Submission in response to the

REVIEW OF THE SMALL AMOUNT CREDIT CONTRACT LAWS

15 October, 2015

To: SACC Review Secretariat
Financial System and Services Division
Markets Group
The Treasury
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ABOUT MONEYBOX LOANS

Moneybox Loans Pty Ltd is a small company, lending online with the assistance of a network of representatives. Based on the perception that most SACCs are for amounts of up to $500 for terms of up to three months, our loans are larger and longer than the average. Traditionally we fit into the category of 'microlender'.

We were incorporated in 2003, and traded in Western Australia until 2011 as part of the Fast Access Finance group of companies. Moneybox Loans obtained its Australian Credit Licence in January 2011, and subsequently moved its base of operations to Queensland in mid 2012.

All of our lending capital is sourced internally from a small group of investors.

We are predominantly a SACC lender. In the two full financial years since the introduction of SACCs (1 July, 2013 to 30 June, 2015), 78.52% of our business by number of loans was in SACC provision. The remaining 21.48% was in MACC provision.

By dollar value SACCs accounted for 64.77% of funds advanced, while MACCs accounted for 35.23%. The discrepancy in percentages between dollars advanced and loans done is due to the differing dollar ranges of SACCs and MACCs.

Our responsible manager has over 18 years of experience in the small amount lending industry, and over 20 years in the finance industry in general. He is a qualified Australian legal practitioner and while in private practice he has acted for a range of lenders engaging in both consumer and business credit; including banks, trustee corporations, managed investments schemes, small pool consortiums and private investors.

In relation to the small amount lending industry, he was the president of the National Financial Services Federation (Qld) Inc and the inaugural vice-president of the National Financial Services Federation Ltd (now the National Credit Providers Association). During his tenure with both organisations he was actively involved in representation to state and federal government bodies and responsible ministers, in fostering public perception and awareness of the industry, and in increasing industry knowledge and reputation.
OVERVIEW

We thank the Review for this opportunity to make our submission. We consider it to be sorely needed.

The SACC regulatory regime is broken. It was broken and ill-considered from the outset. The mark has been completely missed in government’s stated aim of ensuring a viable industry.

There are two fundamental, intertwined reasons why the system does not work:

1. The pricing caps are insufficient; and
2. The compliance requirements are draconian.

We understand the desire and need for consumer protection. We believe in a ‘fair go’ as much as anybody. But it is our view that the consumer is overprotected to the point where they have no responsibility or culpability for their actions. The responsibility and culpability now unfairly lies completely with the lender – as does all the risk.

Our regulator has a ‘scattergun’ approach to policing the industry and an absentee mentality to giving meaningful direction. These combine to make a precarious situation worse.

The amount of red tape necessary to be compliant, which is frankly quite frightening, might be worthwhile if lenders were permitted to make a decent return. But, they’re not. They are figuratively caught between a rock and a hard place – and actually suffering the effects of such a figurative position.

That we are still operating is only down to our commitment to see it through to this Review in the hope that the situation can be salvaged. Without substantive change we see no point in continuing.
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?

There is no balance between these concepts. In practice:

(a) Any real consideration has been given to what is ‘thought’ to be in the interests of the consumer (ostensibly by regulators and so-called ‘consumer advocates’);

(b) Cursory consideration is given to the actual interests of consumers; and

(c) Superficial consideration is given to the interests of industry. With respect to the Review, this can be seen in Section 1 of the Consultation Paper which states:

- A consideration in the makeup of who obtains SACCs, but no consideration of who the lenders are (specifically that many participants are small and privately funded entities);

- An acknowledgment to ensure consumers are treated fairly, but no likewise acknowledgment that industry be treated fairly (either by regulators or consumers); and

- Some of the myriad of regulations which industry may run afoul of in operating in a regulatory framework with "a greater amount of complexity... than for credit providers offering other products" with no reference to any responsibility placed on the consumer (because there is little to none).

Two fundamental issues in the development of the Credit Act underpin this inequality.

The first, a common issue in most regulatory frameworks, is the Act’s development was fuelled by the poor conduct of ‘bad lenders’ – those who purposely, or ignorantly, operated either unlawfully or grossly below realistic expectations. ‘Bad lenders’, operating outside the moral constraints of the ‘bulk of the industry’, engage in practises which attract negative attention (regulators, media, stakeholders and public). Government reforms the rules which apply to the industry in response, albeit often with an unavoidable delay. These changes tend to have three outcomes:

(i) The ‘bulk of the industry’ endure further regulatory burden, cost and risk (insofar as a breach may occur with even the best of intent);

(ii) Some ‘bad lenders’ move on before the regulations come into effect – thereby having no effect on them; and

(iii) The balance ‘bad lenders’ remain but ignore the regulations (maliciously or inadvertently).

Reform is no doubt intended to capture (iii) – but it usually misses (ii) and penalises (i); and it is (i) that we are concerned with ensuring equity for.

This issue is not raised as something that should or could be dispensed with. We readily acknowledged this is the method most law reform currently takes. It is essentially cheaper and can have a more wide ranging effect than court action.

However, it must be acknowledged that group (i) almost universally suffers the brunt of the law changes despite having done nothing wrong, nor having the ability stop the actions of groups (ii) or (iii).
The second issue is the extent of incorrect and misrepresentative information which has been relied on to inform regulatory change (which feeds into the aspect of the first issue concerning society’s expectations of operation). Much of this ‘information’ is fed through the media by consumer advocates (for example: Choice, Consumer Action Law Centre, Financial Counselling Australia and Financial Rights Legal Centre).

Examples include statements:

- That lenders can charge rates of up to “240 per cent a year”, up to the “equivalent of 700 per cent in fees and interest”\(^1\) – one such statement being made in reference to this very Review;

- “government measures to stamp out predatory lending ended up being quite industry friendly”\(^2\); and

- That lenders are making money, or colloquially ‘going gangbusters’, despite what they may say to the contrary\(^3\).

The sentiments of these organisations range from pro-consumer to vehemently anti-industry. Regardless of where they sit on the spectrum, they do not hold sufficient information or qualification to be making such comments.

The most repeated claim, concerning the amount lenders can allegedly charge, is an outright lie because of the very nature of the cap itself\(^4\). We have raised this issue with some of the more vocal consumer advocates who have either ignored the correspondence or blandly replied without responding to the particular issue.

We have also raised issue with the regulators. The Australian Competition and Consumer Commission elected not to deal with this issue, passing the issue to ASIC\(^5\). The Australian Securities and Investments Commission has declined to take any action on the basis that it does not see “sufficient regulatory benefit” in doing so\(^6\). Further consideration about this issue is set out in our response to Question 3.

Unfortunately, it’s not just the misrepresentations from consumer advocates that SACC lenders have to put up with. ASIC are doing just as much (if not more) damage by promulgating misleading information about the industry - notably through Report 426: Payday lenders and the new small amount lending provisions.

There are many glaring problems with this Report such that it could (and probably should) be the subject of its own report. In substantiation we point of some of the more notable issues:

- The use of the pejorative term "payday lenders" to describe the industry. The term is an import from the United States of America to describe a financial product which has little in common with SACCs. A payday loan is an advance against the consumer’s next income payment, often paid against a post-dated cheque. For anyone in Australia who receives their income weekly or fortnightly, the prohibition against short term credit contacts effectively prohibits payday lending.

