Review of the Small Amount Credit Contract Laws: consultation on the regulation of small amount credit contracts and comparable consumer leases

Submission by Legal Aid Queensland

Legal Aid QUEENSLAND

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Review of the small amount credit contract laws: Consultation on the regulation of small amount credit contracts and comparable consumer leases.

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 (CPU) lawyers have extensive experience providing specialist advice and representation to vulnerable clients in consumer law matters. The CPU provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to:

- mortgage stress
- housing repossession
- debt
- contracts
- credit contracts (including small amount loans and consumer leases)
- telecommunications and unsolicited consumer agreements (including door to door selling).

This submission is informed by that knowledge and experience

Question 1: Competing objectives

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

LAQ has an 'in principle' objection to the provision of small amount credit contracts at high cost to vulnerable Queenslanders. In our view, ensuring consumers can access affordable credit should be the objective rather than the viability of the industry or accessing credit at high cost.

Small amount loans are inherently exploitative. In LAQ's experience most of these loans are used by borrowers to pay bills and other household necessities or make poor purchasing choices. In addition, distressed borrowers are not steered towards making hardship applications with their existing service providers and or accessing assistance through financial counsellors and low cost loan schemes to reduce their levels of debt. Instead high cost small amount loans are written which do not improve and often worsen a vulnerable consumer's financial position.

Crucial to consumers accessing affordable credit are public-private partnerships funding No Interest Loan Schemes ("NILS") such as "Step up" and other products. However these schemes do not have a widespread

presence and cannot compete with more visible Small Amount Credit Contract (SACC) providers offering instant access to cash. In addition NILS and similar schemes have a funding focus on supporting the purchase of whitegoods or tangible products rather than providing cash to pay bills.

By way of example the local No Interest Loans Scheme (NILS) service located in Inala Queensland, operates for just 12 hours a week in an area recognised as particularly disadvantaged. Anecdotally, when raising the possibility of obtaining a NILS loan with borrowers who we have assisted, consumers are generally unaware of NILS's loans schemes or have advised that it is difficult to obtain an appointment with such a scheme to make an application for credit.

Question 2: Complexity

Could the current regulatory regime be simplified in a way that provides consumers with the same, or a higher level of, protection while reducing the regulatory burden on industry?

Effective interest rates prior to the introduction of a QLD cap on the cost of credit

Prior to the introduction of a limited interest rate cap in Queensland, LAQ's experience was that the average interest rate offered by small amount lenders exceeded 240% with effective interest rates up to 1600%. A research paper by Griffith University had identified a credit contract with an effective interest rate of 3000% (Nicola Howell, 2008).

Avoidance of the QLD cap on the cost of credit

After the introduction of the cap on the cost credit in Queensland in 2008 to 48%, LAQ observed a general downward pressure on effective interest rates. However, over time effective interest rates increased with the development of new loan structures being offered by companies which attempted to avoid the cap on the cost of credit.

The most commonly used model involved the use of a "broker" to assist with the negotiation of the loan. The brokerage model only appeared in the market once a Queensland interest rate cap inclusive of fees and charges was introduced.

Common features of the brokerage model are:

- A shopfront is established. Operating from the shopfront are lender and broker. These were often separate but closely related companies. A customer is required to use the broker to access a loan from the lender operating from the same shopfront. The customer is usually unable to obtain a loan directly from the lender and has to first make an appointment with the broker who assists the customer to complete the loan application. In the mind of the customer who had entered a "shopfront" and from the customer's perspective it is difficult to understand and differentiate the lender and broker as separate entities.
- The customer agrees to pay a brokerage fee to the broker and interest in some cases to the lender (the disclosed interest ranges up to 48%).
- The lender collects the payments but might use the broker's software to do this.
- The lender and the broker share common shareholders and registered offices and the borrower is unable to distinguish between the broker and the lender, suggesting the arrangement is not at arms-length.
- The broker advertises that borrowers could obtain loans from them (eg cash converters). The lender is not mentioned in any advertising and the broker does not advertise that it provides brokerage services.

