Min-it Software

**SACC Review Secretariat Consultation –**
**Review of Small Amount Credit Contract legislation and Consumer Leases**

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## Background Information

This submission is made on behalf of Min-IT Software ("Min-it") clients.

We welcome the opportunity to submit this submission to the Secretariat on the Small Amount Credit Contract ("SACC") Review that also encompasses consumer leases.

Aside from the software produced in-house, specifically by or for franchised organisations, Min-it Software is a leading loan management software supplier to the micro-lending sector of the Australian market. We have a number of clients that use the system to provide SACC's and consumer leases.

## Introduction

As the author is also the Financiers Association of Australia ("FAA") representative on the Treasury Industry Working Group, we support the FAA's separate submission that argues for legislation to apply equally to all credit providers regardless of size. The entire SACC scheme is unequal as it only applies to non-Authorised Deposit-taking Institutions ("ADI") and we have repeatedly called for the implementation of credit legislation that applies equally to all credit providers, regardless of size, as originally promised by Senator Nick Sherry back in 2009.

Schedule 3 of the Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Cth) ("Enhancements Act") undoubtedly created a disproportionate and, many in the industry would argue, a totally inappropriate regulatory regime for small amount credit contracts ("SACC").

An inevitable consequence of the introduction of maximum fees for SACC's, a radical departure from what had previously occurred under the former Uniform Consumer Credit Code ("UCCC") and which transitioned into the initial stages of the National Consumer Credit Protection Act 2009 (Cth) ("NCCP"), was the early decision by a number of our clients who were ethical credit providers to leave the industry because of perceived over-regulation and unviability. Although ASIC points to a number of new entrants[1] gaining Australian Credit Licences ("ACL") in its report REP 426, *Payday lenders and the new small amount lending provisions*, as time has gone by, many more, both clients and non-clients, have left or are in the process of leaving it due to unviability. This also substantiated in a recent report by a new report on the 'payday' industry by the Australian Centre for Financial Studies[2].

This reduction of industry players was totally in line with the professed desire of the then Assistant Treasurer, the Hon Bill Shorten, to see industry rationalisation. He advised us he ideally wanted to see no more than around a dozen credit providers exist but thankfully, though, the number of SACC credit providers has not yet reduced to such a number and consumers still have a choice of lender.

ASIC's own continually expanding interpretation of the requirements for responsible lending in the various updated versions of Regulatory Guide RG209 and loan suitability for SACC's, with the latest version based primarily on the uncontested Cash Store case[3], has caused its own problems but none more so

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[1] Australian Securities and Investment Commission, March 2015. REP 426, *Payday lenders and the new small amount lending provisions, p. 8*

[2] Banks, M, de Silva, A and Russell, R, 2015. *Trends in the Australian small loan market (payday lending),* 13 October 2015. Available online http://australiancentre.com.au/News/trends-australian-small-loan-market-payday-lending accessed 14/10/2015.

[3] ASIC v Cash Store Pty Ltd (in Liquidation) [2014] FCA 926

than it's more recent decision to regard all SACC's as "payday loans"[4]. As a direct consequence of vigorous lobbying of the Big 4 banks by consumer groups arguing for 'ethical lending', the Big 4 banks now refuse to fund or provide financial services to SACC credit providers, arguably in breach of s.46 (1) (Misuse of market power) of the Competition and Consumer Act 2010 (Cth). We are yet to see the full implication of this and whether the Australian Competition and Consumer Commission will take any action.

For affected clients, this has meant trying to find a second or third tier financial institution or use private investors, invariably at higher rates, in order to continue business. The author is personally aware of the lending division of a client that has more recently been advised by one Big 4 bank that it would also not transact its direct debits and has been forced to change its banker and to start using a third party direct debiting provider.

This decision to regard a SACC as a 'payday loan' was never in keeping with the general industry definition that prevailed under the UCCC. The original US definition of a payday loan was one where the entire amount borrowed plus the fee for providing the credit would be repaid in full on the consumer's next payday. Whilst many 'payday' lenders did insist on a single repayment prior to the enactment of the NCCP, industry and the State-based regulators regarded 'payday loans' as those that had a term of no more than 62 days and generally, the amount lent was less than $500. This is well short of the definition of a SACC given in s.5 of the NCCP.

The fact that a loan repayment is scheduled to be drawn on a consumer's pay day does not make it a 'payday' loan. Consumers regularly have repayments for

[4] Ibid1*, p. 4.*

consumer credit contracts, including home mortgages, arranged to be drawn on a pay day but no one claims these to be payday loans.

