases;
- ii. the base price should be calculated on a GST inclusive basis regardless of whether the metric on which it is based is RRP, market or agreed purchase price with;
- iii. the same approach for add-on fees;

(b) **base price of goods:**

- i. revision of the base price definition (for example, in Bill s. 175AA (5)(a) and (b)) and qualify the provision to include concepts within the control of the lessor (e.g. RRP known *by the lessor*). In addition, we recommend a market comparison with goods of a similar kind/condition where an exact match may not be possible;

¹ https://consumeraction.org.au/wp-content/uploads/2019/11/Payday-Lending-Report_FINAL_UPDATED_WEB-1.pdf

(c) **protected earnings cap:**

- i. the amendment of the protected earnings cap (from 20% of a consumer's gross income in relation to Centrelink recipients, to a 10% of a consumer's net income) for each payment period and that the regulations clearly only limit the protected earnings cap to Centrelink recipients (ie consumers who receive 50% of their gross income as payments under the Social Security Act 1991); and

(d) **overpayments:**

- i. omitting the words "accept payment" from the proposed additional offence contained in Bill s. 156C and s. 175AC; or
- ii. If this concept is retained it should require an intentional act on the part of the lessor appropriately reflecting criminal culpability (e.g. including the words "*must not. knowingly accept payment*") or provide for the lessor becoming aware and appropriately accounting for the overpayment in the customer's favour as soon as practicable after becoming aware of the overpayment.

More detail is provided below.

Cap on costs - Goods and Services Tax

The Explanatory Memorandum notes that the Bill will introduce a cap on the total payments that can be made on a consumer lease. AFIA is supportive of a cap but re-iterates its concerns in relation the wording proposed in section 58 of the Bill (i.e. being the proposed new s.175AA of the National Credit Code). In the proposed new section, the recommended retail price (RRP) or market value is stated to be calculated on a GST exclusive basis. In contrast, the treatment of GST for the agreed purchase price is not articulated. Based on the rules of statutory interpretation, we assume therefore that agreed purchase price should be calculated on a GST inclusive basis.

Further, for the purposes of determining whether the cap has been exceeded, the lessor is required to calculate assuming GST inclusive rental payments by the lessee (Bill s. 175AA (1)). Again, in contrast, in the absence of clear specificity we assume for add-on fees, the calculation should be made on a GST inclusive basis.

Certainty in calculating the cap is critical for our members given the significant potential risk outcomes (e.g. criminal and civil). Therefore, certainty on how GST should be treated is critical and in our view should not be a matter that turns on the rules of statutory interpretation and interplay with the GST law but clearly dealt with in the amendments. Equally, the treatment of GST in the cap calculation plays a key role in the product pricing which has broader business sustainability ramifications.

AFIA recommends that:

- the treatment of GST in key aspects that are critical to the calculation of the cap should be clearly articulated in the amendments as being GST inclusive in all cases;

- the approach should be uniform with base price calculated on a GST inclusive basis regardless of whether the metric on which it is based is RRP, market or agreed purchase price. The same approach should be taken for add-on fees.

Definition of base price of goods

As noted in our previous submission, AFIA is concerned that the drafting of the definition of the base price of goods could be further refined so as there are no unintended consequences. Examples are:

- the RRP is known at the time of the application and exceeds the agreed price but (unknown to the lessor) changes such that it is less than the agreed price when the contract is entered into; or
- where the goods are imported goods (whether new or used) and have no RRP, the market value can only be determined by comparison to like or similar goods rather than goods of the same brand and characteristics (and age in relation to used goods), information that may not be available to the lessor.

Both scenarios above may result in an unintended breach by the lessor of the cap on costs provisions.

AFIA recommends:

- revision of the base price definition to address these circumstances. For example, in Bill s. 175AA (5)(a) and (b) qualify the provision to include concepts within the control of the lessor (e.g. RRP known *by the lessor*). And provide for a market comparison with goods of a similar kind/condition where an exact match may not be possible.

Protected Earnings Cap

The current legislation moves the protected earnings cap of 20 percent of a consumer's gross income in relation to Centrelink recipients to 10 per cent of a consumer's net income. The Explanatory Memorandum is not clear whether the cap is intended to operate to include non-Centrelink recipients.

AFIA supports the inclusion of a protected earnings cap – we support the view that protections should be designed to enable more financially vulnerable consumers to have income to meet basic needs for food and shelter. We also re-iterate the importance of balancing the needs for consumer protection for vulnerable customers with continuing access by all customers to the consumer lease market.

