



**Response to discussion questions in the consultation paper for the review of the small amount credit contract laws**

October 2015

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## Executive summary

### Overview

- 1 CHERPA, the Consumer Household Equipment Rental Providers Association, represents 40 consumer lease providers who currently service 65,000 active consumer leases.
- 2 We are making a submission to ensure that:
  - Critical information about the consumer leasing market not previously or properly addressed is brought to the Panel's attention;
  - Concerns are addressed relating to the potential harm that could be done to a substantial segment of the consumers the laws are intended to protect.
- 3 Our response is founded on five principles:
  - There is an economically valid business model that is beneficial for consumers and business owners alike;
  - Current Legislation inaccurately defines the substance of a real consumer lease;
  - Consumer leases are self-regulating for consumers and prevent debt spirals;
  - SACCs and consumer leases are not comparable;
  - Some consumer leases are credit contracts in disguise and are causing consumer confusion and harm;
- 4 Our submission shows that there is a very real need and opportunity to:
  - more clearly define the substance of a consumer lease and redefine some consumer leases as credit contracts;
  - properly establish consumer leases and improve consumer outcomes and protections ;
  - establish consumer leases as substantially self-regulating for consumer and lessors alike;

### Context

- 5 The rental industry has been going 80+years with some CHERPA members individually involved for 40+ years.
- 6 The advent of rent-to-own and simultaneous entrance of credit financing companies in the early 2000's changed the industry landscape. With the confusion created and with some harm to consumers experienced the government regulated the industry.
- 7 In 2014 CHERPA Members agreed to adopt an Industry Code of Conduct. The Industry Code of Conduct has been upgraded in 2015 to include:
  - Return of items at no cost under hardship
  - Estimated Retail price disclosure
  - Specific percentage caps on both the amount of net income and discretionary income that can be used as payment for a consumer lease provided by members.

### Key Observations

- 8 Out of the approximately 65,000 active consumers CHERPA members had as customers last year, 3 made complaints to EDR about members and none were found to have a case against

the member. That is no cases were brought to EDRs by our members clients that were found to be damaging in any way to our clients.

9. CHERPA has an Industry Code of Conduct that is implemented and used successfully by members and is helping protect consumers. The Industry Code of Conduct helps create the substance of an operating lease that is more beneficial for consumers and substantially increases consumer protections.
10. The opportunity for an “at risk” consumer to create a debt spiral assisted by “overpriced” cost of credit under a consumer lease is significantly restricted if not fully extinguished by the fact that **under the CHERPA Industry Code of Conduct it is mandatory for all members to accept return of goods without any charges where a consumer shows that they are experiencing financial hardship.**
11. Industry practice shows that there are two distinct types of consumer leases being offered in the market:
  - *Operating* style leases - Provided by lessors that supply the good themselves and support the good throughout the life cycle of the lease - deliver it, install it, provide on-site instruction in its use, provide off-site remote support, service the item, carry out any maintenance, repair and replace the item if/as required and uninstall the item.
  - *Finance* style leases that are not supported through the lifecycle of the lease (other than with statutory and extended warranties).
12. The current regulatory framework radically misunderstood the industry when it mandated that all agreements for household goods over a period longer than 4 months were now consumer leases based on the manifestly incorrect notion that all leases were in fact some form of provision of credit to consumers.
13. Many consumers want and need a lessor to provide a full service *operating* style lease. Many lessors are assisting needy members of their community by delivering goods, installing goods, setting up and providing verbal use instructions for goods, providing telephone support in the use of the good, providing the surety that a good can be and will be quickly fixed/replaced upon breakdown, a good can/will be replaced with new good and the consumer can trust the lessor to do it ethically.
14. Definitions are available from AASB 117 that help define and distinguish consumer leases by substance not just the legal form.
15. ASIC Report 447 findings purport that some negative practices they observed are “Current Industry Practice”. This is substantially false and misleading as far as our members are concerned and **our members absolutely refute that the practices outlined in Report 447 are “Current Industry Practice”.**
16. Should caps be applied to consumer leases the viability of the industry would be significantly, even catastrophically, impacted with a flow on significant negative impact on the vulnerable consumers who are trying to access essential household goods.

## Recommendations

17. We make the following recommendations for the review to consider:
  - A. **That** a full service *operating* style consumer lease (refer paragraph 75) be recognised as an important way for consumers to access essential household goods because they are:
    - i. currently the substance of a large number consumer leases already used by consumers;

- ii. genuinely needed by many vulnerable consumers;
  - iii. more simple to regulate; and
  - iv. substantially self-regulating for both lessors and lessees alike whilst providing simpler and greater protections for consumers.
- B. **That** existing or future consumer leases that are *operating* style leases **MUST NOT BE** conflated with the provision of credit or finance in the form of SACCs, otherwise a very significant number of consumers, many of whom are already vulnerable through social and financial disadvantage, will suffer harm.
- C. **That** all consumer leases be clearly defined as either:
- i. genuine *operating* style leases or else
  - ii. be re-classified as credit contracts under the NCCP Act.
- D. **That** consumer lease lessors must allow consumers to return of goods under financial hardship conditions without penalising the consumer for early termination. This is already a requirement of the CHERPA Industry Code of Conduct.
- E. **That** the CHERPA Industry Code of Conduct be endorsed by ASIC and all lessors be asked to achieve compliance with its provisions by June 30 2016.
- F. **That** CHERPA be funded to conduct an education campaign on the Industry Code of Conduct that assists all stakeholders in the industry understand:
- i. The benefits of consumers using operating style consumer leases complying with the CHERPA Industry Code of Conduct.
  - ii. The significant protection's available to consumers from leases complying with the CHERPA Industry Code of Conduct.
- G. **That** the following organisations be encouraged to engage with CHERPA facilitating a better understanding of the benefits and protections afforded vulnerable consumers by consumers leases complying with the CHERPA Industry Code of Conduct :
- i. External Dispute Resolution Schemes – Credit and Investment Ombudsman, Financial Ombudsman Service – so they can confirm and promulgate the Code of Conduct as industry practice and use it as substantive evidence of what is/is not appropriate lessor behaviour;
  - ii. ASIC - so they can promulgate the Code of Conduct as industry practice for what is/is not appropriate and compliant lessor behaviour;
  - iii. Department of Human Services, Centrelink so they can confirm and promulgate the Code of Conduct as compliant industry practice.
  - iv. Stakeholder community law services and
  - v. Stakeholder welfare groups
- H. **That** the perceived problems with consumer leases are resolved by:
- i. Properly and clearly defining a consumer lease as an operating style lease;
  - ii. Requiring that the leased good can be returned at any point in time with pricing adjustments for the foreshortened periods of a lease if required and