Treasury was advised in a submission we made that its decision to introduce new contract terminology such as SACC and MACC (Medium Amount Credit Contract) in the Enhancements Act was totally out of kilter with industry terminology that had existed for decades and ASIC's latest decision to call SACC's 'payday loans' is baseless. Aside from the serious financial impact for those using a Big 4 bank, the credit providers that never did provide 'payday' loans as the industry previously regarded them are absolutely outraged and feel besmirched.

These credit providers provided 'micro-loans' (generally those between $500 and $3,000 for terms of between 26 – 78 weeks which later increased upto $5,000 for terms of 104 weeks) and have always sought to differentiate themselves from the 'payday' lenders that have created ongoing regulatory and industry concern by offering consumers larger loan amounts for longer terms with more affordable repayments.

Our clients have no issue with a robust yet proportionate consumer regulatory system but the NCCP legislation, and in particular the regulation applicable to SACC's, has created incentives for evasion which have come primarily from larger, mainly online lenders and those that provide consumer lease contracts.

**Comments on the consultation paper**

Referring to the consultation paper released for the SACC Review, overleaf are our comments relating to the matters.

## 1. Question 1: Competing objectives

The main problem industry has with consumer groups is their continued desire for Treasury to enact legislation that either effectively shuts out certain products from the market or demand caps that makes it unviable[5]. Instead of complaining to ASIC about those specific credit providers that cause issues, they take the 'sledgehammer to crack a small nut' approach and claim all credit providers are alike. We have yet to see any evidence of this but it has been their *modus operandi* since 2006 when they successfully persuaded the NSW Government to introduce interest rate caps and then successfully campaigned for the ACT and Queensland Governments to follow suit.

No Government has committed the funds the industry provides consumers to fund schemes such as NILS and LILS but equally, there are some industry players that flout the law or who operate at the fringe and continually push regulatory boundaries. It occurs in any industry. Affected consumers must be protected from unfair practices and deceptive or misleading conduct but it cannot do so if it is unprofitable. We would not want to see consumers return to using unlicenced credit providers.

[5] As examples, see Consumer Action Law Centre's July 26 Media Release "*ALP National Conference: Labor needs to take a stand on payday loans*" available online http://consumeraction.org.au/alp-national-conference-labor-needs-to-take-a-stand-on-payday-loans/ accessed 13/10/2015, its August 7 Media Release "*Review is opportunity to improve protections for payday loan and rent-to-buy borrowers*" available online http://consumeraction.org.au/review-is-opportunity-to-improve-protections-for-payday-loan-and-rent-to-buy-borrowers/ accessed 13/10.2015 and the June 24 Media Release "*Don't make the poor pay more – time to end the free ride for rent to buy businesses: Consumer Groups*" available online http://consumeraction.org.au/dont-make-the-poor-pay-more-time-to-end-the-free-ride-for-rent-to-buy-businesses-consumer-groups/ accessed 13/10/2105.

Current penalty provisions are, in many cases, draconian and industry relies on the regulator sending clear and consistent signals. Some would argue it has done so but there are numerous examples where many in the industry believe this has not occurred. Two examples of this are:

1) the Enforceable Undertaking relating to Paid International Pty Ltd (formerly First Stop Money Ltd and First Stop Money Pty Ltd)[6] where the company admitted to breaching numerous requirements of s.17 of the Code. These were key breaches and the requirements to disclose correctly in existence under the UCCC; and
2) the Enforceable Undertaking relating to Mr Rental[7] who admitted to providing consumer leases effectively whilst unlicenced through the incorrect use of an indefinite period consumer lease. Given the vast amount of publicity ASIC issued to the consumer lease sector, many saw this as deliberate evasion.

Whilst we are certainly not proposing ASIC should prosecute in every instance, these appeared to be serious enough to our clients to question why they weren't.

## 2. Question 2: Complexity

Many clients feel the current regulatory regime has been made far too complex from both a responsible lending and loan suitability perspective by ASIC's amended interpretation of what is required. Further regulation will only add to complexity.