- The broker does not source loans from any other lender.
- The brokerage fee is charged even when the loan is being refinanced or the borrower is seeking another loan and where it is not clear that they had engaged the broker services

Because the regulatory bodies did not take regulatory action in relation to these schemes some members of the industry were of the view that the "Broker model is recognised as a legal lending model by state OFT's and ASIC" and therefore could not be challenged.

The fact that legal action is prohibitively expensive made it difficult for consumer advocates to challenge this view.

Difficulty accessing solutions for consumers prior to the introduction of the SACC regime

The avenue of redress for consumers challenging unconscionable interest rates or companies seeking to avoid the cap was either a complaint to the relevant financial services ombudsman (if the lender was a member) or to court.

Taking action on behalf of consumers was difficult and very resource intensive. Also, when the broker model was challenged with the Credit and Investment Ombudsman, that entity declined to make a decision about whether the brokerage model breached the interest rate cap operating in Queensland on the ground that the model had not been judicially considered.
http://www.cio.org.au/cosl/assets/File/Credit%20Decision%2025%20May%202012(2)(1).pdf

Legal action was and remains prohibitively expensive

Prior to the introduction of the 48% interest rate cap, Queensland had the benefit of the Court of Appeal's decision in *State of Queensland v Ward & Anor* [2003] QCA 366. This decision made it clear that a court would find interest rates in excess of 100% unconscionable. Despite this decision, unless consumer lawyers commenced court proceedings case by case (*Cash Solutions (Aust) Pty Ltd v Turner & Anor* [2008] QDC 108), they were unable to convince Small Amount Lenders that interest charged above 100% was unconscionable and therefore not recoverable. Nor could consumer lawyers, despite the caselaw, influence the rates charged by this market. Rates of 240% became the norm in the fringe lending sector in Queensland. The regulator and LAQ lawyers were powerless to impact on the practice of charging such rates except in individually hard-fought cases.

Even with the introduction of responsible lending requirements when credit was transferred to the Commonwealth, while extremely useful for individual cases, we could not demonstrate the clear legislative intent that usurious interest rates are unacceptable without the current cap on the cost of the loan.

Effectiveness of the legislation

The effective interest rate allowed to be charged under a SACC loan is close to 100% when the fees, interest and charges are taken into account.

The legislative requirements have had the effect of reducing avenues for avoidance, reducing the cost to consumers of credit and at the same time reducing the number of borrowers seeking assistance because they are burdened with the repayment of multiple small amount loans or are in a debt spiral due to successive and repeat borrowings.

In effect the current cap on the cost of credit does balance the viability of the industry with the consumer's desire to access credit.

Recommendation

LAQ supports the retention of existing protections for consumers of small amount credit contacts.

Question 3: Sanctions

The Credit Act imposes three types of sanctions - civil penalty breaches, criminal breaches and infringement notices.

- *Is the current sanctions regime working?*
- *Are there any enhancements that could be made to the sanctions regime to make it more effective?*

LAQ's view is that the current sanctions regime is appropriate. This is evidenced by the successful use of the regime by the regulators in obtaining judgments such as in ASIC v Cash Store Pty Ltd (in liquidation) [2014 FCA 926 and ASIC v Cash Store Pty Ltd (in liquidation) (No 2) [2015] FCA 93. It is also evidenced by the regulator's use of other methods available under the sanctions regime including the cancelling of credit licences and the use of enforceable undertakings.

What is key to the successful operation of the current sanctions regime is ensuring that the regulator, ASIC is provided with enough resources to ensure that they can fulfil their vital enforcement role.

Question 4: Obligation to obtain and consider bank account statements (TOR 1.1)

The law currently requires SACC providers to consider a consumer's bank account statements for at least the preceding 90 days.

- *Is the requirement to obtain and consider bank account statements necessary given the broader responsible lending obligations?*
  - *Are there more effective ways to obtain information about the financial situation of a SACC customer? If so, specify the alternative ways for obtaining information and whether the alternative is simpler, cheaper, or provides more useful information.*
- *Is it appropriate for SACC providers to use bank account statements for purposes other than complying with the responsible lending obligations, such as for marketing?*

Use of bank account statements

Bank account statements provide a rich source of information about the borrower's current income and expenditure. They are cheap to obtain as consumers can often access statements on line and banks generally do not charge for current or recent statements.