If the case was that the protected earnings cap is intended to operate to include non-Centrelink recipients, our concern, as we have noted in our previous submissions, is that flat 10% protected earnings cap² for consumer leases across the entire customer demographic unreasonably restricts lending to customers who do have the capacity to repay a proposed lease of household goods. The basis on which the 10% cap has been determined for consumer leases remains unclear.

² As noted on page 4 of the Explanatory Memorandum to the *National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019*

AFIA recommends:

- that the regulations clearly only limit the protected earnings cap to Centrelink recipients (ie consumers who receive 50% of their gross income as payments under the Social Security Act 1991).

Overpayments

We reiterate our concerns in relation to the prohibition on lessors from entering into lease contracts which impose obligations on lessees in excess of the protected earnings cap (Bill s. 156A) and more general costs cap (Bill s. 175AA). We understand the intention is to add a further layer of sanction prohibiting lessors from "accepting payment" of an amount that exceeds these caps (Bill s. 156B and s. 175C).

Our concern is that payments not initiated or "caused" by lessors (for example, customer initiated payment arrangements, automated payments, direct debit payments set up by the customer) may result in the total amount paid under a consumer lease exceeding the protected earnings cap and/or on the overall cap on costs exposing the lessor to significant breach risk. This may result from the rounding of payments or payments of irregular and unequal amounts initiated by customers in individual periods and/or over the term of the lease exceeding the amount allowed to be charged in a periodic period and/or under the lease overall. Overpayments of this type will be detected by the lessor and dealt with in the customer's favour (e.g. held as rent in advance and returned on request or at lease expiry). The acceptance of such payments should not however expose the lessor to a penalty from breach of the prohibition of exceeding the protected earnings cap or more general cap on costs.

AFIA recommends:

- omitting the words "accept payment" from the proposed additional offence contained in Bill s. 156C and s. 175AC; or
- If this concept is retained it should require an intentional act on the part of the lessor appropriately reflecting criminal culpability (e.g. including the words "*must not.. knowingly accept payment*") or provide for the lessor becoming aware and appropriately accounting for the overpayment in the customer's favour as soon as practicable after becoming aware of the overpayment.

As we have previously noted, we are supportive of the Bill and the Government's commitment to the protection of consumers, particularly those that are vulnerable to predatory lending behaviour. We believe that the proposed legislation with the refinements requested in this submission, strike a more appropriate balance between continuing to facilitate customer choice and access with respect to credit while protecting consumers.

Should you wish to discuss our feedback further, or require additional information, please contact me at _____ or Naveen Ahluwalia, Director, Policy & Regulatory Affairs at _____ or _____

~~Kind~~ regards

Karl Turner
Chief Operating Officer



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Annexure A

The Australian Finance Industry Association (AFIA) is the voice of a diverse Australian finance sector. AFIA represents over 100 providers of consumer, commercial and wholesale finance in Australia which includes:

- major, regional and mutual/community owned banks;
- providers of consumer finance, including home loans, personal loans, consumer leases, credit cards, buy now pay later services, and debt purchasers;
- providers of land finance, including residential and commercial mortgages and bridging finance;
- equipment financiers, including commercial equipment financing ranging from agri-equipment to small ticket equipment financing;
- motor vehicle financiers, including consumer motor finance, novated motor finance, small business motor finance and heavy vehicle finance;
- fleet leasing and car rental providers; and
- providers of commercial finance, including secured and unsecured loans and working capital finance to businesses, including small businesses.

AFIA's members range from ASX-listed public companies through to small businesses providing finance, which operate via a range of distribution channels, including through 'bricks and mortar' premises (physical branches and other outlets), via intermediaries (including finance brokers, dealerships, retail suppliers), and through online access or platforms (traditional financial institutions and fintechs).

AFIA's members collectively operate across all states and territories in Australia and provide finance to customers of all demographics from high to low-income earners and to commercial entities ranging from sole traders, partnerships and across the corporate sector in Australia.

AFIA's members provide a broad range of products and services across consumer and commercial finance, a snapshot of these include:

- consumer: home loans, personal unsecured loans, revolving products (including credit cards and interest free products coupled with lines of credit), personal secured loans (secured by land or personal property); consumer leases of household assets (including household goods, electrical/IT devices or cars) and buy-now, pay later services;
- commercial: land, asset or equipment finance (finance/operating lease, secured loan or hire-purchase agreement or novated leases); business finance and working capital solutions (secured loans, online unsecured loans; debtor and invoice finance; insurance premium funding; trade finance; overdrafts; commercial credit cards), together with more sophisticated and complex finance solutions.

For further information about AFIA, please see [here](#).