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\(^1\) A claim made variously in articles such as “Fears around growth of payday loans”, Yeates, C., The Sydney Morning Herald, 24 March 2015; “Protections from payday lenders for low-income Australians are overdue”, Brody G. and Guthrie, F., WAToday.com.au, 29 March 2015; “ASIC: Poor records make depth of payday loans crisis a riddle”, Whalley, J., Herald Sun, 17 March 2015; “Low and no interest loans offered to low-income earners in Adelaide’s north”, Eacott, A., ABC News online, 14 August 2015; “Review is opportunity to improve protections for payday loan and rent-to-buy borrowers”, Consumer Action Law Centre media release, 7 August 2015.


\(^4\) Creating an effective per annum interest rate requires a compounding calculation to be done. Fees and charges under the SACC cap cannot be compounded, by law. Further, the statements ignore the explicit total cost cap contained in the legislation.

\(^5\) Email from ACCC dated 9 September, 2015 (at Annexure 3, Document 1).

\(^6\) Letter from ASIC dated 15 September, 2015 (at Annexure 3, Document 2).
The correct term, as the Review well knows, is 'short term credit credit'. That is the term that appears in the legislation. That term 'payday loan' does not. We, and we are sure many other lenders, consider the term a slanderous insult. It's bad enough that the Australian media has picked up and propagated the term, without our regulator effectively endorsing it;

- Despite the report being released in March of 2015, the information it is based upon was obtained in a two week period in August 2013\(^7\) - just after the implementation of SACCs. It is therefore somewhat unsurprising that ASIC may have found a high incidence of breaches in the circumstances. Our point here is that ASIC makes no effort to recognise the importance of the timing nor that the Report did not relate to current information;

- ASIC purposely selected lenders with a "higher risk of non-compliance with responsible lending and disclosure obligations" garnered from "intelligence and reports of misconduct"\(^8\). It doesn't take much to understand that selecting lenders with a 'high risk of non-compliance' is likely to return information of non-compliance - or that extrapolating those results over the whole industry is grossly misrepresentative; and

- ASIC claim to have identified "problematic practices where payday lenders set the loan terms on credit contracts at 12 months or more in circumstances where the relevant file indicated that the consumer requested a shorter loan term of well under 12 months."\(^9\) By definition, SACCs may only have a maximum term of one year - as recognised by ASIC in the Report at page 18 under the heading "What is a 'small amount loan'?".

How then can ASIC be considering loans with a term of more than 12 months as part of a review on SACCs? By definition, they are not SACCs. The Report is glaringly silent on this point and we suspect that it may have been lost on ASIC altogether. This raises the serious question of whether the regulator in charge of our industry has a basic understanding of those it is regulating.

With this quality of research, we have little faith in ASIC's ability to regulate our industry.

\(^7\) Report 426, at paragraph 109.
\(^8\) Report 426, at paragraph 105.
\(^9\) Report 426, at paragraph 38.
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?

We acknowledge and agree with the statement the SACC regulatory framework “results in a greater amount of complexity for SACC providers than for credit providers offering other products”.

Question 2 is put on the basis the result is to provide the “same, or a higher level of, protection” for consumers. In our opinion this is a fundamental flaw in the question as it ignores the possibility that consumers are over-protected when it comes to SACCs. Neither the Credit Act 10 nor the Terms of Reference for the Review stipulate that reducing the level of protection may not be considered.

To address this flaw we have responded to the question without the restriction.

The current situation in the legislation

Issues with ‘principles based’ provisions

A major problem with the regulations’ complexity lies in their non-prescriptive nature. Although allowing for a degree of flexibility, it comes hand in hand with uncertainty. To illustrate: Four (or five) parties can each have a separate understanding of compliance necessary for each one of a range of responsible lending obligations:

- The lender;
- The consumer;
- (The consumer’s representative);
- The regulator; and
- The courts.

The courts are obviously the ultimate arbiter; but are also the last to be consulted after what is often a large expense of time, effort and money.

We have only recently seen some examples of the diversity in understanding as matters have begun to filter through the court system:

- In The Cash Store case 11 there was a difference of opinion between the lender, ASIC and the Federal Court as to what constituted sufficient ascertainment of the purpose of credit; and
- In the Teleloans case 12 ASIC took the opinion that the lender’s operations breached the Credit Act and Code, and prosecuted the lender accordingly. The Federal Court disagreed completely, throwing ASIC’s case out. The issue of time and cost is further highlighted in this instance as the court made the curious order that each party should bear their own costs. We can’t imagine it was a cheap exercise for either side.

The sanctions for failing to comply create further disquiet. Civil and criminal penalties (and more) can apply for ‘getting it wrong’. When considered in light of possible range of opinion as to what compliance actually entails, this makes lenders nervous and unwilling to stray from conservative interpretations – and if it doesn’t make them nervous, it should.

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10 Credit Act, s335A.
11 ASIC v The Cash Store Pty Ltd (in liquidation) [2014] FCA 926.
Difficulty is added in the legislation's use of particular phrasing, which is very open to interpretation. The biggest bugbear is "substantial hardship", a phrase ultimately underpinning any credit assessment. There is no guidance as to this phrase's meaning in the Credit Act. ASIC is no help on the subject either, proclaiming:

"We do not propose to give any definitive formulation of what substantial hardship means. The law about the meaning of 'substantial hardship' will develop and become clearer as cases come before the courts and judgments are handed down."\(^{13}\)

No lender wants to be a respondent in the court case where this issue is determined - it is simply too fraught with danger and potential penalty.

Simply put, the regime can be summed up as:

"Here's a range of guidelines about how to act. We'll use some words that no one yet knows the meaning of, but we won't tell you what we think they mean. If we think you got it wrong, we'll prosecute – but we won't tell you what we think is wrong, and it's not up to us anyway. You'll know whether you're doing the right thing or not when someone gets in trouble and gets hauled before a court. You better hope it isn’t you."

**Issues with prescriptive provisions**

By contrast, the completely prescriptive aspects of some requirements force lenders into action which may be unbeneﬁcial. In this, we submit the requirements of the National Credit Code with respect to hardship notification\(^{14}\). This is a relatively complex provision with internal, contingent time frames dependent on actions of both the lender and the consumer. Simply put (as possible):

(a) A consumer contacts their lender and states to the effect of “I'm unable to meet my obligations under the credit contract”. This is sufficient to constitute a hardship notice and start the operation of the Code\(^{15}\) without the consumer having to give any further information;

(b) The lender now has a maximum of 21 days to decide whether to change the credit contract. If the lender agrees, they must give the consumer a written notice recording the change\(^{16}\). If the lender doesn’t, they must give a notice setting out why and all but inviting the consumer to make a complaint to the lender’s external dispute resolution provider\(^{17}\);

(c) The lender may, within 21 days of receiving the hardship notice, request the consumer provides specific, stated information to the lender\(^{18}\). The information must be relevant to deciding whether or not the consumer can meet their obligations under the credit contract, or how to change the contract. The consumer must comply with the request for information within 21 days\(^{19}\), but there is no direct sanction against the consumer if they fail to do so;

(d) From there, one of two things can happen:

(i) The consumer provides some or all of the requested information – in which case the lender must make a decision and give either notice referred to in (b), but within 21 days of receiving the information; or

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\(^{13}\) Regulatory Guide 209, at paragraph 209.97.

\(^{14}\) National Credit Code, section 72.

\(^{15}\) Code, subsection 72(1).

\(^{16}\) Code, subsection 72(4)(a).

\(^{17}\) Code, subsection 72(4)(b).

\(^{18}\) Code, subsection 72(2).