Bank account statements can be used to interrogate potential borrowers about the information provided in loan applications. Judicious use of information contained in bank account statements can be used to confirm sources of income, how long the person has been employed, whether the person is single or partnered,

whether they may have a disability affecting their capacity to contract (payment of a Disability Support Pension) and whether they may have a gambling problem (regular and frequent withdrawals at ATMS at hotels and clubs for example).

They are most effective in showing regular expenditure commitments that the borrower may not have mentioned in their loan applications such as repayments of fines, child support, pay tv, phone and internet contracts, repayment of goods and services (using Certegy), private school fees, health insurance, and or payment arrangements for electricity, water or other debts.

Some lenders when assessing eligibility will just rely on a benchmark such as the Henderson Poverty Index (HPI). Such a benchmark when used in isolation without reference to a consumer's actual commitments and liabilities can give a false impression that the consumer can afford the loan and that a loan can be responsibly made to that individual consumer.

The information contained in a consumer's bank statement is the clearest and most accurate source of a consumer's income and expenditure which is vital in allowing a SACC lender to make an accurate decision about the affordability of a loan under responsible lending requirements.

In a recent matter (not involving a SACC) an examination of the bank account statement of the borrower at the time the application for finance was made would have shown that the borrower was partnered, that they were in receipt of a New Start allowance and they had only recently commenced employment. These facts were not reflected in the application for finance and the proposed loan was irresponsible.

It is acknowledged that one of the pitfalls of the requirement that lenders obtain bank account statements is that unsophisticated consumers may give lenders access to PINs and account numbers to enable the lender to access their information online without realising the consequences of providing such information. Evidence of this practice in the past was unearthed when 'book-up' was investigated in regional Australia. Vulnerable consumers were found to have given shopkeepers and taxi drivers access to their PINs.

Recommendation

LAQ supports the retention of the requirement on SACC providers to consider a consumer's bank account statements for at least the preceding 90 days.

Lenders should be advised that the collection, use and retention of access PINs is prohibited.

Use of bank account information for other purposes including direct marketing

Issues with consent to use of information for other purposes

Consumers provide their bank account statement because it is a requirement of the law, the lender's application guidelines require it and because they are seeking a financial accommodation from the lender.

In that respect they are already in a weaker bargaining position than consumers purchasing other goods and services where the consumer either opts in or opts out of the use of their information for other purposes.

The information contained in bank account statements is itself a very rich data set and it is difficult to imagine in what circumstances the use of that information by the lender for other than statutory purposes could benefit the consumer. One of the reasons that lenders seek this information is for the purpose of direct marketing to consumers.

LAQ does not believe that the legislation should permit the use of information obtained from access to bank statements for direct marketing by SACC providers.. Small amount lenders seek this access for direct marketing as they argue that without it there is an unfair competitive advantage for larger companies.

An argument that legislation should allow an increase in direct marketing to consumers is flawed as it is premised on the notion that direct marketing of credit is beneficial to consumers.

Unsolicited credit offers have significantly contributed to household debt in Australia and was the reason why a ban on unsolicited credit card offers was introduced into the National Consumer Credit Protection Act 2009 (NCCP).

The information obtained from bank statements is useful for tailoring offers of credit to consumers, because it allows the credit providers to gain a better understanding of the way the individual consumer spends and what products they are likely to find attractive. For SACC loans this is particularly problematic as they are significantly more expensive than other product offerings and remain targeted at the financially vulnerable (including low paid workers).

Recommendation

LAQ recommends a prohibition on the use of any information contained in the consumer's bank account except for the legitimate purpose of assessing the suitability of the credit and financial product offered.

Question 5: Restrictions on repeat borrowing (TOR 1.2)

There is a presumption that a SACC is unsuitable if either the consumer is in default under another SACC or in the 90-day period before the assessment the consumer had two or more other SACCs.

- *How do SACC providers determine whether a prospective customer has a SACC with another SACC provider or is in default under another SACC?*

As there is a requirement on a SACC provider to obtain 90 days of bank account statements from the prospective customer, it is relatively easy to establish whether the prospective customer has a SACC with another provider.

Every SACC provider has a self interest in ensuring that the bank account statement provided by the consumer is the same bank account statement into which the client's main source of income is paid as this is the account they would likely seek to have theiir own direct debit payments made from.