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[6] Australian Securities and Investment Commission, 2014. Enforceable Undertaking P00429406 (15 October 2014), available online http://download.asic.gov.au/media/2614741/p00429406.pdf accessed 18/10/2014

[7] Australian Securities and Investment Commission, 2014. Enforceable Undertaking 027728572 (08 January 2013), available online http://download.asic.gov.au/media/1301005/027728572.pdf accessed 10/0/2013

In addition, Treasury's insistence on the Adjusted Credit Amount of SACC's not being subject to the credit limit definition[8] contained in s.5 of the NCCP and so applying to amounts of $1,612.90 to $2,000 inclusive, confirmed initially by ASIC Class Order CO 13/818 and subsequently by Regulation 4D, added further complexity and confusion.

If a credit contract can be deemed 'not unsuitable' for a consumer, the consumer and the credit provider should be able to enter into that credit contract freely. After all, in most cases, it's the credit provider's own funds being used as lending capital and we have yet to find any lender that lends money in the full knowledge the loan will not be repaid. The consumer is protected in the event of financial difficulty through the credit provider being required to provide IDR and EDR processes.

ASIC could also assist in reducing complexity by providing clear 'safe harbour' compliance rules for credit providers rather than issuing ambiguous guidelines that even lawyers have trouble interpreting.

With some exceptions, such as retaining s.39B, 39C of the National Credit Code and Regulation 79C, we believe the regulatory regime could be simplified by repealing all the SACC provisions (including Regulation 4D) without affecting consumer protection.

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[8] *Credit limit* of a credit contract means the maximum amount of credit that may be provided under the contract. Under s.3 of the National Credit Code, the amount of credit is the amount of the debt actually deferred. The amount of credit does not include:
(a) any interest charge under the contract; or
(b) any fee or charge:
(i) that is to be or may be debited after credit is first provided under the contract; and
(ii) that is not payable in connection with the making of the contract or the making of a mortgage or guarantee related to the contract.

## 3. Question 3: Sanctions

We will not comment as to whether or not the current sanctions regime is working except to question why some breaches can attract both a civil and a criminal penalty. For example, see s.133CA, 133CB, 133CC.

Civil penalty provisions are founded on the notion of preventing or punishing public harm. In the examples given, the civil monetary penalties (2,000 penalty units) are much higher than the criminal penalties (50 penalty units) and although to our knowledge ASIC has not pursued such penalties, we consider the civil penalties, if applied, are more than sufficiently serious to act as a deterrent, particularly given the lower burden of proof required.

For that reason, we believe the criminal penalty options should be repealed.

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

From the implementation if the Enhancements Act, our clients found that almost all consumers regarded review of their bank statements as intrusive and totally disproportionate to the value of the loan application.

That said, rather than the consumer supplying copies of bank statements themselves, we have recommended they use the services of one of the four current bank statement suppliers because:

a) it reduces the cost to the consumer. Some banks charge up to $30 per monthly statement and so a fee of up to $90 is avoided as the credit provider pays the (very much reduced) fee;

b) it is easier to detect fraud. The author has seen a number of very realistic but altered bank statements offered and when comparing this with one obtained online, any differences can be spotted relatively quickly;

c) missed or dishonoured payments are able to be picked up; and

d) the online bank statement suppliers are able to provide an analysis of a number of categories, including payments for other loans and leases, to assist the lender but as ASIC noted, these are not foolproof.

In our opinion, it's the most effective way to obtain the consumer's up-to-date financial situation details. We know of no other alternative as we have always suggested to our clients they should always obtain bank statements in order to assess the consumer's creditworthiness.

Some clients have suggested that where the consumer is well known to the credit provider and has a proven repayment history, the credit provider should be able to provide further credit without having to conduct the same level of assessment. Exactly how this could be achieved legislatively, we are unsure, though ASIC may be able to issue Regulatory Guidelines that would cover such a situation.

It is inappropriate to use bank statement accounts for any other purpose other than complying with responsible lending obligations and suggest it

would breach Australian Privacy Principle APP 6 if no consent were provided. We cannot see why any consumer would provide such consent.

## 5. Question 5: Restrictions on repeat borrowing (TOR 1.2)

We note the Review Secretariat mentions both the Community Action Law Centre's *Caught Short* and ASIC's REP 426*, Payday lenders and the new small amount lending provisions reports.* We contend neither are valid references. The former one almost entirely relates to practices well before the NCCP was introduced using a distinctly biased statistical population whilst the latter refers to practices immediately on implementation of the Enhancement Act provisions when the industry was trying to get to grips with what is required and ASIC has used the later Cash Store case decisions to denigrate those practices in retrospect.