- iii. Requiring that the leased good can be returned to the lessor under hardship provisions without any adjustments or other costs for excessive damage greater than fair wear and tear and
  - iv. Commensurate with, in conjunction with and not separately from H.v-vi., requiring that all leasing arrangements not be subject to reporting to Credit Reporting Bureau for defaults other than “skips” (where a lessee has not returned an item, is no longer paying for it and is not in contact with the lessor.)
  - v. Commensurate with, in conjunction with and not separately from recommendation H.iv-vi., significantly strengthen the law around “skips” to decrease the likelihood of it happening and remove some of the business risk (and therefore cost) of providing consumer leases in the market.
  - vi. Commensurate with, in conjunction with and not separately from recommendation H.iv-v., strengthen lessors’ rights to pick up goods (repossession) and lessees’ obligations to return goods
  - vii. Deeming all leases other than *operating* style leases are arrangements for financing goods and therefore subject to other areas of NCCP Act.
- I. **That** an estimated cash sale price of a leased good be clearly disclosed on lease documentation – as mandated in the CHERPA Industry Code of Conduct.
  - J. **That** the amount in excess of an estimated cash sale price not be disclosed on the lease documentation as it is unlikely to be relevant to consumers who are specifically choosing an *operating* style lease – refer recommendations L and M also.
  - K. **That** there be no additional disclosure requirements for the cost of credit in dollar terms in a consumer lease – refer recommendations L and M also.
  - L. **That**, under an *operating* style lease, the extra costs incurred by a consumer over and above the cash price of a good be properly recognised as the charges made by a lessor to fully support the good during the lease - refer recommendation M also.
  - M. **That** the cost of credit as an interest rate not be disclosed in a consumer lease since the transaction is not a debt transaction to which an interest rate can apply and would be likely to create confusion for a consumer as to the nature of the transaction – refer recommendation L also.
  - N. **That** consumer leases be redefined as *operating* style leases commensurate with the level and type of support to be provided by the lessor throughout the lease.
  - O. **That** caps not be applied to consumer leases because:
    - i. a significant portion of them are *operating* style leases and a SACC level cap would significantly, possibly catastrophically, impact the viability of the industry with a flow on significant negative impact on the vulnerable consumers who are trying to access essential household goods by using them.
    - ii. since there are non-existent to very small barriers for consumers to return goods to lessors providing *operating* style consumer leases that are compliant with the CHERPA Industry Code of Conduct consumers would be accessing goods in a competitive, consumer driven environment and an economically efficient market.
  - P. **That** a ‘provision of credit’ style cap would be counter-productive to achieving market efficiencies and run the very real risk of creating a “black market” through business model avoidance or some other contrivance through internal avoidance; and therefore

- Q. **That** a ‘provision of credit’ style cap would be completely redundant under the CHERPA Industry Code of Conduct since all the risk in a consumer lease transaction settles with lessors compliant with the CHERPA Industry Code of Conduct .

## Introduction

- 18 CHERPA, the Consumer Household Equipment Rental Providers Association, represents 40 consumer lease providers in Australia. Our members write approximately 20% of all consumer leases written in the market and currently service approximately 65,000 consumers with active consumer leases.
- 19 We are making a submission to The Review of SACC Laws to ensure that:
- Critical information about the consumer leasing market which has not been previously or has not been properly addressed is brought to the Panel's attention;
  - Concerns are addressed relating to the potential harm that could be done to a very substantial segment of our members' customers (the very consumers the laws are intended to protect) are not prejudiced, and therefore harmed, by the well-meaning but misplaced actions of a few stakeholders.
- 20 The foundation principles of our response are:
- A. **There is an economically valid business model that is beneficial for consumers and business owners alike:**  
The industry has been providing a useful and beneficial service to a population of consumers for 80+ years – in substance, true leases or at the very least operating leases. So clearly there is a group of consumers who want and/or need the service being offered and have enjoyed the benefits of receiving the service for a long time. The longevity of the business model across a diverse range of business sizes, a diverse range of geographic locations and in a diverse range of economic conditions is further evidence that a range of consumers want or need the service proffered.
- B. **Current Legislation inaccurately defines the substance of a real consumer lease:**  
The service described at item A above was deemed to be a consumer lease by the NCCP Act in 2009 but the legislation does not properly describe the substance of the preferred lessor/lessee transaction that is occurring in practice. The substance of the transaction for this particular type of consumer is that s/he wants or needs the benefits of ownership of a good without the full risk of ownership. The consumer wants the lessor to keep most of the risk.
- C. **Consumer leases are self-regulating for consumers and prevent debt spirals:**  
Because consumers can simply return goods at any time consumer leases are effectively self-regulating for consumers and inherently prevent consumer debt spirals.
- D. **SACCs and consumer leases are not comparable:**  
SACCs are for amounts of cash and consumer leases are for physical products. Cash can be squandered unlike physical products provided through consumer leases. Once cash is spent it cannot be returned whereas goods can simply be returned to a lessor.
- E. **Some consumer leases are credit contracts in disguise and are causing consumer confusion and harm:**  
As a result of a poor definition of a consumer lease in the Legislation there are a number of lessor operators now in the market that appear to be providing financing arrangements for consumers in the guise of consumer leases. Using consumer leases as a guise for financing consumer goods has created confusion and resulted in harm for some consumers who were unaware that no support services are provided.
- 21 In our response submission we will:
- show that there is a very real need and opportunity to:

- properly and more clearly define and carefully protect one particular form of consumer lease that improves consumer outcomes and protections; and
- redefine some consumer leases as credit contracts and have those consumer leases regulated as such.
- show that properly set up and managed consumer leases are mostly self-regulating.
- identify that properly set up and regulated consumer leases assist an important consumer segment and are substantially self-regulating

## Background

### The Consumer Household Equipment Rental Providers Association (CHERPA)

- 22 The rental of household goods to consumers has been taking place happily and without problem in Australia for at least 80 years. Many CHERPA members have a very long history, 40+ years, of successfully renting essential household goods to happy consumers.
- 23 In the early 2000's the nature of the industry began to change with advent of the "rent-to-own" paradigm interplaying simultaneously with credit finance companies who began providing financing and loans for small amounts of credit on consumer goods – and confusingly using the word "rent" in their business name and product offering.
- 24 The resulting consumer confusion created the need for clarification which was to arrive in the form of the NCCP Act.
- 25 However, the introduction of the NCCP Act in 2010 left the industry in a significant state of confusion. Since that time lessors then operating in the industry have been increasingly concerned to see the entrance of many new players in the market, including a proliferation of operators who appear to be of dubious and unethical intent.
- 26 **Industry Code of Conduct** - In 2013 the industry formed a peak body, the Consumer Household Equipment Rental Providers Association, CHERPA, to address concerns that the long term industry operators held. CHERPA began engaging with stakeholders to understand their concerns and in 2014 an Industry Code of Conduct was accepted at CHERPA's Annual General Meeting.
- 27 CHERPA has continued engaging with stakeholders since that time culminating in the recent voluntary upgrade to its Industry Code of Conduct for members to include:
  - Return of items at no cost under hardship
  - Estimated Retail price disclosure
  - Specific percentage caps on both the amount of net income and discretionary income that can be used as payment for a consumer lease provided by members.