\(^{19}\) Code, subsections 72(2), 72(3).
(ii) The consumer does not provide any of the requested information — in which case the lender must still make a decision and give notice as per (b), but within 28 days of the date on which the lender requested the information (per (c)).

If the lender fails to give the required notice within the required time frames, the Code provides for a civil penalty of 2,000 penalty units20. This penalty is in the same quantum as engaging in credit activities without a licence21. Further comment about sanctions is made in Question 3, but the comment serves to show it is imperative that lenders comply with the timeframes.

Apart from being somewhat complicated, successful compliance often devolves to the actions of the consumer. If the consumer simply claims they are in hardship (and nothing further), the lender has little to no information upon which to base a change to the credit contract. Any prudent lender must therefore request information which, should the consumer fail to respond at all or within the required timeframe, relegates the lender to having to make a decision without sufficient information.

There is no capacity in the Code for the time frames to be extended — with or without agreement by the consumer.

The following table shows our experience with completed hardship notifications to date to illustrate our point:

<table>
<thead>
<tr>
<th>Calendar Year</th>
<th>No. hardship notices</th>
<th>No response to information request*</th>
<th>Part response to information request</th>
<th>Percentage w/ insufficient info.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>80</td>
<td>19</td>
<td>1</td>
<td>25%</td>
</tr>
<tr>
<td>2014</td>
<td>60</td>
<td>23</td>
<td>1</td>
<td>40%</td>
</tr>
<tr>
<td>2015 (to 30/9/15)</td>
<td>71</td>
<td>40</td>
<td>5</td>
<td>63.38%</td>
</tr>
</tbody>
</table>

*All hardship notices receive requests to provide information.

Complexity is further added because of the operation of the responsible lending obligations. It is an offence under the Credit Act for a lender to suggest to a consumer that they remain in a credit contract which is unsuitable for them22.

When applied to a hardship situation, the lender is conceivably under an obligation to ensure any change agreed to pursuant to a hardship notice does not, at least, increase the consumer’s overall hardship under the contract. When the consumer fails to provide the requested information within the legislated period the lender is forced to either decline to make a change (and run the risk of the matter being referred to external dispute resolution) or make a change and run the risk of increasing the overall hardship of the consumer (and therefore potentially committing an offence). It is then a matter of the lender choosing which is the lesser of two evils.

What can be done to improve the overall operation of the regulatory regime?

We understand that some of these suggestions rise above the scope of the Review. However, we would be remiss if we failed to include them in any comprehensive discussion.

1. **Legislated guidance on imprecise terms.** Providing interpretation of phrasing such as ‘substantial hardship’ will help inform lenders, regulators and courts, and lead to an overall improvement in certainty. We accept that some concepts are logistically impossible to define absolutely, but surely a

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20 Code, subsection 72(4).
21 Credit Act, section 29.
22 Credit Act, per sections 115 (subsection (2)) and 119.
range of factors that comprise the concept should be achievable. And, if it is not achievable, we question why it should be permissible for the phrase to be used in the legislation in the first place;

2. **Safe harbour provisions for lenders.** Provisions should be included in the Credit Act protecting lenders who are able to demonstrate their attempts to do the right thing in the face of open ended regulatory requirements, or for matters beyond their control.

3. **Legislated requirement for regulator feedback.** This would take the form of a simple, cost effective method of seeking guidance from the regulator as to a particular course of action. While we acknowledge this would not be any real protection if a matter proceeds to court, it would help save the lender from prosecution by the ASIC and hopefully be taken into consideration against any possible penalties if an adverse finding were made.

4. **Better consideration of the interplay between competing obligations** (along the lines of the issue caused by the hardship provisions, identified above).

5. **Protections for lenders who are compromised by consumer actions.** Lenders are required to make reasonable enquiries about a consumer’s financial situation in assessing a loan application. Part of that process necessarily involves requesting information from (or at the direction of) the consumer. Lenders are then obligated to take reasonable steps to verify the information. If the consumer omits relevant information or provides incorrect information, and it is beyond the limits of ‘reasonable’ that the lender could discover this, the lender could nevertheless suffer liability.

   At the very least the loan may be subsequently deemed unaffordable, resulting in the consumer evading some or all of their obligations under the loan. In such a situation the lender will suffer loss through no fault of their own, with no recourse and no protection. While this may be considered an inherent ‘risk’ in lending, this risk must either be reflected in the lender’s ability to generate a return or some standard of compensation or protection against loss.

6. **Relaxations of requirements for lenders.** Obligations under the legislation should be relaxed, or removed, in situations where:

   (a) The lender is compromised by the action or inaction of a third party outside of their control (most notably, the consumer);

   (b) There is an acknowledged deficiency in established determinations about a particular issue;

   (c) The regulator is unable, or unwilling, to provide reasonable guidance on an issue which is unclear; and

   (d) Where there is a conflict in legislative requirements which operates to push a lender into a particular act, the lender should suffer no detriment for that act.
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?

With respect, the three items mentioned are not the extent of the sanctions imposed by the Credit Act. There are also:

- Declarations;
- Banning and disqualification orders;
- Injunctions;
- Compensation orders; and
- Adverse publicity orders.

Our response to this question will consider these as well.

Is the current sanctions regime working?

What is not specified by the question, or in the consultation paper, is, "at what?" We have accordingly tried to consider the situation in a holistic manner.

There is only a small body of judicial instances to date upon which to base an opinion. Most of ASIC's outcomes have been as the result of 'administrative remedies', 'enforceable undertakings' or 'negotiated outcome'. Table 2 refers:

Table 2 - ASIC regulatory outcomes for credit: January 2014 to June 2015

<table>
<thead>
<tr>
<th>PERIOD</th>
<th>CRIMINAL ACTIONS</th>
<th>CIVIL ACTIONS</th>
<th>ADMINISTRATIVE REMEDIES</th>
<th>ENFORCEABLE U'TAKINGS/NEGOTIATED</th>
<th>TOTAL MATTERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan - Jun 2014</td>
<td>2</td>
<td>1</td>
<td>16</td>
<td>5</td>
<td>24</td>
</tr>
<tr>
<td>Jul - Dec 2014</td>
<td>2</td>
<td>1</td>
<td>12</td>
<td>7</td>
<td>22</td>
</tr>
<tr>
<td>Jan - Jun 2015</td>
<td>2</td>
<td>1</td>
<td>21</td>
<td>4</td>
<td>28</td>
</tr>
</tbody>
</table>

Importantly, the table shows outcomes for all of credit - no breakdown was available for the small amount industry. Also, no explanation or breakdown was given for "Administrative Remedies".

In all three halves, over 85% of outcomes obtained were as the result of regulator action only.

From information ASIC has released about particular instances relating to small amount lenders:

(a) A lender was issued with infringement notices totalling $30,600 in respect of misleading statements in online advertising;
(b) The lender referred to in (a) separately entered into an enforceable undertaking to refund $1.1 million in excessive fees;
(c) A lender refunded $14,000 in unlawful fees;

* Per Reports 402, 421 and 444 “ASIC enforcement outcomes”.
(d) A lender paid $42,500 under an infringement notice for failing to obtain bank statements in accordance with the requirements; and

(e) Civil penalties totalling nearly $19 million were issued by the Federal Court against two entities (lender and broker) for a number of offences, including failing to comply with the responsible lending obligations.

In consideration of these specific cases, we can set aside (b) and (c) for our purposes here as they covered reimbursement of the consumers.

Cases (a) and (d) were regulator determined penalties. It's concerning it is unknown to what degree these offences were due to the lender not being aware that they were in breach of the laws before being penalised by ASIC. For example, the lender in (d) was obtaining the full 90 days of bank statements for new customers, but not for returning customers. This signals a misinterpretation of the requirements rather than any malicious intent.