When assisting customers who have a dispute with the SACC provider, LAQ has had little difficulty in obtaining information about SACC arrangements from the bank statement. Where a regular debit is shown on the bank statement a simple questioning of the consumer will bring to light repayment of a SACC.

LAQ acknowledges that it is difficult to establish whether a person has defaulted under a previous SACC. Other SAAC loans in default can easily be identified where the loan was with the same SACC provider (which is quite common because of repeat borrowings). Where the SACC loan has been obtained from another provider the bank account statement will reveal evidence of failures to make a regular payment on due dates which would then require investigation to determine whether the other loan is in default.

While a mandatory register of SACC loans is attractive for this purpose, it would not be sufficient to displace the need to consider bank account statements. In addition registers have numerous issues relating to privacy, access, correction, dispute resolution, mandatory reporting, monitoring and compliance. Resolving these issues can be costly and would ultimately be passed on to consumers. These are consumers who are already vulnerable financially and least able to afford extra costs. It is difficult to see how a stand alone register's benefits would outweigh the detriment to consumers.

Is a restriction on repeat borrowing necessary to protect consumers?

LAQ's past experience is that many borrowers only seek assistance when they are unable to repay the small loans they entered. This was usually as a result of either repeat borrowings or multiple small loans.

It was is uncommon for consumers to approach LAQ after they have borrowed from the same provider on numerous occasions with some consumers having had more than 30 loans with a small amount lender. Many loans prior to the introduction of the SACC restrictions were given to repay the last loan and others were rolled over, increasing the consumers' indebtedness.

Anecdotally, some mental health workers have reported that they sought guardianship orders for their clients who were caught in a spiral of repeat loans.

Recommendation

In LAQ's view a restriction on repeat borrowing is necessary to protect consumers, as it encourages them to seek assistance earlier and before the much greater harm of multiple borrowings and a debt spiral occurs.

This restriction is critical for the protection of consumers and should remain.

- *Is a rebuttable presumption or a bright-line test (e.g., an outright ban or a limitation on the number of SACCs that a consumer can take out in a certain period of time) more effective? When responding, please consider:*
  - *the degree of protection afforded to consumers;*
  - *the complexity for SACC providers who are making a decision to grant a loan;*
  - *the cost of complying with the requirement; and*
  - *the flexibility afforded to SACC providers and whether this flexibility is desirable.*

LAQ has no data or experience that would prefer one approach over the other. Generally our casework experience is that the rebuttable presumption appears to be working and has effectively morphed into a "bright line" test as few providers are providing loans where there are repeat borrowings or they have established that the consumer has defaulted under a previous SACC. In LAQ's view the presumption is providing protection for consumers as was envisaged by the legislation.

- *Would the objective of limiting a debt spiral through repeat borrowing be assisted by requiring SACC providers to rely on a recognised prescribed benchmark, such as the Household Expenditure Measure or Henderson Poverty Index (with or without an added margin)?*
  - *If so, do stakeholders have any views on which benchmark should be used?*
  - *How should a benchmark be used? For example, should the use of a benchmark replace the need to make inquiries about a consumer's expenses or the rebuttable presumption?*
  - *What is the likely cost or saving of requiring SACC providers to use benchmarks?*

Recognised prescribed benchmarks are extremely helpful in setting a minimum amount that a consumer requires to live above the poverty line. This makes it relatively easy to argue that the SACC is irresponsible if made to a consumer who relies solely on a Newstart payment or some other pension entitlement or benefit (with high rental costs). However, in our view it would not be enough to just rely on a benchmark with a margin.

The danger of requiring a lender to rely on a HEM or HPI benchmark is that it fails to take into account actual expenditure by the household on goods and services that are not included in the benchmark. The expenditure may not be discretionary, e.g. fines, other loans, child support, private school fees, health insurance, gym memberships, foxtel contract and or the actual cost of housing rather than the average cost. When these commitments are taken into account the loan may be irresponsible even where the income of the consumer exceeds the relevant benchmark. A balance would require the application of the HEM or HPI benchmarks together with consideration of the individual circumstances of the consumer.