### CHERPA Members

- 28 On Average CHERPA members have been in the industry for more than ten years
- 29 There are more than 10 members who have been in the business for more than 20 years and
- 30 There are a few members who have been in the business as employees or business owners for more than 40 years.

- 31 Last financial year there were 3 complaints reported to external dispute resolution bodies about CHERPA members of which none found the member liable. That is the EDR schemes found the members to have acted appropriately in all cases.
- 32 The estimated total number of goods rented out by CHERPA members is currently 108,000
- 33 Businesses range in size from:
  - >\$100,000 turnover with 200-300 units on lease and approx. 150 -200 customers
  - to
  - \$40,000,000 turnover with approximately 27,000 units on lease and approx. 24,000 customers.
- 34 CHERPA members as a cohort in the consumer leasing industry have been highly compliant with regulatory requirements, have excellent customer relations and have demonstrated ongoing industry best practice as evidenced by the very low number of complaints received by our members.

## Feedback and comments

### Section 1: General comments and feedback

#### Section 1: Competing Objectives

**Question 1:** How is the need to protect consumers balanced with the need to ensure that the industry remains viable and consumers can still access credit?

#### Broad commentary on Question 1

- 35 We believe that there is a false premise in this question– namely that consumer protections or outcomes are necessarily degraded by the need for ensuring that the industry remain viable. We note the apparent reason given for allowing this degradation is so that “so some consumers can still access credit”.
- 36 There is also an important inference in the question and its background context that needs to be highlighted – the inference that balance between consumer protection and industry viability is only or is best achieved through the mechanism of the legislation, regulation and a compliance regime.
- 37 We don’t believe that consumer protections need to be degraded to maintain a viable consumer leasing industry. Instead we believe that an appropriately regulated and operating industry would be inherently self-regulating effectively protecting consumers and maintaining the consumer leasing industry as a commercially viable point of access for essential consumer goods. We detail why below.
- 38 In a properly structured, economically efficient industry a lessor would provide a lessee with a good that meets their needs and desires. The good would only be provided by the lessor to the lessee on the basis that the lessor knew that the lessee could/ would pay for the use of the good for the time that the lessee had it. The lessee would only agree to have beneficial use of the good if the good met their needs and they thought they could afford the payment/s whilst they had the good in their possession.

- 39 In an economically efficient industry lessors would NOT lease goods to consumers who could not or probably may not pay for goods in the future. To do so on any kind of regular basis would simply risk the lessor going out of business.<sup>1</sup> In a properly structured, economically efficient industry if a lessee could no longer afford, or no longer wanted or had no further need for the good, the lessee would simply be able to return the good. An adjustment may be required for a good returned significantly earlier than initially predicted by the parties – not a penalty but an adjusting back to the rate that would have been charged if the good had been taken out for the shorter period of time. For example, a good returned after two months instead of being kept by the lessee for 12 months would incur an early return adjustment because the utilisation rate is instantly reduced for the lessor. Historically, this was predominantly how the industry operated (prior to the release of the NCCP Act). This exact model is still used today in the business to business rental market – Kennards Hire, Coates Hire, amongst many others.
- 40 In a free society consumers should be able to access products and services that meet their lawful needs and desires. A properly structured economically efficient consumer leasing industry provides one way for consumers to access goods that meet the individual’s needs and desires. A properly structured, economically efficient consumer leasing environment would both inherently protect consumers and help maintain a viable consumer leasing industry. It would be inherently self-regulating, protecting consumers and maintaining an industry as viable as long as it continues providing a commercially valuable product to consumers. We will call these “true leases”<sup>2</sup>
- 41 The current regulatory framework radically misunderstood the industry when it deliberately or inadvertently mandated that all agreements for household goods over a period longer than 4 months were now consumer leases based on the manifestly incorrect notion that all leases were in fact some form of provision of credit to consumers. What the whole legislative process got fundamentally wrong was the assumption that all consumers with leases wanted to own (keep) the good. In fact, prior to the legislation being introduced some member lessors had “keep rates” as low as 10%. In other words, their customers did not buy the good being rented and had no intention of doing so. These consumers were using consumer leases as *operating* leases not finance leases – see Section 3 comments for a specific definition of these lease types.
- 42 In fact many customers of our members want and need the lessor to provide a full service *operating* lease for a variety of reasons. The current regulatory framework radically failed these customers by introducing consumers leases as if they were the provision of credit and NOT taking in to account the fact that many lessors were assisting needy members of their community by delivering goods, installing goods, setting up and providing verbal use instructions for goods, providing telephone support in the use of the good, providing the surety that a good could be and would be quickly fixed/replaced upon breakdown, a good could/would be replaced with new by trusted lessor.
- 43 The problem with introduction of the NCCP legislation was that it opened the door to exactly what the government wanted to prevent. Rogue lessors who effectively only provide financing arrangements to consumers and did not provide any other real support. These “financing only” lessors want nothing to do with the support structure that included repair, maintenance, service and early return capabilities that the original industry lessors had been providing. Many of the

<sup>1</sup> Jim Hawkins. *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*. Indiana law Council. Vol 89:1361. Page 1385-1386. “While it may be unlikely that fringe banking firms are particularly concerned with the overall financial well-being of their customers, members of the industry have structured their lending activity to prevent losses due to non-payment by largely avoiding repayment issues altogether. It is precisely because fringe borrowers are vulnerable to financial distress that fringe bankers structure transactions to prevent it.”

<sup>2</sup> Ali, McRae, Ramsay and Saw. *Consumer leases and consumer protection: Regulatory arbitrage and consumer harm*. (2013) 41 ABLR 240.

new operators sold leases outside their physical geographic area – so it wasn't even possible for a customer to return an item or get repairs done, etc.

- 44 So again we state that we don't believe a compromise for both lessors and lessees, a "balancing act", has to be carved out of a sub-prime situation.
- 45 We believe that there are very good reasons why this industry could operate very efficiently with reduced but clarified regulation that improves consumer protections and outcomes whilst providing a very important access point for essential household goods to vulnerable consumers. The opportunity to recognise and promulgate the use of *operating* leases by consumers to access physical goods in Australia, especially essential household goods, needs to be carefully examined.

### IMPORTANT RECOMMENDATION:

46 We believe that the full service *operating* leases (see also paragraph 75) should be recognised as an important way for some consumers to access many essential household goods because they are:

- currently used by a large number of consumers;
- genuinely needed by many vulnerable consumers;
- more simple to regulate; and
- self-regulating whilst providing simpler and greater protections for consumers.

## Section 2: Specific comments and feedback

### Section 2: Additional Provision for SACCs (TOR 2.2)

Question 12: Are stakeholders aware of any avoidance practices in relation to the Credit Act? If so, provide details of these practices and scope (if known)

Should an additional anti-avoidance provisions be included in the Credit Act?

- If so, should there be any distinction between business model avoidance and internal avoidance??