The NCCP requires all credit providers to be responsible in their lending, whether it's for a consumer credit contract or a consumer lease. When the legislation was first drafted, we sought legal opinion from a number of specialist credit lawyers on whether we could assist our clients with some form of automation on this. All indicated we could not and unlike some of our competitors, the Min-IT Lending System remains purely a Loan Management System.

Our clients must perform their responsible lending and loan suitability assessment obligations off system. Some clients have their own front end system that takes the application and depending on its construction, may perform some automated identity checking and/ or credit reporting. To the best of our knowledge, all require the consumer to indicate whether he/she

has any current contracts and if so, the details of them, whether they are in default under another SACC or if any of the funds are to be used to pay out all or any portion of a current SACC. For those that don't have such a front-end, these questions will be contained on an application form and the consumer asked further questions face-to-face.

The question of default is more difficult to ascertain as under the contract supplied with the Min-IT Lending System, it's only when a Default Notice has been issued under s.88(1) of the Code does default occur. Generally, bricks-and–mortar credit providers will ask additional questions whilst online lenders may contact either the consumer or other credit provider(s). It would appear a small number of large online lenders do no checks.

One of the biggest problems the industry has is with the dozen or so largest online lenders that the vast majority of our clients believe lend irresponsibly is they use software that imports the analysed information from the bank statements along with benchmarks such as the Henderson Poverty Index rather than taking actual income and expenses into consideration as ASIC has indicated is required. These particular credit providers use this as the available income will generally be calculated higher than what it really is in order to accommodate the consumer more readily and disregard the presumption of unsuitability. We are very firmly of the opinion that absolutely no benchmark should be used as the ones currently using them are already causing the most detriment to both consumers and other credit providers.

Our clients believe prohibiting repeat borrowing is inappropriate as it is too prescriptive. It takes no account of personal circumstances and is likely to

lead to unintended consequences. Consumers ought to be able to decide if and when they borrow.

If the SACC provisions are not repealed, we believe the rebuttable provision should remain rather than introducing a bright line test. Restricting borrowers to a specific number of SACC's in a given period, however well intentioned, may also cause unintentional consequences and we suggest, requires further discussion and investigation.

We also believe credit providers should be able to obtain an establishment fee for any new credit they supply. The provision contained in s.39A(2)(ba) that prohibits a credit provider obtaining a Permitted Establishment Fee where, "if some or all of the amount of credit (the refinanced amount) is to refinance some or all of the amount of credit provided by the credit provider to the debtor under another small amount credit contract". In our opinion, the prohibition should only apply where the amount of credit refinances credit under a SACC already provided by that particular credit provider. This would reduce complexity for SACC providers.

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

There will undoubtedly be some credit providers and others that will argue consumers are the ones best placed to select when they can afford to repay a SACC but the reality is it's more likely to be the lender's choice. When one considers loan suitability requirements, it is ironic the legislation prohibits credit providers from offering loans of 15 days or less even if that is what the consumer desires rather than what the credit provider may wish to impose but it has not had the effect of removing single repayments for

SACC's. As the consultation paper notes, such payments are not illegal but many in the industry saw this as one of the consumer groups' major complaints as to the cause of financial detriment and debt spirals.

Having been a party to the original legislative negotiations and listened to consumer advocate concerns, we have made the minimum term of a SACC for our clients as being 21 days so that it would almost always allow one clear fortnightly payment to be made on the day the consumer was paid. This was based on the fact that as a SACC must be "at least" 16 days and applying the s.218 (2) definition of this phrase contained within the Code to it (the NCCP is itself silent as to its meaning, as is the Acts Interpretation Act 1901 (Cth)), the minimum term would therefore be 19 days and we then extended it slightly.

We believe the prohibition of short term credit contracts should remain as it will have stopped some consumer detriment from occurring.

## 7. Question 7: Warnings (TOR 1.4)

We have no evidence, anecdotal or otherwise, that proves whether or not the required Regulatory warnings have been effective. On the basis most consumers don't want to read either the contract or Information Statement, we suspect they haven't paid any attention to them and few would have been influenced by the warning or the information they contain.

Immediately prior to implementation of the Enhancements Act, we were made aware of two clients who were prohibited, under the terms of their leases, from placing any affixed notices on either the doors or windows of

their leased premises. Their landlords were not interested these were new regulatory requirements and as a consequence, they both had to modify their business model and not provide SACC's. Both have since exited the industry.