Recommendation:

LAQ recommends prescribing either the HEM or HPI benchmarks in assessing suitability in conjunction with an examination of the individual's circumstances based on a minimum of an examination and interrogation of the consumers; bank account statements.

Question 6: Ban on short term credit contracts (TOR 1.3)

The Credit Act prohibits loans with a term of 15 days or less.

- *Has the prohibition on short-term lending been effective in preventing lenders from offering loans with a term of 15 days or less?*
- *Has the prohibition on short-term lending had any unintended consequences that mean it should be changed? If so, please provide examples of these consequences.*

The justification for imposing a ban on loans with a term of 15 days or less was that it was recognised that they were inherently harmful to consumers. The prohibition has been effective and we have not observed any unintended consequences caused by the imposition of the ban.

Recommendation

LAQ recommends retaining the ban on short term credit contracts with a term of 15 days or less.

Question 7: Warnings (TOR 1.4)

The Credit Act requires SACC providers to provide a specific warning statement to consumers.

Are the warning statements effective? Could the statements be improved? When responding, please consider:

- *the content of the warning; and*
- *the manner in which it is displayed.*

Should SACC providers be required to include a hyperlink to the MoneySmart website when warnings are displayed on webpages?

For vulnerable and disadvantaged consumers the warnings do not appear to have influenced their decision to accept finance from a SACC provider. As most consumers only approach LAQ for assistance when they are in financial difficulty it is difficult to gauge the warnings' effectiveness.

Warnings may assist more sophisticated consumers but are unlikely to result in vulnerable consumers changing their behaviour in response to the warning statement.

The effectiveness of the warning statement is based upon the premise that most consumers entering into the SACC loan markets have a choice as to whether they would like to enter the market based on the price and the attributes of the SACC's being offered.

In LAQ's experience, vulnerable consumers do not act like a rational buyer in a normal economic market because they are often seeking the loan to pay for basic necessities in the immediate short term. It should be acknowledged that consumers in the market for SACC loans have limited access to mainstream credit. Other alternatives such as NILS and step-up are often unable to meet the need for quick access to short term loans, which means that the consumer has y have no alternative but to accept the terms that are offered by the SACC provider.

Question 8: Caps on costs (TOR 1.5 & 1.6)

The Credit Act currently caps establishment fees at 20 per cent of the credit amount, monthly fees at 4 per cent of the credit amount and the total fees payable in default to twice the credit amount.

- *The policy intention in respect of the rate at which the cap on cost was set was to provide adequate protection to consumers and continue to allow the SACCs industry to operate. Do stakeholders think the cap has broadly met this objective?*
  - *When providing a submission, please provide data, such as evidence that it is not viable for businesses to operate or evidence as to how the amount of the cap is causing financial hardship to consumers.*

LAQ's anecdotal experience is that the cap on the cost of credit, in conjunction with the enhanced responsible lending requirements, particularly the presumption that the loan is not suitable if the consumer has two or more SACCs or is in default of a SACC in the last 90 days, has reduced the financial hardship of consumers.

If the suite of protections that accompany the cap were not in place then the cap on the cost of credit would be insufficient to address the concerns about the financial hardship of consumers.

The future challenge appears to be dealing with Medium Amount Credit Contracts (MACC), as a cap of 48% plus a 20% application fee for amounts between $2000 and $5000 is a significant cost for consumers. For a $5000 loan, if interest only payments were made, the application fee could amount to $1000 plus $2400 for interest annually.

It is also possible for the consumer to have a SACC and a MACC at the same time which could create substantial financial hardship.

- *ASIC Class Order 13/818 granted temporary exemption from the cap for certain medium amount credit contracts (MACCs) and allowed small amount credit contracts (SACCs) providers to exclude fees charged for direct debit processing from the caps. Should the temporary exemptions provided by Class Order 13/818 be made into regulation?* https://www.comlaw.gov.au/Details/F2013L01262

There is no maximum amount that is able to be imposed as a direct debit processing fee in the class order. The concern is that the fee will rise over time as a means of extracting more revenue from consumers particularly if the exemption is made into a regulation.

There is wide disparity in the amount that service providers charge for a "direct debit" processing fee and it often depends on the account from which the direct debit is made. In the telecommunications area, Telstra does not charge a direct debit processing fee made from a debit account while Vodaphone charges $0.60 per transaction.