- 47 With the inception of the Credit Act many businesses who only provided SACCs found it difficult to sustain their business model. As they searched for a solution to a new sustainable business a number of them identified consumer leases as an opportunity because:
- Consumer leases were less regulated than SACCs.
  - The transition to consumer leasing looked easy based on the facts that:
    - consumers were apparently similar and
    - consumers required similar credit checks for repayment capability.
- 48 What many of these new providers of consumer leases did not do was provide the "full support" (refer to para 65) consumer leases that long term operators had traditionally done in this industry.
- 49 This created much angst, confusion and some harm amongst both consumers and traditional providers alike.

- 50 It has become increasingly clear that certain providers are seriously exploiting the loose description of a consumer lease under the Credit Act providing goods to consumers using finance lease arrangements disguised as consumer leases – in an internal avoidance of the credit contract laws. We’ve clearly defined what we think a consumer lease should be at para 75.
- 51 In response to the concerns raised by CHERPA Members and in conjunction with discussion with ASIC on how members could help improve the industry CHERPA members agreed to draft and Industry Code of Conduct.
- 52 The CHERPA Industry Code of Conduct addresses both member concerns and broad stakeholder concerns.

### IMPORTANT RECOMMENDATIONS:

- 53 The CHERPA Industry Code of Conduct should be endorsed by ASIC and all consumer lease lessors should be asked to comply with its provisions immediately.
- 54 In addition CHERPA believes, and is willing and waiting to assist with, an education campaign on the Industry Code of Conduct that assists all stakeholders in the industry understand:
- the benefits consumers, especially vulnerable consumers, can enjoy through the proper provision of *operating* style consumer leases, especially with those lessors complying with the CHERPA Industry Code of Conduct .
  - The significant protection’s available to consumers from leases provided by lessors complying with the existing CHERPA Industry Code of Conduct.
  - The specific organisations we would like to support are:
    - External Dispute Resolution Schemes – Credit and Investment Ombudsman, Financial Ombudsman Service – so they can confirm and promulgate the Code of Conduct as industry practice and use it as substantive evidence of what is/is not appropriate lessor behaviour;
    - ASIC - so they can promulgate the Code of Conduct as industry practice for what is/is not appropriate and compliant lessor behaviour;
    - Department of Human Services, Centrelink
    - Stakeholder community law services and
    - Stakeholder welfare groups

## Section 3: General comments and feedback

### Section 3: Consumer Leases as alternatives to small amount credit contracts (TOR 3)

- 55 The Legislation only describes one definition for a consumer lease however industry practice shows that there are two distinct types of consumer leases being offered in the market:
- Operating style leases - Provided by lessors that supply the good themselves and support the good throughout the life cycle of the lease - deliver it, install it, provide on-site instruction in its use, provide off-site remote support, service the item, carry out any maintenance, repair and replace the item if/as required and uninstall the item.
  - Finance leases – arguably credit contracts under the Credit Act. There are two variants:

- Lessors who have goods “in store” and
  - provide consumers with a choice of those goods only and
  - who rely on warranties (including upsold extended warranty arrangements) to support the goods and
  - include a “no right or obligation” buy out option at the end of a fixed lease period that is intended to see the transfer of the good to the lessee, which event predominantly occurs.
- Lessors who have no shop front or storage at all and who do not carry stock and
  - provide consumers with a choice from a catalogue of goods OR
  - any other goods chosen from third party retailers and
  - who rely on warranties (including upsold extended warranty arrangements) to support the goods and
  - a “no right or obligation” buy out option at the end of a fixed lease period that is intended to see the transfer of the good to the lessee which event predominantly occurs.

56 A large number of the consumer leases provided by members of CHERPA are in the spirit of or in actual substance, “true leases” or operating leases<sup>3</sup>. Using the Australian Accounting Standards Board definition and classification method they can be defined as *operating*<sup>4</sup> leases, distinguishing them from a formal “true” lease (short term rentals) and from consumer leases that are either in substance or in intent *finance* leases (and therefore credit contracts) in the guise of consumer leases – see also paragraphs 60-75, 122-123.

57 There are a number of credit providers who are using regulatory arbitrage<sup>5</sup> in a *positive* way by providing consumers with more than is mandated by the law to give consumers a the product they genuinely want – consumers wanting substantially risk free and financial shock free use of essential goods for either a fixed term or indefinite period.

58 Supporting the rationale that many consumer lease provided by members of CHERPA are in fact operating leases the CHERPA Industry Code of Conduct mandates that:

- Goods can be returned at any time with minor adjustments only for early return - adjustments based on a recalculation using the different rental rate for the foreshortened rental period if any.
- Under hardship goods can be returned without any adjustment

59 There are a number of credit providers providing consumer leases in the market that are in fact using consumers leases as financing arrangements. We believe these leases should be redefined as credit contracts and regulated as such.

<sup>3</sup> Ali, McRae, Ramsay and Saw. *Consumer leases and consumer protection: Regulatory arbitrage and consumer harm*. (2013) 41 ABLR 240. A “true lease” is a lease where a lessee takes temporary ownership of a good and enjoys the rewards of ownership on a temporary basis. The consideration for this is the payment/s made to the lessor but the total sum of payments made generally do not exceed the cash purchase price of the good –because of the temporary nature of the relationship.

<sup>4</sup> Based on the definitions and classification method provided for in AASB 117 where if there is transfer of all risk and rewards of a good to the lessee the lease is likely to be a finance lease. If only part of the risk or reward is provide to the lessee it is likely to be an operating lease. In many cases for CHERPA members there is substantial transfer of the reward to lessees but very little transfer of the risk of ownership to the lessee.

<sup>5</sup> Ali et al at page 241 - Regulation arbitrage is: the manipulation of the structure of a deal to take advantage of a gap between the economic substance of a transaction and its regulatory treatment.

## Question 14: Specific Comment and Feedback

Question 14: The Credit Act applies different obligations to transactions according to whether or not the product is structured as a credit contract or a consumer lease.

Which leases could be considered comparable with SACCs?

60 According to Banks, de Silva and Russell<sup>6</sup> specific features of SACCs are, and we quote:

- *The credit comes in the form of cash, either as physical notes or a deposit in a bank account;*
- *There is fast access to this cash;*
- *It now typically takes less than 15 minutes for a consumer in North America, Europe or Australasia who has at least some paid work, a bank account and a smart phone to apply and receive a payday loan.<sup>7</sup>*

61 By comparison specific features of a consumer lease are:

- A physical good is provided to the consumer
- Whilst pre-approval can take 15 - 30 minutes, final approval takes 24 - 48 hours as documentation supporting the “not unsuitable” test is provided to the lessor;
- Consumers leasing goods from CHERPA members can return goods at any time
- Those experiencing hardship may terminate early without penalty – under the CHERPA Industry Code of Conduct.
- Consumer leases actually put essential household items in to homes - SACCs are only used 4% of the time to purchase goods that consumer lessors provide.<sup>8</sup>

62 The contention here is that SACCs are somehow comparable to and according to non-industry stakeholders can be conflated with consumer leases because they are:

- used by the same demographic
- for similar amounts of money
- both regulated under the NCCP Act
- have somewhat similar regulatory requirements

63 We agree that in these limited ways SACCs and consumers leases are somewhat comparable. However as we have shown above they are fundamentally different transactions. SACCs are a transaction for providing cash to consumers. Consumer leases are (or should only be) a transaction for transferring beneficial possession (not ownership) to a consumer without transferring all the risks of ownership.