The lender in (e) was well known to the small amount credit industry as a maverick organisation. It had, for example, been excluded from the National Credit Providers Association (then the National Financial Services Federation) - the only lender to have been to our knowledge. This largely makes them an anomaly.

Of major concern in that case the Federal Court imposed the maximum penalty available under the law for most of the offences. As 'first cab off the rank', this leaves little room for an understanding of whether the penalties will range with the severity of an offence or simply be set at maximum for all offences.

It also appears ASIC is willing to take action aggressively when it perceives any breach of the laws. This is alarming for industry because of the open ended nature of interpreting the rules (as discussed previously in our response to Question 2). Since the sanctions available under the Credit Act are to no doubt act as prohibitions against breach, the fact some lenders are attempting (but failing) to comply and being heavily penalised indicates the aim is currently failing. These lenders do not appear to be purposefully breaking the law - so no manner of prohibition will ultimately be effective against them. The requirements may simply be too onerous.

Unfortunately, the preceding paragraph is not necessarily true. ASIC has shown a distinct unwillingness to take action in respect of the largest small amount lender in Australia: Cash Converters. Despite questionable practices, two high-profile class actions in the Federal Court and a newly revealed consumer advocate represented action in the Federal Circuit Court, Cash Converters has apparently yet to be brought to task by ASIC and seems to be enjoying 'golden child' status.

ASIC have also refused to take action against certain lenders on breaches brought to their attention, and claimed a lack of jurisdiction in another matter which directly affects industry:

(i) A complaint was made to ASIC regarding the publicly funded “community” lender, Fair Loans Foundation Pty Ltd. The complaint cited Fair Loans’ failure to cite their ACL on their website, failure to

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\(^{24}\) Per ASIC Report 426 “Payday lenders and the new small amount lending provisions”, March 2015, at paragraph 27.

\(^{25}\) Referred to in publications such as ASIC Report 426 and the Four Corners program "A Game of Loans", aired 30 March, 2015 on the Australian Broadcasting Corporation.

\(^{26}\) Gray v Cash Converters International Ltd [2014] FCA 420, and the matter of Sean Lynch v Cash Converters Personal Finance Pty Ltd (currently before the court).

\(^{27}\) The matter of Hilary Anne Kelly v Cash Converters Personal Finance Pty Ltd (formerly Safrock Finance Group Pty Ltd) & Ors (currently before the court).

\(^{28}\) Section 52 of the Credit Act, a strict liability offence, requires a lender’s ACL to be cited in prescribed documents.
state an annual percentage rate when providing repayment amounts\(^{29}\) and possible false or misleading representations\(^{30}\) in relation to statements about their fees and charges.

ASIC responded\(^{31}\), saying:

(a) It is not a requirement to cite an ACL on a website. This was despite the Credit Act regulations prescribing advertisements relating to the provision of credit as requiring the ACL to be quoted\(^{32}\), and ASIC stating they consider websites are advertising\(^{33}\);

(b) Stating amounts that must be repaid on a loan is not the same as stating repayment amounts. We're not sure consumers would see or understand the difference; and

(c) Concerns regarding possible misleading and deceptive statements were not sufficient to take further action because the wording 'seemed to indicate' an interpretation which ASIC was apparently satisfied with. We submit that had the same situation occurred with a commercial SACC lender, ASIC’s interpretation would be otherwise;

(ii) A complaint was made to ASIC that not-for-profit lender, Good Shepherd Microfinance (who actively compete with our industry sector) was making false and misleading statements in the media about the charges under SACCs. The CEO of Good Shepherd was quoted on a number of occasions stating SACCs have interest rates of up to 350 per cent over a year. The comments, made in August 2015, were cited as being particularly unfair due to their coincidence with the announcement of this Review.

ASIC declined to take action, responding that they did not consider the matter to be of sufficient public benefit\(^{34}\); and

(iii) Complaint was made to the ACCC, and thereafter ASIC, concerning similar comments to (ii) made by consumer advocate body, Consumer Action Law Centre, and published on their website. CALC has refused to take the offending material down, and have a history of such inflammatory, incorrect comments.

The ACCC refused to take action, citing ASIC as the best placed regulator to assist\(^{35}\). After referring the matter to ASIC, they cited an inability to assist due to a lack of jurisdiction\(^{36}\).

It is apparent regulators are unconcerned with protecting the legitimate industry participants or creating an ‘even playing field’. They appear to apply a different weighting and standard of conduct to commercial lenders as opposed to non-commercial ones. This not only creates a double standard approach to enforcement, it also destabilises business confidence and makes regulatory interpretation more difficult (in what is already a difficult environment).

Any other concerns aside, we do not consider that a penalties regime can ever be effective when it is applied wholly subjectively. ASIC has shown a propensity to arbitrarily target certain sectors of the industry while completely ignoring others.

\(^{29}\) Required by subsection 150(3) of the National Credit Code.

\(^{30}\) Prohibited under section 154 of the National Credit Code.

\(^{31}\) By letters dated 30 January, 2015 and 5 May, 2015; (Annexure 3, Documents 3 and 4 respectively).

\(^{32}\) Subsection 13(1)(b) of the Credit Act Regulations.

\(^{33}\) ASIC “Regulation Guide 234: Advertising financial products and services (including credit): Good practice guidance” at RG234.8 to RG234.12.

\(^{34}\) By letter dated 15 September, 2015 (Annexure 3, Document 2).

\(^{35}\) By email dated 9 September, 2015 (Annexure 3, Document 1).

\(^{36}\) By email dated 13 October, 2015 (Annexure 3, Document 5).
Are there any enhancements that could make it more effective?

It is our firm belief that if the regulatory regime is able to be better understood and clarified, it will be better complied with. If it is better complied with, then the sanctions will be less relevant as only those wilfully breaking the law will be subjected to them. Unfortunately, that is not the regime that we have.

We aim to impress on the Review that the regulatory environment facing small amount lenders is draconian and confusing. It is akin to walking into a minefield where some of the mines are visible, some are not and only certain people set any of them off. Following in the footsteps of the person in front of you is no guarantee of safety.

Looking at the actual sanctions, the penalties regime is largely set to maximum across the board. Table 3, in Annexure 1 to this document, shows most of the civil penalty provisions in the Credit Act which may apply to small amount lenders. In every single instance, breach can result in up to 2000 civil penalty units - which equates to fines of $360,000 for individuals or $1,800,000 for companies 37.

These amounts are sobering when it is considered:

- There has been one instance to date where a court has made civil penalty orders against a small amount lender 38, and it awarded the maximum penalty for each breach against the perpetrator. It further awarded half the maximum fine amount against the party found to have secondarily engaged in the contravention - effectively taking the penalty for each transgression above the maximum; and

- The maximum gross revenue ever achievable on a small amount credit contract is capped at $2,000 (or, if the lender is a body corporate, less than 0.12% of the amount they can be fined for each mistake they may make in regard to that loan).

These considerations together clearly show that small amount lenders’ risk to reward ratio is grossly out of balance. A more just regime would take into account the comparative levels of risk for all parties.

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37 Penalty units are $180.00 each, per section 44 of the Crimes Act 1914 (Cth). Pecuniary penalties under the Credit Act are multiplied by five for bodies corporate, per subsection 167(3)(b) of the Act.