In that respect, we fully support the FAA submission that the onus should be on Government to demonstrate the usefulness of such mandatory warnings.

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

Almost without exception, the maximum cap on SACC fees has become the industry standard, just as we advised Treasury it would.

One of our clients is a Community Development Financial Institution ("CDFI") that currently provides supplies SACC's with just charging the maximum 20% Establishment Fee allowed but with no ongoing monthly fee and whilst some of our other clients have tried implementing lower fees, they have since resorted to applying the maximum in order to stay viable.

With the exception of the CDFI client, one of the few credit providers known to be currently providing SACC's with reduced rates is Credit Corp Financial Services Pty Ltd that trades as Wallet Wizard. This is a new player with no experience in this part of the market and the industry expects a repetition of what occurred with Amazing Loans under the UCCC when it advised the NSW Government it could be profitable with that State's

maximum capped interest rate but it could not. That company was placed into liquidation[9] in January 2013 after reporting losses exceeding $4.3m.

Prior to the enactment of the Enhancements Act, we supplied the then General Manager, Corporations and Financial Services Division of Treasury, Mr. Geoff Miller with a number of detailed spreadsheets showing what was required for the industry to survive based on an establishment fee and the application of an interest rate. It is understood these were rejected by the then Assistant Treasurer as they did not fit with what was politically acceptable and the industry was then presented with the SACC and MACC ideas. Should the Secretariat wish to view these, I can make them available.

For SACC's, a fee-based regime consisting of a 10% Establishment Fee and a 2% Monthly Fee was mooted and after industry protestation, this was increased to a 20% Establishment Fee and a 4% Monthly Fee based on a Cash Converter's suggestion. It should be noted even that company, though, had no intention of offering loans of less than 32 days so that each SACC would attract at least one additional monthly fee. Most credit providers, including Cash Converters' own franchisees, stated it would be difficult to survive under the SACC regime and suggested an increase of the monthly fee to 3%.

The problem with such a fixed fee regime is it is not inflation proofed and in real terms, the income of SACC credit providers has been reduced at least

[9] Papadakis, M, 2013. *Amazing Loans in liquidation, loan book up for sale*, BRW Financial Review, 01 February 2013. Available online http://www.brw.com.au/p/business/amazing_loans_in_liquidation_loan_uWEqlYsXW2IJNvAjD1rovO accessed 12/10/2015

by 3.5%[10] but in that time, wages have increased by 5.5% according to the Fair Work Commission. Many of our clients have advised their lease costs have increased by almost 10% in this period and so their ingoing viability has been drastically reduced.

In reality, when the cost of obtaining bank statements and other fixed costs (such as increased power charges) are added in together with increased compliance costs in order to meet ASIC's requirements, most credit providers are at least 15% worse off currently when compared to 2013.

If one adds in the proposed new ASIC charges[11], credit providers will suffer financial detriment and any additional loss of industry participants will seriously limit consumer choice.

Under s.31A, we would bring to the Review Secretariat's attention there is an interpretation issue as to exactly what constitutes an "enforcement fee", with at least one credit provider believing fees relating to the issuance of a Default Notice to be such a fee. It is not known how that lender regards dishonour and missed payment fees but based on what was learnt in the Treasury Industry meetings, we and many other lawyers have taken all such unascertainable fees incurred when the contract is in default as fees being included in the two times Adjusted Credit Amount maximum recoverable limit for SACC's. To our knowledge, no Court or ASIC has issued guidance on this. This requires clarification.

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[10] Comparison of CPI base rates for period September 2013 – June 2015 using Australian Taxation Office. *Consumer price index (CPI) rates,* available online https://www.ato.gov.au/Rates/Consumer-price-index/ accessed 12/10/2015.

[11] Treasury, 2015. *Proposed Industry Funding Model for the Australian Securities and Investments Commission*, available online http://treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2015/Proposed%20industry%20funding%20model%20for%20ASIC/Key%20Documents/PDF/ASIC_industry_funding_model_CP.ashx accessed 12/10/2015

Regulation 4D already covers that part of ASIC Class Order CO13/818 that relates to the credit limit applying to credit limits and this should be repealed. We advised Treasury applying a regulation to amend a definition contained in the main act was inconceivable as no one would look for it. In our opinion, the 'credit limit' definition contained in s.5 of the NCCP must apply to all credit contracts and the maximum SACC amount reduced to no more than $1,612.90 as we originally stated should be the case so there is consistency across all credit contracts.