Certegy Pty Ltd charge $2.95 for a direct debit processing fee. This company collects payments from consumers on behalf of businesses who have sold consumers interest free products or services.

In the circumstances it may be reasonable for the exemption to continue but with the expectation that ASIC may tighten Class Order 13/818 if processing fees for direct debits increase over time.

Recommendation

LAQ recommends retaining the current cap on the cost of credit in relation to SACC if other protections are retained.

LAQ recommends research into whether MACCs are causing significant financial hardship.

LAQ recommends that the exemptions provided by Class Order 13/818 not be made into a regulation.

Question 9: Protection for Centrelink customers (TOR 1.7)

The Credit Act caps the amount of the repayment for consumers who receive 50 per cent or more of their gross income from Centrelink payments to 20 per cent of the consumer's gross income.

- *Is the protection for consumers who receive 50 per cent or more of their income under the Social Security Act 1991 working effectively?*

- *Do any additional groups of consumers need to be subject to specific protection in relation to SACCs? For example, should the provisions be extended on a similar basis to persons whose income is less than a specified amount or recipients of payments under the Veterans' Entitlements Act 1986?*

In our view this provision is largely ineffective as it difficult to imagine any circumstance where a SACC made to someone reliant on Centrelink would be responsible if more than 20% of their gross income was directed to the repayment of a SACC loan. The unintended consequence of the requirement is that it could have the effect of implying that if the payment is less than 20% of the consumer's income it is responsible.

Question 10: National database (TOR 2.1)

The review is required to consider whether a SACC database would enhance the capacity of SACC providers to meet the responsible lending obligations by providing them with access to more comprehensive and accurate information.

- *Is there sufficient information currently available for a SACC provider to meet the responsible lending obligations?*
- *If not, would a database or alternatives such as comprehensive credit reporting be a more effective way to meet the responsible lending obligations?*
- *If a SACC database is considered an effective method to meet the responsible lending obligations, please comment on:*
  - *the cost of a database;*
  - *any privacy concerns;*
  - *the advantages and disadvantages of having multiple databases operating in parallel;*
  - *whether a database would assist SACC providers to discharge the responsible lending obligations; and*
  - *the effect of the comprehensive credit reporting (CCR) regime, including whether or not additional information could be obtained through a SACC database that would not be available through CCR.*
- *a recommendation was made to introduce a database:*
  - *What information should be included in the database?*
  - *Who should manage the database (a third party or government agency)?*
  - *How should the database be funded?*
  - *Should reporting of key information be mandatory or voluntary?*
  - *Should SACC providers be required to check the database and, if so, when should this obligation be triggered?*

- *Should SACC providers be charged a fee for accessing the database and, if so, should the fee be included in the cap?*
- *Who should be permitted to access and amend information on the database?*
- *What mechanism should be available to ensure that the database was accurate?*
- *How should the database interact with the other responsible lending obligations?*

The establishment of the comprehensive credit reporting CCR regime involved many years of consultation between government, consumer advocates and industry groups to ensure that the privacy concerns of consumers were appropriately balanced with the desirability of having a database that could assist lenders in making appropriate lending decisions.

In LAQ's view there is little benefit in developing another database that will not have the same protections for consumers as those offered in the CCR regime.

In addition, having a central database will be a further disincentive for lenders to interrogate bank accounts in depth as they will have an alternative source of information in relation to previous and current SACC loans.

In our view, if a national database were to be developed it should come under the auspices of the CCR framework with all of the rights and protections for consumers that currently apply to information on the data base.

As it is understood by LAQ the current CCR regime would allow the SACC lender to determine whether the person was in default of a SACC loan or whether they were already a borrower under one or more SACC loans.

The accuracy of the CCR regime is dependent on every lender providing timely and accurate information to the CCR. This remains an issue for lenders who may not themselves have the systems and processes to provide that information in a timely manner. Such limitations are also likely to be encountered in any stand alone register.