64 So no consumer leases should not be considered comparable to SACCs. (see also para 20D & para 69).

<sup>6</sup> Marcus Banks, Ashton de Silva A and Roslyn Russell. Trends in the Australian Small Loan Market. School of Economics, Finance and Marketing RMIT University. October 2015.

<sup>7</sup> Ibid Banks et al at page 14.

<sup>8</sup> Banks, Marston, Karger & Russell, 2012. Caught Short. Exploring the role of small, short-term loans in the lives of Australians.

65 Further evidence against comparing and conflating SACCS and consumer leases:

- SACCs are used to get hard cash for short term solutions - which a consumer can spend on anything – including gambling or drugs<sup>9</sup>
- Consumer leases are used by consumers to get access to physical goods - essential household goods - that they can use for their own benefit of for the short, medium or long term.
- Cash coming from SACCs is subject to availability bias – cash is more easily spent when the cash is in the consumer’s hand<sup>10</sup>. It is very much harder to convert physical household items into cash and the pain of doing so is much more immediate – and so it is much less likely to happen.
- Consumer leases provided by our members always involves the provision of goods not cash. The important point to note here is that if there is an unexpected event creating hardship the goods can simply be returned (and in many cases may be replaced with cheaper items, even no-cost items) – not so with cash loaned out and already used.
- No-one needs 2, 3 or 4+ washing machines whereas the need for cash can seem endless and is therefore endlessly attractive.
- Cash is easily spent whereas it is not so easy to sell off an item of equipment that is clearly marked as belonging to someone else (the lessor).
- IMPORTANTLY under consumer leases with most CHERPA members, goods are provided in a fully serviced environment for the life cycle of the lease. The full service environment includes:
  - Transport to site
  - On site installation – often heavy, lifting work.
  - Onsite instruction in the use of the good
  - Phone support for the use of the good
  - Repairs/maintenance over the life of the good.
  - Replacement of goods whilst repairs are effected – especially on essential items
- MORE IMPORTANTLY consumers want (and importantly, in a number of cases critically NEED) the lessor to provide the above services. This is very important for many customers in all communities across Australia who:
  - Are illiterate (use and safety instructions explained, controls explained,)
  - Have impaired eyesight
  - Have impaired physical ability
  - Have impaired mobility
  - Have impaired intellectual ability
  - Have reduced psychological strength to persevere with achieving safe and effective set up of equipment.
  - Want to maintain a level of independence and use members’ services to aid that
  - Have developed a comfortable and trusting relationship with members and for whom unknown parties in their residence causes distress
  - Combinations of the above

<sup>9</sup> An ABC Four Corners report aired earlier this year showed payday lenders were providing credit to heroin addicts, "doling out loans at one end of the shop after the addicted person had pawned goods at the front desk" <http://www.smh.com.au/business/banking-and-finance/pensioner-with-a-gambling-addiction-taking-payday-lender-cash-converters-to-court-20150924-gjtka#ixzz3nmcstY5X>

<sup>10</sup> Jim Hawkins. *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*. Indiana law Council. Vol 89:1361. Page 1374. "Because the experience of spending (and borrowing) is relatively painless ... people underestimate the significance of accumulating debt."

- 66 If all consumer leases are conflated with SACCs and continue to be treated as simple financing arrangements, **our members will no longer be able to provide the critical community services listed above.**
- 67 In these circumstances a significant portion of the consumers who use consumer leases now with our members and who will want and NEED to use them in the future will be significantly worse off if this fundamental error in the premise that SACCS are comparable to all consumer leases is not corrected and the critical distinction clearly communicated.
- 68 Furthermore for a majority of consumers of all different walks of life who use consumer leases (of the operating lease type) to access goods, the very arrangement of the lessor accepting and managing the risk on behalf of the consumer, is exactly what the consumer wants, what has created the market that has existed for 80+ years meeting and is continuing to meet a very real and important consumer need.

#### IMPORTANT RECOMMENDATION:

- 69 Consumer leases **MUST NOT BE** conflated with the provision of credit or finance in the form of SACCs or anything else, otherwise a very significant number of consumers, many of whom are already vulnerable through social and financial disadvantage, will have the safety of this mitigated risk removed from their lives.
- 70 The majority of CHERPA members provide the “full support” consumers leases described above to their customers, **CHERPA lessors own all the risk of a good performing during the lease period.** Under these circumstances AASB 117 clearly defines these leases as operating leases.
- 71 For lessors providing genuine *operating* leases, the extra costs and risks borne (refer para 74 and AASB 117 excerpt cl.52 below) of fully supporting *operating* style consumer leases needs to be reflected in their business cost structure.
- 72 It is manifestly clear to CHERPA that some lessors operating in the market are simply providing credit contacts disguised as a consumer lease in that they are:
- **not** providing this full support service, taking on the operating risk during the term of the lease;
  - offering the statutory good warranty as the form of “service and support” and
  - further offering consumers the opportunity to pay extra for extended warranties that cover the length of a lease or other extras;
  - expecting the leased good to transfer to the consumer in the future after a specified fixed term having no storage physical storage arrangements in place to hold returned goods.
  - providing goods to consumers “sight unseen” (telling their customers to go to a retail stores where they select a good and then contact the lessor who makes payment and organises delivery from the third party retail store.)
- 73 Since these lessors are transferring all of the rewards AND all of the risks to lessees then clearly these consumer leases are actually financing leases – see also AASB 117 para 37 extract below.
- 74 Extracts from the Australian Accounting Standards Board (AASB) Standard 117<sup>11</sup> clearly support our view:

<sup>11</sup> [http://www.aasb.gov.au/admin/file/content105/c9/AASB117\\_08-15.pdf](http://www.aasb.gov.au/admin/file/content105/c9/AASB117_08-15.pdf)

**Definitions:**

A **lease** is an agreement whereby the lessor conveys to the lessee in return for a payment or series of payments the right to use an asset for an agreed period of time.

A **finance lease** is a lease that transfers substantially all the risks and rewards incidental to ownership of an asset. Title may or may not eventually be transferred.

An **operating lease** is a lease other than a finance lease.

**The inception of the lease** is the earlier of the date of the lease agreement and the date of commitment by the parties to the principal provisions of the lease. At this date:

- (a) a lease is classified as either an operating or a finance lease; and
- (b) in the case of a finance lease, the amounts to be recognised at the commencement of the lease are determined.

An **operating lease** is a lease other than a finance lease. (Note that many lessors, particularly CHERPA members, transfer most of the rewards of ownership to lessees but keep the risks of ownership. For example, most CHERPA members fully support, service, install, repair and conduct any required maintenance goods leased to their customers)

A **finance lease** is a lease that transfers substantially **all the risks and rewards** (our emphasis) incidental to ownership of an asset. Title may or may not eventually be transferred.