As the person originally responsible for getting third party direct debit fees excluded from the Adjusted Credit Limit under ASIC Class Order CO13/818, the intention was to allow those credit providers that did not have their own direct debiting facility to recover the higher fees charged by the third party providers. As the Review notes," ASIC has noted that most SACC providers are charging consumers a fee for direct debit services with some lenders utilising complex corporate structures to suggest it is not the credit provider charging the fee. ASIC has seen examples of consumers being charged up to $3.50 per transaction". This was never the intention as no genuine third party provider charges more than $1.65 (including GST) per transaction. Most are around $1.10 (including GST).

I suggested to Treasury that ASIC could easily amend the Class Order and apply a cap on the direct debit fee charged to be no more than this amount and requiring the third party direct debit provider to be PCI compliant. This would have had the effect of removing any contrived entity out of the current Class Order requirement but it suggested waiting for this review. By allowing such entities to exist and continuing to charge amounts higher than $1.65, many of our clients feel ASIC has given these credit providers

an unfair financial advantage, particularly when they feel the costs charged are not at true cost.

In our view, the temporary exemption in respect of direct debit fees need to continue and be amended and extended as stated above if the legislation in respect of SACC's is not repealed. Ideally, it should also apply to MACC's but we accept this is beyond the scope of the Review Secretariat.

Not all credit providers subscribe to Credit Reporting Bodies ("CRB") and so Credit Report fees are incurred only by those that do so. On the other hand, all credit providers are required to obtain 90 days' worth of bank statements under s.130 (1A) of the NCCP. At the time the Class Order was created, credit providers were not utilising third party bank statement providers and had I known they would do so, I would have also requested the ability to recover the cost of these as well. I urge the Review Secretariat to consider this request.

## 9. Question 9: Protection for Centrelink customers (TOR 1.7)

Almost all of our clients currently will not lend to any recipient of a New Start benefit. In principle, we support the FAA's submission and oppose any consumer class distinction of consumers, including any specific protection for particular Centrelink customers. All consumers should have the same rights and protections under the law.

If a SACC is unsuitable for a consumer in receipt of Centrelink benefits, the legislated unsuitability requirements ought to be sufficient protection for them. Our clients have found it is only a small number of larger online credit providers that ignore the responsible lending requirements.

## 10. Question 10: National database (TOR 2.1)

The sole legitimate reason we can see for creating a national database of SACCs would be to try and establish if a consumer has had two or more other SACCs in the last 90 days. A review of the bank statements would establish whether a repayment due under a SACC has been missed or dishonoured but even then, that does not necessarily mean the contract is in default. Under the contract supplied with the Min-IT Lending System, it's only when a Default Notice has been issued under s.88 (1) of the Code does default occur.

If a credit provider undertakes its responsible lending and loan suitability assessment correctly, the number of SACC's can be easily identified. Currently, there is sufficient documentary evidence available to show that around a dozen or so large online credit providers regularly ignore their responsibilities. The author has been shown numerous borrowers' bank statements and this same group of credit providers can be consistently seen on each.

We contend the consumer groups' legitimate complaints of consumers being provided with multiple SACC's in breach of either s.132(3) of the NCCP or Regulation 28XXF(2) would end if ASIC took specific action against these particular credit providers who regularly ignore their legal obligations.

The industry does not need to have a database imposed on it for the actions of such a small number of credit providers and for most credit providers, all it would serve to do is impose additional costs on them. The

question is if such a database were to be introduced, will the costs of any enquiry or registration be able to be recovered? If not, why not?

The consultation paper suggests the use of CRB's to provide such a database but that would necessitate providing all CRB's with the data so there would be multiple databases, not just one. Given the CRB's already hold incorrect data, what guarantee of immunity would be provided to a credit provider that acted in good faith using incorrect data? In our opinion, no CRB should have the ability to run such a database. Most SACC lenders do not currently use CRB's because of outrageous costs and in any event, the information is not timely. Also, use of credit reporting is voluntary and not mandatory and we are of the opinion it should remain that way.

Credit providers should also not be forced into full repayment history reporting. There is already sufficient consumer backlash faced by credit providers in having to demand the information required for responsible lending without adding this as a requirement. We believe if implemented, it would drive at least some consumers to look for non-licenced lenders in order to keep their borrowing out of government knowledge.