38 The Cash Store case.
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?

Requirement to obtain and consider

An unresolved dichotomy in the Credit Act is it is supposed ‘principals based legislation’ which then proceeds to be very prescriptive in some respects – the requirements regarding bank transactions being one of them.

The rationale for the requirement is not problematic. We consider obtaining and reviewing bank account statements as part of a loan application assessment is fundamental, and have always done so (including prior to the advent of the Credit Act). Our view is it is an integral part of the assessment process - a lender cannot comply with the responsible lending obligations without doing so.

However, in practice, the requirement has a tendency to create problems. Sub-section 130(1A) of the Credit Act provides:

“If the credit contract is a small amount credit contract and the consumer holds ... an account with an ADI into which income payable to the consumer is credit the licensee must ... obtain and consider account statements that cover at least the immediately preceding period of 90 days.”

The problems invoked are:

(a) The ‘immediately preceding period of 90 days’.

What date must it immediately precede? Is it the date of application? The day the assessment process begins? The date the assessment is made? The date the SACC is entered into? The legislation is unclear in this regard. Common sense and practicality indicates it should be the day the assessment process begins. Otherwise, unless all steps can be undertaken and finalised within the same business day, the condition would forever require asking for an extra day of transactions.

Once which day is determined, practical difficulties in obtaining the transactions can arise. We have encountered all of the following situations on more than one occasion:

(i) If the consumer has not had any transactions on their account in the past few days, care must be taken to ensure that their bank provides the data in some way to show this and that it covers up to the ‘preceding day’. Not all banks provide their data in a way that shows this clearly;

(ii) If the consumer has not had the bank account for more than 90 days (for example, due to changing banks), it can be difficult to obtain sufficient transaction listings in a timely manner for the old account;

(iii) We have multiple instances of consumers who do not have access to internet banking or who still operate passbook accounts – making fulfilling the requirement all but impossible. The time delay to provide the information immediately renders the information out of date; and
(iv) The consumer may have a ‘hole’ in the middle of their transactions period, where nothing happened in their account and the time may fall between statement dates. While the balances from the dates on either side may correlate, there is no certain way of knowing there were no transactions past obtaining representations from the consumer; and

(b) Which accounts must be obtained?

The wording of the subsection appears to indicate the requirement extends only to the account(s) into which the consumer’s income is deposited. However, ASIC’s view of the requirement extends beyond this perception to any account the consumer holds:

“... your steps to verify the financial situation of the consumer must include obtaining and considering account statements that cover at least the immediately preceding period of 90 days... You need to obtain statements for all of the consumer’s accounts.\(^{39}\) [emphasis added]

The Regulatory Guide does not stipulate, but context would seem to indicate in the affirmative, whether the preceding 90 days of transactions for all accounts of the consumer must be obtained.

These considerations pose further potential issues:

- If all or part of the consumer’s income is deposited into a third party’s account, how is the lender to proceed where the third party does not consent to providing their account statements to the lender?

- How is the lender to know how many accounts the consumer has? The Regulatory Guide does state that the lender should “check with the consumer”, but this is hardly decisive (especially in the event that compliance becomes contested); and

- How is a consumer’s right to privacy balanced against the lender’s requirements under the Credit Act, especially with regard to accounts which may have no applicability on a SACC application?

**Are there more effective ways?**

There are other ways of obtaining information about a consumer for the purposes of assessing a SACC, but they are complementary to reviewing transactions, not as effective in isolation and therefore are not suitable for replacing.

We consider obtaining bank statement information (albeit in a practical manner – see above) is fundamental to determining the consumer’s financial situation. However, it should not be the only way in which their situation is determined.

**Is it appropriate for lenders to use the information for other purposes?**

While we do not (and do not propose to) use the information from consumers’ bank accounts for any purpose beyond making an assessment on their SACC application, we have no objection to the practice so long as the consumer gives fully informed consent prior to the use being made. In this respect, we see no difference between this information and any other personal information.

We draw no distinction between such consent and a written directive from the consumer for the information to be provided to any third party (such as a consumer representative).

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\(^{39}\) Regulatory Guide 209: Credit licensing: Responsible lending conduct, ASIC, at paragraph RG 209.66 (page 26).
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?
- Is a restriction on repeat borrowing necessary to protect consumers?
- 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?
- 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)?

How do we determine the existence of other SACCs?

We employ a number of measures to determine whether a consumer has any other SACCs:

(a) **Initial disclosure in our application form.** When our system determines a consumer is applying for a loan of less than $2,000, it automatically:

   (i) Provides an easy to understand explanation of what a SACC is; and

   (ii) Requires the consumer to provide a response to the question “have you owed any money under any SACCs in the last 90 days?” Consumers must choose either: “Yes, one SACC”, “Yes, two or more SACCs” or “No”.

   All applications, regardless of type, are further requested to provide budget information including:

   (iii) Expenditure on loans by way of specified categories, including “home loan”, “car loan”, “credit cards”, “other loans”, “goods rental” and “other expenses”; and

   (iv) Details of any debts or current loans, including “type”, “balance owing” and “to who”.

   These responses are published as part of the completed application form;

(b) **Search our loans database for previous or existing SACCs for the consumer:**

(c) **Review of bank transactions.** Per Credit Act requirements, the bank transactions of the consumer will be obtained. These transactions must be reviewed as part of the assessment process. Any evidence of indebtedness (no matter to whom) at any time within the statements obtained is to be further investigated – not only to satisfy the requirements of assessing a SACC but also to ensure that the information disclosed in the application matches the actuality. Indication of payment dishonour, for example, is an immediate cause for investigation;

(d) **Review of budgetary information.** Our assessors review the budget information provided in the application (per (a)) and thereafter further revise the budget with the consumer as part of their assessment interview. This is done after having reviewed the bank transactions, so that the assessor can be informed of any discrepancies or items requiring further explanation;
(e) **Credit file history search.** Provided the application proceeds to the proper stage of assessment, all applicants for SACCs will have their credit file searched (negative credit reporting only). Assessors must review the information provided for indications of credit application and indebtedness. Any information which appears inconsistent with information already obtained will be referred back to the consumer for comment and investigation; and

(f) **Targeted disclosure as part of the assessment process.** This step will be informed by the assessor’s interview with the consumer as well as the information obtained in the above steps. Assessors are required to seek and record responses from the consumer to the following:

(i) Have you owed any money under any SACCs in the last 90 days?;

(ii) Do you currently owe any money under a SACC to any lender?;

(iii) (If yes to (ii)) Have you missed or dishonoured a payment under a current SACC without prior permission from the lender? (the rationale for this question is to determine whether a default has occurred); and

(iv) A statement is read to the consumer regarding the information they have given which they must confirm and agree to about the information that they have provided.

These steps must be documented in the required standard form and kept as a record with the loan records.

If it is determined that the consumer has been a debtor under a SACC at any time in the preceding 90 days, the information presented will be reviewed for indication of what the status of each SACC is. The extent of the investigation will ultimately depend on the information which presents, and the consumer will be requested to provide explanation to inform further necessary investigation.

Lending policy requires that any evidence of the presumptions being triggered (indebtedness under two or more SACCs in the 90 day period, or default under a SACC) presumes the application unsuitable and to be declined.

If the assessor believes there is sufficient reason to rebut the presumption, they must refer the whole application to our responsible manager for full review and determination together with copies of each relevant SACC and the purpose for each one. Following a review of all relevant factors, tailored to the circumstances, the responsible manager will be the ultimate arbiter of whether the loan is approved. Regardless, the application will be automatically declined if the applicant is in default of any SACC or the applicant has two or more current SACCs. Our policy is that neither of these two circumstances can be sufficiently rebutted.