Furthermore, sharing of information must be mandatory for the system to be effective in disclosing the required information

LAQ's understanding is that the reason SACC providers are not accessing the CCR is because of the expense of doing so. Instead of developing a new register which is either funded by industry (and therefore ultimately by consumers) or government it may perhaps be more prudent to negotiate with the CCR providers to allow limited access to information required by SACC lenders at a reasonable cost.

The danger of any database is that it becomes the tool by which lenders can abrogate their responsibilities to lend responsibly. This is particularly so if they are able to rely on the information in the register in making their decision as to suitability of the lending in circumstances where they may have other information (eg bank statements) that contradict the information in the register. In addition, it may mean that instead of a CCR being a one stop credit check, SACC and other lender's will not have a comprehensive picture of the client's overall indebtedness without checking the existing CCR and any new database.

Recommendation

LAQ recommends that any SACC database should not be a stand alone database, but part of the current CCR regime.

Question 11: Additional provisions for SACCs (TOR 2.2)

The terms of reference require consideration of whether any additional provisions relating to SACCs should be included in the Credit Act.

- *Are there any additional provisions relating to SACCs that should be included in the Credit Act taking into account the objective of the legislation? For example, are there any provisions that have been effective in other jurisdictions that could be introduced?*

LAQ does not have any comments to make in relation to this question.

Question 12: Anti-avoidance provisions (TOR 2.2)

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

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

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

A distinction should be drawn between non-compliance with existing legislation and business model avoidance.

Non-compliance with current legislation

Failure to comply with the responsible lending provisions remains the primary way in which industry is failing to comply with existing legislation.

One major SACC lender used percentages to determine monthly expenses. By way of example, the mother of three children whose monthly income was assessed at $3247.00 was assessed as having $1846.00 of uncommitted income per month after 25% of her income was used as the default amount of rent she paid and 15% of her income as the default amount of her share of living expenses. Whereas if the HPI had been used to benchmark her capacity to pay together with a review of her actual income and expenses from her bank statement, it would have been clear that she was living below the poverty line when her actual debt and expenses were taken into account.

There is a general failure by the industry to interrogate bank statements as to current income and expenditure. Our experience is that the statements are always collected but rarely used to adjust estimates made to living expenses.

Structuring repayments to extend term of the loan with larger payments at the beginning of the term and smaller payments at the end

This practice is best illustrated by an example from LAQ's casework. A loan for $600 imposed an application fee of $120 and was repayable over 12 months. It required 13 fortnightly payments of $58.15 followed by 13 fortnightly payments of $19.38 (approximately $260.00). After the initial 13 payments only $80.00 remained outstanding under the loan; however by reducing the payments for the remaining term, the lender was able to extract an extra $140.00 approximately from the consumer.

LAQ has assisted two consumers who presented with this repayment arrangement. When asked why they had chosen to repay the loan in that way, they said they had not requested it and did not know why it was structured in that way.

Consolidating SACC and providing additional credit to create a MACC

LAQ has observed an example of where the SACC provider appears to have created a MACC when otherwise a further SACC would have meant that there was a rebuttable presumption that the loan was irresponsible. LAQ does not have any current evidence that this is a widespread issue.

Consumer Lease

Since the introduction of the cap on the cost of credit, there has been a shift from providing SACCs to providing consumer leases.

One of the particularly effective measures under the SACC regime is the inability to take security to secure repayments under the loan.

This is not the case for consumer leases, where in addition to the leases not being subject to the cap on the cost of credit the lender also retains ownership of the leased goods.

This arrangement allows the provider to threaten to repossess the goods if the payments are not made. Providers can also report the goods as stolen if the consumer breaches the leasing agreement or does not return the goods when requested. While it is uncommon for lenders to make a police report, it does occasionally occur and consumers maybe charged with a criminal offence. LAQ is aware of other cases where lenders have advised consumers that they intend to make the police report. Any advice that is provided to consumers seeking assistance must address the possibility of the lender complaining to police and charges being laid, in addition to their rights under consumer law.

A customer service officer in a relatively large consumer lease provider advised a LAQ client that they intended to report his failure to pay and to return the leased goods to the police. When this was raised with the provider, the provider apologised but it remains concerning that such a threat was used at all.

In LAQ's view caps on the cost of credit should apply to SACC loans and to consumer leases more generally.

Recommendation

LAQ recommends all protections in the NCCP relating to loans also apply to consumer leases.