There is also the significant possibility that the larger institutions would further discriminate against anyone that has a SACC. Many ADI's already use credit reports (based on those that do register defaults or credit enquiries) to discriminate against those that have borrowed from a non-ADI credit provider in the past 24 months. As stated above, the vast majority of SACC credit providers don't use credit reporting and all consumers are likely to suffer financial exclusion or be stereotyped as poor credit risks if their SACC loans were recorded in a national database.

## 11. Question 11: Additional provisions for SACCs (TOR 2.2)

We submit that additional legislation or regulation for consumer protection in respect of SACC's is unnecessary but both consumers and industry would be better served with better legislative drafting, clearer rules relating to responsible lending and contract unsuitability and the introduction of 'safe harbour' provisions.

## 12. Question 12: Anti-avoidance provisions (TOR 2.2)

When the original late 2012 consultation on anti-avoidance was issued, we were extremely concerned about the provision relating to "carrying out a scheme for the purpose of avoiding the application of a provision of the Credit Act".

We contend every business will create products that are designed to maximise profit within any regulatory regime. Credit providers are no different. Case law relating to taxation has evolved to differentiate between avoidance and minimisation practices but over the years, the Australian Government has sought to blur the differences and regard minimisation as being identical to evasion[12]. It took this same approach with the proposed anti-avoidance measures.

Businesses legitimately elect to conduct their business activities in such a way as to avoid various Code provisions or rely on express exemptions.

[12] A useful discussion on this is *The distinction between tax avoidance and tax evasion has become blurred in Australia: why has it happened, a* 2008 paper by John McLaren. Available online http://www.austlii.edu.au/au/journals/JATTA/2008/14.pdf accessed 18 January 2013.

We are, though, aware of practices we feel are genuinely avoidance of specific SACC requirements. These relate to:

- the use of two-tier repayment amounts over the term of the contract and the issue of two SACC's to prevent other credit providers supplying credit by at least one large credit provider;
- credit contracts with two payments, one payable after 7 days and the other for the remaining balance due at 16 months; and
- the charging of all the permitted monthly fees upfront rather than on the same date each month.

We can supply the Review Secretariat with more details on these if required.

Anti-avoidance could also impact on those credit providers providing consumer leases. For example, if a consumer states the lease is to be 4 months or less and the lease is subsequently extended, we submit the credit provider should be able to rely on the initial intentions stated by the consumer without any further inquiry unless the credit provider actually knows this to be incorrect. We would not want to see such actions be capable of being interpreted as 'a scheme' for avoiding the Code.

As the FAA submission has stated, if a particular product or practice is lawful, it should not be made unlawful by a regulator deeming it to be done for avoidance purposes.

## 13. Question 13: Documentation of suitability assessments (TOR 2.2)

The NCCP requires all credit providers undertake a suitability assessment in order to provide a consumer credit contract or consumer lease but there is no prescribed Regulatory form.

As stated earlier, our clients perform their responsible lending and loan suitability assessment obligations off system. Some clients have their own front end system that takes the application and which may perform some automated identity checking and depending on its construction, require the consumer to indicate the purpose of the loan, whether any current contracts are in default or if the funds are to be used to pay out all or any portion of a current SACC.

After the introduction of the Enhancements Act, consumers quickly learnt that that stating the truth would lead to a declined application, so there is a need to verify the information provided. How this occurs for our clients depends on the credit provider's capabilities and credit policies but many have found that unless they actually contact the consumer and verify details, they take a risk in making the loan.

From looking at bank statements, it is obvious there are a number of larger, mainly online lenders, all of whom are non-Min-IT clients, that our clients claim they simply cannot have verified suitability for those consumers. These are the credit providers the regulator should be targeting as the consumers they have supplied often have upwards of 4 or more current SACC's. Our clients have evidence of this small group of lenders providing finance to clients they declined because of unsuitability and the author has seen one consumer's bank account that already had 9 SACC's, all running concurrently, and the consumer had applied to our client for yet another.

Some of our clients' front-end systems will look for 'markers' in the application process and if it's readily apparent the consumer cannot afford the repayments or the credit provider has a policy of not wanting to seek the rebuttable presumption of unsuitability, a message will appear on screen stating that the credit provider is unable to assist in the circumstances. If the application proceeds further and is then declined, the client will be advised either by email or verbally. Some of these systems are capable of producing an 'assessment document' but the vast majority of assessments for our clients will be produced manually.