These steps form part of our mandatory, documented lending policy for the assessment of all SACC applications.

We also decline an application where it becomes too difficult or uneconomical to determine the consumer’s SACC status; rather than potentially breach the Credit Act.

**Is a restriction on repeat borrowing necessary to protect consumers?**

We do not believe that a restriction on repeat borrowing should be necessary.

From a policy standpoint, we support the personal freedom of consumers to enter into contracts without regulatory restriction. Imposing restrictions will necessarily impinge the ability of some consumers to obtain finance, and we do not support the contention that doing so is preferable in order to potentially protect other consumers. We are under no illusion that this standpoint is in political favour.
From a regulatory standpoint, sufficient requirements already exist in the Credit Act such that a restriction of this sort is unnecessary. The responsible lending obligations, generally, and the requirement to assess suitability, specifically, are sufficiently extreme to protect consumers in all aspects – this included.

If a consumer has two or more SACCs within a 90 day period, for example, this will necessarily inform and be a part of the assessment of their financial situation for suitability. Taking this into account – if the assessment shows a SACC is unsuitable, the application must be declined. Likewise if the SACC is entered into in circumstances where it would be unsuitable to do so, then the licensee has breached the law and is subject to penalty.

We do not see how a consumer is any better protected by a specific restriction on repeat borrowing than they already are under the standard provisions.

We note that this type of restriction is not levied on any other type of credit under the Credit Act, and postulate that its real purpose may be to make life easier for the regulator rather than anything else.

It must also be realised that putting restrictions on repeat borrowing creates and enforces anti-competitive behaviour. If a consumer obtains credit from one lender, and is prohibited from obtaining further credit from another lender – whether that is in the form of additional credit or a refinance of existing credit (which has its own, separate issues) that consumer becomes ‘locked in’ to only being able to use the first lender; even if only for a period of time.

We regularly have applicants approaching us (through our credit representatives) attempting to obtain a SACC when they have, or have had, SACCs with other lenders. A number of times we have discovered a consumer has been given multiple SACCs by the other lender - effectively forcing us to decline their application. Our credit representatives have also received anecdotal reports from the declined applicants who say they went back to the first lender and receiving further credit. We fully accept these applications must necessarily fail for unsuitability in any event – but the point is some lenders are entering into multiple SACCs with consumers; apparently (or at least, potentially) in order to ‘capture’ a portion of the market.

**Is a rebuttable presumption or a ‘bright-line test’ more effective?**

Accepting our comments above, the response to this question is: ‘at what?’

If the intention is to ensure consumers are not entering into credit which is unsuitable for them (and we understand this to be the overarching aim in the legislation), then there is no need for an absolute prohibition. A properly conducted assessment process will be more effective, and more discerning, than any prohibition. Likewise, a rebuttable presumption should feed in and form part of an assessment to the extent where it should not be necessary to form part of the legislation. It could, for example, form part of the regulator’s guidance material (which should not be de facto law).

If the purpose of either provision is to simplify the task of a regulator and the courts in determining of breach of the Credit Act, then a prohibition is more effective as it is a clear delineation. Having a rebuttable presumption really only serves to shift the onus of proof from the regulator to the lender in having to prove compliance with the legislation (it is already arguable that the onus lies with the lender in any case due to the nature of the regulation and the legislative requirements for assessment of credit).

If the intention is simply to limit the ability of consumer’s to access small amount credit, the answer is obvious.

**Reliance on prescribed benchmarks**

We cringe at the arbitrary use of benchmarks in any form of credit assessment. To be clear, we do see the usefulness of these tools (and make use of them ourselves) – but they are used to inform the assessment process, not to be a hardline determining method.
Tools, such as the Henderson Poverty Index, are best used to measure large groups of people. They do not, and cannot, properly cater for the circumstances of the individual. Using them in this way only sees consumers reduced to the lowest common denominator - a "number not a name" approach.

Our concern is that legislating reliance on such tools removes the ability to take into account the consumer’s individual circumstances. As the legislation currently stands, the whole of a consumer’s financial situation can be taken into account.

Common examples of where this holistic approach may be warranted include consumers who:

(a) May be boarding with family - and have decreased rent, meals included or subsidised utilities;
(b) Have special work arrangements – such as a provided residence, meal allowances or transport provided (common incidences of this are ‘fly in, fly out’ workers);
(c) Have a spouse or partner who is not an applicant for credit, but who provides financial support which the consumer may rely upon; and
(d) Live in a location or region where the cost of living is not commensurate with the statistical norm represented in the particular tool.
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.

In our experience, short-term lending has never been an issue. Our products have always had a minimum term of at least six months, and we cannot recall the last instance of lenders having products with a term of less than at least 28 days.

Accordingly, we cannot say that the prohibition has been effective as we have no recollection of there having been a problem with short-term lending in the first place.

The prohibition is, however, a restriction on the right of consumers and lenders to freely contract. A consumer could possibly have a reason to request a loan with a short term but we can’t nominate a realistic scenario in which it may occur, and simply state that it is a possibility.

We therefore don’t consider the prohibition is something warranting much argument one way or another.
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?

Are the warning statements effective?

We have a fundamental issue with the rationale for the warning. It requires businesses to put up a barrier to their customers, saying, "Don't come here. Go somewhere else - and here is where you should go."

That sentiment aside, we have no information about the effectiveness of the statements. If they dissuade consumers from using our services, we have neither the means nor the ability to determine how many. We certainly have received no enquiries from any consumers about the warnings.

In fact, the only comments we have ever received on the warning statements have been from other professionals who have visited our offices and seen it; expressing surprise that such a thing should be a requirement.

Our responsible manager did recently refer a consumer to the 1800 007 007 number stated in the warning. The consumer was seeking credit and a SACC had been deemed unsuitable for her. A couple of days later she telephoned the responsible manager again. When asked if she had contacted the number she responded that she had but that, "They were useless. I need money to pay my car registration and they can't help me get a loan."

Should a hyperlink to the MoneySmart website be required?

We can see no issue with the requirement being amended to include a hyperlink on the webpage warning. We do not anticipate that it will be of any great improvement, however, because:

(a) There will always be a large proportion of people who, we fear, pay no heed to information such as the warning statement; and

(b) If a consumer is technologically savvy enough to navigate a website and find themselves at the warning statement, they are knowledgeable enough to conduct an internet search for the MoneySmart website if they are so inclined to find it.
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?

Part 1: Responses to comments in the Consultation Paper

We feel some of the comments in the Consultation Paper require attention:

(a) "There is a separate cap that applies to default fees." We are unsure if this is a misstatement, because while technically correct it poorly communicates the nature of the total cost cap. When considered in isolation it may not appear to be of import. In the larger scheme, where there is abundant poor communication of concepts and terms, it becomes important that issues should be addressed in neutral terms wherever possible.

(b) "The caps were designed to balance the need to protect consumers from high fees and being caught in a debt spiral against the need to ensure the industry remains viable." Our issue regarding the comment is not so much with the stated aim, but rather with the concept that the caps were designed to ensure industry viability. This contention is dealt with below.

(c) "...as 48 per cent is a small amount in dollar terms for small amounts of money over a short term." We have no problem with this comment whatsoever. Rather, we are glad to finally see official recognition of this important fact.

(d) "... generally seeing less avoidance around the cap on costs than had previously been seen with interest rate caps." It is important to note that there is a direct correlation between the level of cap and the degree of avoidance, which is made obvious with the realisation that the ‘48% cap regime’ made industry inherently unviable – lenders either avoided the cap, or ceased to exist.