**Classification of leases**

- 7 The classification of leases adopted in this Standard is based on the extent to which risks and rewards incidental to ownership of a leased asset lie with the lessor or the lessee. Risks include the possibilities of losses from idle capacity or technological obsolescence and of variations in return because of changing economic conditions. Rewards may be represented by the expectation of profitable operation over the asset's economic life and of gain from appreciation in value or realisation of a residual value.
- 8 A lease is classified as a finance lease if it transfers substantially all the risks and rewards incidental to ownership. A lease is classified as an operating lease if it does not transfer substantially all the risks and rewards incidental to ownership.

**Finance leases:**

- 37 Under a finance lease substantially **all the risks and rewards incidental to legal ownership are transferred by the lessor**, (our emphasis) and thus the lease payment receivable is treated by the lessor as repayment of principal and finance income to reimburse and reward the lessor for its investment and services.

**Operating leases:**

- 52 Initial direct costs incurred by lessors in negotiating and arranging an operating lease shall be added to the carrying amount of the leased asset and recognised as an expense over the lease term on the same basis as the lease income.
- 55 A manufacturer or dealer lessor does not recognise any selling profit on entering into an operating lease **because it is not the equivalent of a sale**. (our emphasis)

**IMPORTANT RECOMMENDATION:**

75 CHERPA recommends that all consumer leases be clearly defined as either:

- 1) genuine **operating leases** or else
- 2) be re-classified as credit contracts covered by other areas of the NCCP Act.

## Question 14: Specific Comment and Feedback – cont’d, Should there be greater consistency, similarities between, etc...

Question 14: The Credit Act applies different obligations to transactions according to whether or not the product is structured as a credit contract or a consumer lease.

Should there be greater consistency in the regulatory requirements that apply to SACCs and comparable consumer leases? Please consider:

- The similarities between the consumer bases for SACCs and comparable consumer leases;

- 76 Some of the consumer base is certainly demographically and socioeconomically similar for SACCs and consumer leases. However mere similarity of demographic or socioeconomic status is not a valid reason for determining that two transactions are similar.
- 77 Again, there is a fundamental difference between SACC and consumer lease transactions - see above paragraphs 40 - 69.
- 78 The argument that consumer leases should be treated the same as SACCs appears to originate in the premise that consumers in a certain demographic and socioeconomic base need the same level of protections in both SACC arrangements and consumer leasing arrangements. These would be protections against abusive practices that might cause them to enter financial distress, over indebtedness and to enter “debt spirals” on the basis that this demographic has limited discretionary income.
- 79 This is evidenced by some stakeholders making the argument that “consumer leases are charging too much in interest for too long” thereby putting (or keeping) consumers into hardship or financial distress. If this is the argument then the problem is very simply fixed - refer to paragraph 80.

### **IMPORTANT RECOMMENDATION:**

- 80 CHERPA recommends that providers of consumer leases must allow return of goods under financial hardship conditions without penalising the consumer for early termination. This is already a requirement of the CHERPA Industry Code of Conduct.

## Question 14: Specific Comment and Feedback – cont’d: Should there be greater consistency, ...similar outcomes...

Question 14: The Credit Act applies different obligations to transactions according to whether or not the product is structured as a credit contract or a consumer lease.

Should there be greater consistency in the regulatory requirements that apply to SACCs and comparable consumer leases? Please consider:

- the similar economic outcomes of SACCs and comparable consumer leases;

- 81 We disagree that all consumer leases have similar economic outcomes. SACCs and consumer leases are only comparable in the instances where consumer leases are in substance *finance* style leases. SACCs and consumer leases are not comparable in the instances where consumer leases are in substance *operating* leases.
- 82 Where consumer leases are operating leases consumers do not bear the costs of maintaining, servicing, repairing or replacing goods across the lifecycle of a lease. Subsequently it cannot be true that the economic outcomes for these consumers is the same as a consumer who used SACC to buy a good outright. A consumer using a SACC to own a good outright would have to cover all maintaining, servicing, repairing or replacing faulty goods. This is exactly why some consumers choose to use consumer leases as operating leases to access their essential household goods.
- 83 This point also presumes that SACCs are used to purchase essentials goods when mostly they are not.<sup>12</sup> In fact SACCs are only used to 4% of the time to purchase goods that consumer lessors provide.<sup>13</sup> It is also very easy to take cash and use it recklessly<sup>14</sup> as opposed to having a physical good delivered and installed which is very much more difficult to turn in to cash that can be used recklessly.

## Question 14: Specific Comment and Feedback – cont’d: Should there be greater consistency, - ASIC evidence...

Question 14: The Credit Act applies different obligations to transactions according to whether or not the product is structured as a credit contract or a consumer lease.

Should there be greater consistency in the regulatory requirements that apply to SACCs and comparable consumer leases? Please consider:

- ASIC evidence<sup>15</sup> which suggests that the effective interest rate for some consumer leases is substantially greater than the maximum allowed for SACCs under the caps;

### 84 In regard to the referenced ASIC report:

<sup>12</sup> Ibid Banks et al (2015) quoting work of multiple other researchers ‘The promise of ‘fast cash’ is the small loan industry’s key point of difference in the AFS market. These loans are mostly used by customers to pay for recurring expenses (Schmitz 2014: 71). Australian and international studies of the small loan market consistently show that the most common reason for taking out a small loan is not pay for a ‘one-off’ expense but rather to cover some of the unmet costs of bills, food or other regular outlays (Banks et al. 2012; Beddows & McAteer 2014; Burtzloff & Groce 2011). Research by Pew in the United States shows that 69% of store-front borrowers and 73% of online consumers used their loan to cover a recurring expense, such as utilities, credit card bills, rent or mortgage payments, or food (Pew 2012).

<sup>13</sup> Banks, Marston, Karger & Russell, 2012. Caught Short. Exploring the role of small, short-term loans in the lives of Australians.

<sup>14</sup> <http://www.smh.com.au/business/banking-and-finance/pensioner-with-a-gambling-addiction-taking-payday-lender-cash-converters-to-court-20150924-gjtka>

<sup>15</sup> ASIC Report, Cost of consumer leases (September 2015).