Question 13: Documentation of suitability assessments (TOR 2.2)

The Credit Act requires lenders to make an assessment that the proposed SACC is not unsuitable.

- *How do SACC providers currently meet the requirement to make a suitability assessment and what records of the decision-making process are maintained?*
- *What is the most efficient and effective way to document suitability assessments? Is it possible to use the same steps for actual compliance and demonstrable compliance?*
- *Should SACC providers be required to document the assessment? Please consider whether such a requirement could lead to greater transparency.*

The current assessments for SACC loans appear formulaic and of little value to consumers. It is not clear how changing the suitability assessment and documentary requirements will improve suitability assessments. LAQ's view is that this is not just an issue for SACC providers but also for lenders more broadly.

In LAQ's experience where lenders are engaging with the individual circumstances of a client and reflecting that consideration in the suitability assessment, consumers benefit. Unfortunately, most suitability assessments LAQ has seen have lacked this level of detail.

Question 14: Comparable consumer leases (TOR 3)

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?*
- *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;*
  - *the similar economic outcomes of SACCs and comparable consumer leases;*
  - *ASIC evidence[1] which suggests that the effective interest rate for some consumer leases is substantially greater than the maximum allowed for SACCs under the caps;*
  - *the effect of introducing new regulatory requirements on the viability of the consumer leasing market and the availability of consumer leases; and*

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- *the impact of the distinction based on whether or not the consumer has a right or obligation to purchase the leased goods.*

Please provide data, such as evidence as to the effect of any cap on the viability of businesses currently providing comparable consumer leases or evidence of where the absence of any cap is causing financial hardship to consumers.

See general response to questions 14 to 16 following question 16.

Question 15: Applying SACC provisions to comparable consumer leases (TOR 3)

- *As SACC and comparable consumer lease providers market to a similar consumer base, should the same provisions apply?*
- *Should there be additional disclosure requirements for comparable consumer leases, such as a requirement to disclose:*
  - *the purchase or cash price of the leased good;*
  - *the amount the consumer will pay in excess of the purchase or cash price;*
  - *the cost of credit in dollar terms;*
  - *the cost of credit as an interest rate; and*
  - *the cost of other services financed through the rental payments (apart from the cost of hiring the goods, such as a warranty or delivery)?*

Please consider the cost of complying with any such additional disclosure requirements against the benefit of providing additional information to consumers.

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 comparable consumer leases?*

Question 16: Cap on costs for consumer leases (TOR 3)

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

- *The cash price of the good is used as the basis for applying the cap on costs. Should the approach for sales by instalment also be used as a basis for applying the cap to leases that are comparable to SACCs? If so, how should the cash price of the good be defined?*

Consumer Leases – general statements in relation to questions 14 to 16

The cost of credit for a consumer lease should be regulated by the cap on the cost of credit for all leases not just those that would be considered to be a SACC.

LAQ continues to assist many consumers who have "leased" or "rented" cars and expect to retain possession of the goods at the expiry of the contract terms. These cars are rented at substantially more than their market value. For example a couple who were required to make payments of approximately $42,000 over 5 years for a car worth approximately $5,000 to $7,000 with no contractual right of ownership at the end of the term.

LAQ has analysed a number of consumer leases since 2010 where the cost of the lease exceeds the relevant caps on the cost of credit for other loans.

The same provisions in the NCCP as apply to comparable loans should be applied to consumer leases.

In relation to comparable SACC loans, it is appropriate that the owner of the goods can repossess goods if the consumer defaults but only if the goods leased were purchased with the funds provided by the owner. This is to avoid the situation where a lender asserts ownership over goods sold to them by the consumer and for which a lease is then provided.

Regulation of consumer leases in a similar way to loans could be achieved by amending the National Credit Code to ensure that the cost of credit is defined as the amount payable over the term of the lease less the cash price up-front using the Part 13 definition and the market value of the goods (if any) upon termination.

Consumer leases currently contain formulae to define the market value of the goods upon termination but there could be assumptions about values for classes of consumer goods (eg household goods and computers would retain negligible value over extended leases).

Recommendation

LAQ recommends all protections in the NCCP relating to loans also apply to consumer leases where practicable.