(e) "ASIC identified ‘... practices where payday lenders set the loan term on credit contracts of 12 months or more’...". We have issues with this statement (which we realise is a quotation from ASIC Report 426), which we have expanded on in our response to Question 1.

(f) "ASIC has noted that most SACC providers are charging customers a fee for direct debit services...". We are unfamiliar with ASIC making this statement, and no reference appears in the Consultation Paper. We are further unaware of any court decisions in this regard. Our concern lies in the claim lenders are using ‘complex corporate structures’ in order to charge a fee for direct debit processing. Such unsubstantiated comments are inflammatory, and will no doubt encourage consumer advocates to make a further push for the fees to be re-worked against industry.

The simple fact is that the banking industry is withdrawing services from the SACC industry - allegedly due to blackmail from consumer advocates. There are multiple instances of bankers giving SACC lenders scant notice that all of their accounts are being closed, leaving them 'unbanked'. The banks are certainly denying direct debit facilities. If there are any 'complex corporate structures' involved, it is no doubt a by-product of lenders trying to get access to the services which are vital to being able to operate in the market.
Part 2: The performance of the cap

The cap’s creation

In considering the performance of the cap against the policy intention, it is first necessary to get a thorough understanding of the cap’s creation.

To be clear: we do not wish to create the impression we are unconcerned with the protection of consumers. Rather, our point of view is that industry viability is severely inhibited under the cap to the point where it demands immediate and full attention. We cannot take action to protect others when we are hard pressed fighting for our own existence – especially when the proposed means of protection hastens our demise.

The Cap Explanatory Memorandum\(^\text{40}\) reflects the originally proposed cap of 10% establishment fee and 2% monthly fee (rather than the 20/4 model ultimately enacted). In the stated context of the provisions\(^\text{41}\) only scant consideration is given to industry. In fact, no statement at all is made about any concern for the viability of industry under the proposed cap. The only approximate comment appears at paragraph 5.9 which merely reflects “a greater return for small amount credit contracts, given the relatively higher establishment costs they may incur.” We submit it does not matter how much of a ‘greater return’ is afforded if the final amount is still below what is needed to ensure viability.

The RIS\(^\text{42}\) (which also appears as Chapter 11 of the Cap Explanatory Memorandum) makes little attempt to discuss the costs of operation in the small amount credit industry. It is impossible to determine a proper pricing structure in any industry without an accurate understanding of the cost of production.

The RIS:

(a) Refers to comments by industry and industry representatives that a 48% per annum comprehensive cap (as was mooted at the time) was simply inoperable for business\(^\text{43}\); 

(b) States “the actual cost of providing these loans across the industry has historically been difficult to ascertain, and is subject to a high degree of variability. Costs will depend on the efficiency and scale of the business and the amount and the term of the loans”\(^\text{44}\); and 

(c) On the subject of cost, refers to\(^\text{45}\):

(i) Cash Converters’ response to the Green Paper\(^\text{46}\) which “stated that the average cost per $320 transaction was $76.07...”;

(ii) The National Australia Bank’s Small Loans Pilot, which sought to determine the viability of a fringe credit lending model. Apart from not particularly operating in the SACC market (their loans were from $1,000 to $5,000), the NAB reported “it is not possible to make a profit and

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\(^\text{40}\) The Explanatory Memorandum to the Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, which was enacted as the Consumer Credit Legislation Amendment (Enhancements) Act 201.

\(^\text{41}\) Cap Explanatory Memorandum, pages 60-61, paragraphs 5.3 to 5.9.


\(^\text{43}\) RIS, pages 40 – 41.

\(^\text{44}\) RIS, page 41.

\(^\text{45}\) RIS, page 41-42.

\(^\text{46}\) Treasury’s “National Credit Reform. Enhancing confidence and fairness in Australia’s credit law”, Green Paper, July 2010.
legally operate with the 48% per annum cap for loans of $1,700 or smaller, for a portfolio of 3000 loans or less, for loan terms of one year or less.”

Further, to make a small profit on an average loan of $605 the lender would need to write 165,000 loans a year – which we consider is well beyond the vast bulk of the industry, if it is achievable by any; and

(iii) A Canadian report prepared by Ernst & Young LLP for the Ontario Government in 2009 on their domestic payday industry, which calculated an unaudited weighted average cost of $21.50 per $100 lent. No indication is given as to how comparable these costs are to the Australian environment; but we wager our compliance cost is comparatively one of the highest in the world.

Before turning to what the RIS did not do, it is important to note:

- These comments were made regarding the previous compliance regime, which was not as onerous or extensive as that currently in place. This means the cost of production of small amount credit products was less when the comments were made than it is now – indicating that operating margins are even more constrained now than they were then; and

- The maximum charge allowable for a $320 SACC for one month is $76.80 (20% establishment fee plus 4% monthly fee: 24% x $320 = $76.80). This amount is only $0.73 more than that stated cost of Cash Converters to produce such a loan – the acknowledged largest SACC lender in Australia, who should by that status enjoy the greatest ‘efficiency and scale of business’. We again state, for the purpose of clarity, that this cost was quoted for a period before the current heightened regulatory regime.

Further comment about Cash Converters’ involvement in the creation of the cap is made below, in its own section.

What the RIS did not do was actually consider the cost of provision of a SACC in Australia under the proposed regulatory regime. It did not, in fact, create any form of economic modelling or apparently progress beyond referring to the aforementioned comments.

It is apparent Treasury was simply denied the opportunity to do so by the Government – the lack of involvement is simply that glaring. When questioned on the subject by the Parliamentary Joint Committee on Corporations and Financial Services, Treasury officials were unable to give any details about economic modelling despite repeated questioning and were relegated to simply saying that it was the government’s objective to maintain a viable industry.

Treasury’s knowledge of industry and the false claim of ‘viability’

Treasury was well aware of the dearth of independent information about the costs that industry faced. What is not acknowledged in the RIS is that a study into the costs of provision of small amount lending and the impact of an interest rate cap was commissioned by the Western Australian Department of Consumer and Employment Protection in 2008 (“WA Report”), to be prepared by Price Waterhouse Coopers.

Our director tried, repeatedly, to obtain a copy of the WA Report, but was denied any access to any part of the document. Documents obtained under Freedom of Information reveal that Treasury was likewise unsuccessful

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48 Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, 24 October 2011, pages 75 to 77.
when they attempted to obtain a copy of it in 2010. The Director of Strategic Policy and Development for Consumer Protection, Department of Commerce, Western Australia stated, in response to Treasury’s request:

“The PWC report to which you have referred has not been made public and there is no current intention to publish the report. There were a number of concerns with regard to the way in which the report was prepared which have given rise to this position. As a result, I’m unable to provide you with a copy.”

To the extent of our knowledge, this is the only attempt at any time by an Australian government to undertake a study of this nature. That apparently no-one is able to access its information, and no further attempt has been made to revisit it, is extremely suspicious.

Treasury also made attempts to obtain information from other states regarding their rationale for interest rate caps. At the time, both New South Wales and Queensland had 48% interest rate caps in place.

A Treasury File Note dated 23 December, 2009 reveals that New South Wales did not obtain a regulatory impact statement “or equivalent document” relating to their imposition of a cap. The NSW Minister for Fair Trading promised to review the effect of their cap (similarly to this Review), but it never eventuated.

Queensland relied on a statutory exemption from producing a regulatory impact statement on the basis that a similar law was in place in another jurisdiction in Australia (NSW) – a patently absurd course of action since NSW hadn’t done one.