- 85 CHERPA as the peak industry body has been actively trying to engage and work with ASIC for over 2 years and had thought it had a continuing working relationship up until the release of report 447.
- 86 We are deeply concerned that the methodology used to create Report 447 and the substantially misleading nature of its reporting has led to us to the belief that ASIC is deliberately positioning the whole consumer leasing industry as ripping vulnerable consumers off.
- 87 All the members that we have spoken to were horrified at the information presented by ASIC and particularly appalled at the misleading and utterly unrepresentative portrayal of much of the industry, particularly the segment our members represent.
- 88 We have written to the Minister Responsible for ASIC stating our very serious concerns including our concern that ASIC deliberately timed the release of the report to inappropriately and negatively influence the SACC Review.
- 89 More disappointingly ASIC have missed a real opportunity to conduct robust research with real credibility that would have helped deliver better outcomes for both the industry and consumers alike. To wit – our own comparison in this document of operating leases versus finance leases which could have been easily and instructively performed by ASIC instead of promulgating spurious results based on targeting outlier, possibly even rogue type operators.
- 90 Detrimentially for both consumers and industry alike, the undue negative influence promulgated by ASIC has had an effect because some of the either deliberately or inadvertently skewed findings of Report 447 are used in the SACC Review Consultation Paper and labelled “Current Industry Practice”. **Based on discussions with our members we absolutely refute that the practices outlined in Report 447 are broadly “Current Industry Practice”.**
- 91 Substantively what is stated here as evidence of “Current Industry Practice” appears to be the practice of a very few, possibly rogue type lessors, the kind that can be found in any industry from time to time and that form what are known in statistics as “outliers”<sup>16</sup>.
- 92 **In regard to “ASIC evidence which suggests that the effective interest rate for some consumer leases is substantially greater than the maximum allowed for SACCs under the caps”:**
- 93 It’s true that the cost of any one given consumer lease might be higher than a given SACC. It’s also true that some given consumer leases may be cheaper.
- 94 But firstly an important fundamental is being missed here in the comparison between SACCs and consumer leases ... Consumer leases are mostly for the supply of a PHYSICAL product not cash.
- 95 Subsequently the opportunity for an “at risk” consumer to create a debt spiral assisted by “overpriced” interest rates is significantly restricted by the fact that even if the good is overly expensive and putting the consumer into hardship the good can simply be returned. Indeed **under the CHERPA Industry Code of Conduct it is mandatory for all members to accept return of goods without any charges where a consumer shows that they are experiencing financial hardship.**

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<sup>16</sup> In [statistics](#), an **outlier** is a single observation "far away" from the rest of the [data](#). out li er n. 1.A value far from most others in a set of data: "Outliers make statistical analyses difficult" (Harvey Motulsky). In most samplings of data, some data points will be further away from their expected values than what is deemed reasonable. This can be due to [systematic error](#) or faults in the [theory](#) that generated the expected values. Outlier points can therefore indicate faulty data, erroneous procedures, or areas where a certain theory might not be valid. However, a small number of outliers is expected in [normal distributions](#).

- 96 In fact, unless rogue/abusive practices are being carried out (for example unreasonably high exit fees being charged for early termination of consumer leases) a debt spiral cannot be created. This is especially true for lessor members of CHERPA who, upon return of goods under hardship may offer the consumer even further assistance by providing a cheaper good and in some circumstances even provide a good free of any charge whatsoever ensuring that a distressed consumer continues to have use of an essential household good – washing machines, fridges, TVs, dryers, are common items where this takes place.
- 97 Where lessors are providing *operating* type consumer leases it would be normal to expect that comparative interest rates for operating leases might indeed be high because lessors must continue to provide their “full service” across the whole life cycle of an operating lease.
- 98 Where finance type consumer leases are being provided they should comply with the credit contract laws.
- 99 Whether there should be a cap for *operating* type consumer leases needs further research. The factors impacting a cap might be:
- The location of a business – city, regional, rural – because the physical costs bases are different for each
  - The size of the business that may affect purchasing power for goods and capital which has a direct impact on competitiveness
  - The degree of competition locally and more broadly in the market.

## Question 14: Specific Comment and Feedback – cont’d: Should there be greater consistency, effect on viability of market...

Question 14: The Credit Act applies different obligations to transactions according to whether or not the product is structured as a credit contract or a consumer lease.

Should there be greater consistency in the regulatory requirements that apply to SACCs and comparable consumer leases? Please consider:

- 100 No consumer leases should not be considered comparable to SACCs. (see paragraphs 20D & para 60 - 69).

- the effect of introducing new regulatory requirements on the viability of the consumer leasing market and the availability of consumer leases; and the impact of the distinction based on whether or not the consumer has a right or obligation to purchase the leased goods.

- 101 Whilst we believe that comparison of SACCs to consumer leases is invalid there are regulatory changes we recommend that would maintain or even increase the availability to consumers of beneficial consumer leases. We believe the changes significantly increase the benefits and significantly improve the protections for consumers.
- 102 The changes would increase the certainty for lessor businesses and help reduce some of the compliance burden for both businesses and ASIC as well.

- 103 As previously noted - CHERPA recommends that all consumer leases be clearly defined as either **genuine operating leases** or else be re-classified as credit contracts regulated by other areas of the NCCP Act.
- 104 As also noted previously some consumers specifically want and need the full service and risk mitigation provided by a genuine operating lease arrangements.
- 105 We've pointed out earlier in our submission that the current consumer lease law is not well enough defined and as a result certain providers are seriously exploiting the loose description of a consumer lease under the Credit Act providing goods to consumers using finance lease style arrangements disguised as consumer leases –an internal avoidance of the credit contract laws.
- 106 New regulatory requirements that we think will improve the viability of the consumer leasing market for lessors and lessees alike are:
- 107 Properly and clearly defining a consumer lease as an *operating* style lease only. Include in the re-definition the type and level of support to be provided throughout the lease.
- 108 Requiring that leased goods can be returned at any point in time:
- a. with rental payments adjustments if required for the foreshortened period of a lease and
  - b. with the rental payments for the various leasing periods disclosed at initial sign up and
  - c. with no other termination charges or fees other than:
    - i. costs for excessive damage greater than fair wear and tear and
    - ii. any collection fees already charged and
    - iii. any arrears already outstanding and
- 109 Requiring that the leased good can be returned at any time to the lessor under hardship provisions without any adjustments or charges other than costs for excessive damage greater than fair wear and tear and
- 110 **Extinguish payment arrears credit default reporting** to Credit Reporting Bureaus thereby providing consumers protection against minor default and also providing opportunity to re-build a useful credit rating.
- 111 Requiring that all leasing arrangements **not be subject to reporting to Credit Reporting Bureaus for arrears defaults** other than “skips” (where a lessee has not returned an item, is no longer paying for it and is not in contact with the lessor.)
- 112 The cost of these skips is significant in the industry and adds substantially to the cost structure burden of providing all consumer leases. The civil procedures available through the courts are not commercially viable to pursue “skips”. Therefore civil procedures do not work as a method to recovery goods or as a deterrent to prevent future fraudulent activity by abusive consumers. Laws relating to “skips” need to be significantly strengthened to become criminal offences - where lessees are refusing to return goods and are no longer paying for the good. A skip is actually a theft offence but theft offences are State laws and it is difficult, sometimes nearly impossible, to get police engaged in pursuing what are to them minor items.
- 113 Complementary with the lessee's ability to return goods at any time strengthen the lessor's right to pick up goods and the lessees lawful obligation to return goods in a timely way if they are not paying for them and are not in hardship or negotiating around same. Again, the cost of

skips is significant in the industry and adds substantially to the cost structure burden of providing all consumer leases.