If a consumer cannot afford the repayments or the presumption of unsuitability cannot be rebutted, the assessment process will stop immediately. When an assessment incurs significant staff time for the credit provider and the typical decline rate for SACC's by our clients is between 90 - 95%, the details being recorded are immediately stopped to minimize costs. We would argue this is a natural business process.

If Government wants credit providers to undertake a fully documented assessment for every application, even if credit is not provided, then credit providers must be allowed to recover the costs involved.

Rather than providing a written assessment, we agree with the FAA's submission it would be better to simply require the credit provider give reasons for its decision on request.

## 14. Question 14: Comparable consumer leases (TOR 3)

We are of the opinion that no consumer lease is comparable to a SACC because:

1) leased goods have to be returned unless the lessor and lessee agree on suitable terms to retain possession or acquire ownership;

2) leased good(s) are generally secured whereas SACC's do not permit any security to be taken;

3) a consumer lease is over specific good(s) whereas a SACC is provided in money that can be for any purpose; and

4) the lessee must maintain the good(s) at its own cost during the lease period, regardless of the lessor's location whereas any good(s) purchased using funds obtained from a SACC must be at the borrower's cost.

Consumer leases therefore have different product characteristics and, whilst the client base of some lessees might be similar to those using SACC's, they are different products and have different characteristics from loans.

Goods to be leased are also acquired in different ways and from different product distribution channels and the 2015 RMIT market survey data and ASIC REP 447 do not appear to take this into account. The fact that one credit provider provides a lease for a good costing $500 if purchased at retail at $x per week and another credit provider provides a similar item also via a consumer lease $y per week over the same or different lease terms is an unfair comparison as it incorrectly assumes both credit providers have the same market purchasing power and are in the same location.

The term 'rent to buy' is technically misleading and deceptive for almost all such contracts, though our own solicitor has created one where it has the

terms and conditions of a lease but for regulatory purposes, it's a loan and so subject to a maximum Annual Cost Rate of 48%. This contract also has Centrepay approval. To our knowledge, ASIC has taken no lessee to task for purporting to describe terms of 'rent to buy' or similar when the contract provided is actually a consumer lease without the right to purchase.

The area of largest avoidance and one that creates the greatest number of complaints lies in how the contract is worded so as to provide effective ownership or product retention at the end of the lease term.

In our view, the simplest method would be to allow the re-introduction of 'hire purchase' which was effectively prohibited under s.10 of the UCCC (cf. s.9 of the NCCP). Ownership of the good would remain with the credit provider until the good was paid for in full or to the satisfaction of the credit provider.

If the provisions relating to Centrelink beneficiaries under Regulation 28S are to be retained rather than repealed as we suggest, we would support the application of the same provisions relating to consumer leases for contracts having a total amount repayable of $2,000 or less.

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

We do not support applying SACC provisions to consumer leases except in respect of the application of provisions under Regulation 28S in the circumstances described above in question 14.

The rental system available in the Min-IT Lending System requires any costs such as delivery or warranty to be paid up-front. These are disclosed when amounts are entered in the appropriate fields at the time of the consumer lease creation. However, requiring a purchase or cash price of the leased good may be difficult to ascertain due to the different product distribution channels goods are obtained. For example, some products such as computers are available only at specialist retail outlets whereas a similar but not identical model may be available through major retail stores. Manufacturers badge some white goods exclusively for the rental market and these are not available in any retail store. Although identical in appearance, neither may have the same internal components.

As stated above in question 14, the lessor is responsible for a number of services, such as possible re-delivery, maintenance and servicing of the leased good(s) under a consumer lease. As the FAA submission notes, “it is an oversimplification to assert that the cost of a lease is the amount in excess of the cash price for the goods. Cost comparisons based on this flawed methodology are misleading”.

This would make any decision to include a financial table similar to a SACC or any other consumer credit contract difficult.

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

As we have previously stated, rather than trying to apply a cap to consumer leases, it would be far simpler to re-introduce the notion of hire purchase. As a matter of principle, we support the FAA submission and oppose any further extension of price controls on credit.

If a cap were to be applied, it's equally likely that the maximum amount or rate permitted would become the de facto rate, just as we have said it would for SACC's.

We fully support the FAA's comment that the "regulation of consumer leases should not be dealt with in a piecemeal fashion. Rather than applying a completely inappropriate price control system for SACCs to some consumer leases that are "comparable", the general scheme of regulation of consumer leases as a whole should be considered".

If the Review Committee would like further clarification on any matter raised in this submission, the author would be happy to answer any questions or make further submissions if required.