### IMPORTANT RECOMMENDATION:

114 CHERPA recommends bringing the perceived problems with consumer leases “under control” by:

- Properly and clearly defining a consumer lease as an *operating* style lease only;
- Requiring that the leased good can be returned at any point in time with pricing adjustments for the foreshortened periods of a lease if required and
- Requiring that the leased good can be returned to the lessor under hardship provisions without any adjustments or charges other costs for excessive damage greater than fair wear and tear and
- Requiring that all leasing arrangements not be subject to reporting to Credit Reporting Bureau for defaults other than “skips” (where a lessee has not returned an item, is no longer paying for it and is not in contact with the lessor.)
- Significantly strengthen the law around “skips” to decrease the likelihood of it happening and remove some of the business risk (and therefore cost) of providing consumer leases in the market.
- Improve and strengthen a lessor’s right to pick up goods (repossession) and the lessee’s obligation to return goods
- Deeming all leases other than operating leases are to be arrangements for financing and therefore subject to other areas of NCCP Act.

115 Costs associated with complying with these additional requirements will be significant for some operators. Cost will include:

- Drafting changes to documented management systems
- printing cost for agreement forms;
- changes to management software to accommodate forms and to write programs for calculating costs;
- Staff education and training costs;
- Changes to website content;
- Changes to marketing content and collateral.

## Question 15: Specific Comment and Feedback: Should same provisions apply...

Question 15: As SACC and comparable consumer lease providers market to a similar consumer base, should the same provisions apply?

116 No. As detailed earlier in our response, simply having the same consumer base is not a good reason for broadly applying the same provisions. Our earlier comments and feedback on clearly distinguishing whether consumer leases are operating leases or financing arrangements apply to this section also.

**IMPORTANT RECOMMENDATION:**

117 As for para 75, CHERPA recommends that all consumer leases be clearly defined as either:

- 3) genuine operating leases or else
- 4) be re-classified as credit contracts covered by other areas of the NCCP Act.

**Question 15: Specific Comment and Feedback – cont'd:  
additional disclosures required?**

Should there be additional disclosure requirements for comparable consumer leases, such as a requirement to disclose?

118 Irrespective of our disagreement that SACCs and consumer leases are particularly comparable CHERPA believes in open and transparent arrangements with consumers. Subsequently we confirm the following recommendations below.

- Should there be additional disclosure requirements for the purchase or cash price of the leased good;

**IMPORTANT RECOMMENDATION:**

119 CHERPA recommends that an estimated retail or cash sale price of a leased good be clearly disclosed on the lease documentation. It is already included in the CHERPA Industry Code of Conduct.

- Should there be additional disclosure requirements for the amount the consumer will pay in excess of the purchase or cash price;

**IMPORTANT RECOMMENDATION:**

120 No CHERPA does **not** recommend that the amount in excess of an estimated cash sale price be disclosed on the lease documentation. It is unlikely to be relevant to consumers who are specifically choosing an operating lease.

- Should there be additional disclosure requirements for the cost of credit in dollar terms;

**IMPORTANT RECOMMENDATION:**

121 No CHERPA does not recommend that there be additional disclosure requirements for the cost of credit in dollar terms in a consumer lease.

- the cost of credit as an interest rate; and

122 Since there is no right or obligation to acquire a good, there is no intended transfer of ownership and therefore there is no debt being incurred during a consumer lease transaction. Since there is no debt there is no credit being provided and there is no interest rate to be disclosed in a consumer lease. Hence the distinction in the NCCP Act between sale of goods by instalment as a credit product and consumer leases.

123 In reality it is a fundamentally flawed logic that a properly setup *operating* style consumer leases even has an interest rate. The amount charged to consumers over and above the market value of a good over the term of a lease agreement is for the provision of support and servicing that might need to take place. This is analogous with the provision of a telephone line rental to a consumer premises. Presumably the line rental is substantially for the service and support that might be need over the time that a line is rented as opposed to the cash cost of the wires bringing the service which would have been essentially amortised to zero.

#### IMPORTANT RECOMMENDATION:

124 That the cost of credit as an interest rate not be disclosed in a consumer lease since the transaction is not a debt transaction to which an interest rate can apply and would be likely to create confusion for a consumer as to the nature of the transaction.

- the cost of other services financed through the rental payments (apart from the cost of hiring the goods, such as a warranty or delivery)?

125 In an *operating* style consumer lease we believe that there should be no extra charges apart from:

- The agreed rental payments
- Delivery
- Payment for repairs over and above fair wear and tear.
- Other reasonable charges such as debt collection, etc.

126 We note that some current lessor businesses offer the statutory and manufacturer warranties as an indication that they “fully support” the good being leased. This support is the same as is provided when purchasing goods under a sale by instalment - credit contract. We note that these companies also offer consumer extended warranties to buy to cover periods of the consumer lease outside the normal warranty period.

#### IMPORTANT RECOMMENDATION:

127 As previously stated CHERPA recommends that consumer leases be redefined as *operating* style leases. A foundational element of the *operating* style leases is the level and type of support to be provided by the lessor throughout the lease.

## Question 15: Specific Comment and Feedback – cont’d: modify SACC provisions?

Question 15: If greater consistency between SACCs and comparable consumer leases is considered warranted, which SACC provisions should be extended to those leases?

Would the SACC provision need to be modified when applied to consumer leases?

128 We’ve noted earlier our disagreement that SACCs and consumer leases are at all comparable. Where they are comparable in any way then the consumer lease is almost certainly a finance arrangement and should be treated as such – ie a sale by instalment with a credit contract. So SACC provisions will not need to be modified and should never be applied to consumer leases.

## Question 16: Specific Comment and Feedback

Question 16: If a cap on consumer leases that are comparable to SACCs was introduced, how should the cap apply?

129 We’ve noted earlier our disagreement that SACCs and consumer leases are at all comparable.

130 In preparation for this submission a small analysis of a few CHERPA members was conducted and it found that the SACC interest cap would be unsustainable and would have a severe to catastrophic impact on the industry and the consumers who use it to access essential household goods.

131 If any consideration was made to establish a cap rate for *operating* type consumer leases CHERPA strongly urges that independent, proper and robust research of industry operators be first conducted.

132 CHERPA and its members are fully committed to working with industry stakeholders and independent research institutions to collect data, participate in research, etc.

### **IMPORTANT RECOMMENDATION:**

133 CHERPA recommends that caps not be applied to consumer leases because a significant portion of them are operating style leases and a cap would significantly impact the viability of the industry with a flow on significant negative impact on the vulnerable consumers who are trying to access essential household goods.

134 Since there are non-existent to very small barriers for consumers to return goods to lessors under CHERPA’s Industry Code of Conduct , CHERPA believes the industry would be relatively competitive and therefore economically efficient in providing *operating* style consumer leases as previously described and that are compliant with the CHERPA Industry Code of Conduct .

135 Since almost all the risk in the market evolving from lessors compliant with the CHERPA Industry Code of Conduct a ‘provision of credit’ style cap would be counter-productive to

achieving market efficiencies and run the very real risk of creating a “black market” through business model avoidance or some other contrivance through internal avoidance.