Despite the lack of information, Treasury felt comfortable to make comments such as “20/4 cap to apply... as it allows for a viable industry” and “PROPOSAL: 20/4 cap to apply – so no changes proposed. COMMENTS: Government is committed to retaining the cap at this level” despite having no apparent evidence to support their contention of viability.

In fact, Treasury was aware of the opposite effect with the proposed cap. A document described as an executive minute from Treasury to then Minister for Financial Services and Superannuation, Bill Shorten, on 26 June, 2012 (obtained from Treasury under Freedom of Information and included as Annexure 3, Document 9) states:

“I propose to make the following key changes to the regulation of SACCs:

- The cap for SACCs is to be retained at the 20/4 level – that is, it is unchanged from the cap in the draft Parliamentary Amendments. This has been accepted as a level which will allow for the continued viability of some small amount lenders (although others will be required to exit the industry).”

So, not only was the government not aware of the costs of provision of services so as to be able to make an informed consideration of caps, they were well aware that the proposed cap would only allow some lenders to remain viable.

Whether this is sufficient to make a claim of allowing the ‘industry’ to remain viable is debatable. We contend that it is at the very least misrepresentative and disparaging to the bulk of the industry, who are apparently expected to just ‘fade away’.

49 Email communication, Sunday 2 May, 2010, obtained under Freedom of Information (Annexure 3, Document 6).
50 Obtained under Freedom of Information (Annexure 3, Document 7).
Cash Converters’ involvement in the setting of the cap

We believe the decision to implement a cap of 20/4 was a direct result of the lobbying of the largest industry participant – Cash Converters. At the time of announcement of the cap, anecdotal evidence within the industry was that Cash Converters had lobbied directly for and proposed the figure of 20/4. It was apparent they were ‘going it alone’ on the lobbying front as they had refused to participate or share information with any of the industry representative bodies.

Confirmation of this was indicated by Mr Peter Cumins, then managing director of Cash Converters in the Four Corners program “A Game of Loans”. In the program, Mr Cumins stated:

- “We were led to believe by Treasury that the rate cap that was going to be put in place was one that would allow us to continue in the business. Unfortunately, when the cap came out at a 10 per cent establishment fee and a two per cent monthly fee, that was effectively prohibition for us. We couldn’t continue under those rates”; and

- In an interview with Four Corners’ journalist, Stephen Long:

  Stephen Long: “The final legislation, when it took force in mid-2013, let payday lenders levy double the fees and charges initially planned.”

  Peter Cumins: “From our point of view, we think it’s a very good piece of legislation.”

  Stephen Long: “It was, in fact, what you’d proposed?”

  Peter Cumins: “As it happens, it’s what we proposed. I can only ag– um, ah, commend the Government on recognising that that was the right level.”

In our view it is no coincidence that the 20/4 cap is just above Cash Converters cost of provision of its typical loan (as referred to above). We believe that Cash Converters was aware that most of the industry would be wiped out with the impending cap and positioned themselves to be able to survive. They would then seek to take up market share in the ensuing vacuum. Unfortunately, we don’t think Cash Converters anticipated the extra constraints imposed with the cap (in the form of the presumptions of unsuitability for multiple SACCs and previous defaults, for example).

These sentiments tie in with the knowledge that:

- For industry to remain existent, Cash Converters must be viable. To do otherwise would see all other lenders probably wiped out as well, as Cash Converters has the greatest ability to survive due to their size and turnover. It therefore makes sense that government would seek to implement a cap which they could live with; and

- ASIC has failed to take any perceived regulatory action against Cash Converters, despite an apparent abundance of opportunity to do so. When considered in light of all the circumstances, it certainly appears that they are a ‘protected species’.

To be fair, if Cash Converters were the reason the cap was lifted from the initially proposed 10/2 to 20/4, we are thankful – despite it appearing that any benefit flowing to the rest of industry may have been unintentional. It is nevertheless concerning if that is what it took for the revision to happen.

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53 Refer to our previous comments in our response to Question 3 under the heading “Is the current sanctions regime working?”. We are also aware of a presentation conducted by the Financial Rights Legal Centre (then Consumer Credit Law Centre) and Legal Aid NSW entitled “Dealing with Payday Loans: Tips and Traps” in which financial counsellors were urged to refer lenders such as Cash Converters “every time”.
The current climate of operating under the cap

General costs of holding an Australian Credit Licence

An integral component in looking at the suitability of a pricing restriction is a consideration of the cost of production. As well as the costs involved in the provision of a SACC (which are discussed below), there is the further cost of being in a position to actually provide a SACC – holding a valid ACL. It is relevant that the costs of maintaining an ACL are considered.

In this section we touch on the cost to obtain an ACL, but mainly concentrate on the ongoing maintenance of it. Many of the costs in setting up a lender do not represent ‘once off’ costs, as many of the relevant items require ongoing review, maintenance and amendment. For sake of ease, we don’t differentiate between obtaining and maintaining a cost item unless specifically noted.

We won’t specifically discuss the common costs of running a business; such as rent, wages, utilities, stationery and the like. These cost items do deserve consideration and to be factored into the argument - especially the cost of retaining an appropriately qualified responsible manager. However, for the sake of brevity we will assume that the Review is cognisant of these.

Generically, we see the following requirements as absolutely necessary to holding an ACL:

- **ASIC licensing fee**: This is the fee payable to ASIC for the annual compliance certificate. The fee is dependent on the nature and turnover of the licensee. We consider that most SACC lenders fall into the same category that we do: lending less than $100 million per year, and not a sole trader. This current amount for this category is $1,121.00 (assuming online lodgement). We point out that the fee is indexed yearly on July 1 but the fees and charges achievable under SACCs are not.

  We further note that the cost of applying for a new licence is proposed to increase to $5,700.00 under the Proposed Industry Funding Model for ASIC which is currently the subject of consultation.

- **ASIC ‘user pays’ fees**: Every indication has been received that the proposed Industry Funding Model for ASIC is likely to pass and become law. Treasury’s consultation paper gives an indication of that the anticipated fees will be in the order of $1,650.00 per annum. While it is also proposed that the annual compliance certificate costs will be reduced to zero under this model, we fail to see how this will become practical reality and there is insufficient substantiation offered for the rationale.

- **Compliance policies and procedures**: This item requires a significant set up cost. As recognised by the Review, compliance with SACC regulatory requirements is greater than for other consumer credit industries. This is reflected in the need for specialised, accurate and up to date policies and procedures. ASIC’s view is they must be well documented, citing the requirements under subsection 47(1)(k) of the Credit Act.

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55 Proposed Industry Funding Model for the Australian Securities and Investments Commission, Treasury, 28 August 2015, per Table G2 (items P-CL01AA to P-CL01AI) at page 62.

56 Per consultation paper: $5.00 for small proprietary companies (Page 36, Table A2) and $1,600 for Tier 3 credit providers (Page 38, Table B1).

57 Per consultation paper, Table H1 at page 69.

58 See for example; RG 205: Credit licensing: General conduct obligations at Table 1 and RG205.30, RG205.31; RG 206: Credit Licensing: Competence and training at RG206.72; RG 209: Credit licensing: Responsible lending conduct at RG209.106.
Included in this category are policies and procedures required by other pieces of legislation but which directly relate to the provision of credit (for example, a privacy policy compliant with the Privacy Act, or the requisite program A and B for the purposes of the Anti-Money Laundering and Counter-Terrorism Financing Act).

We were fortunate in being able to source these documents internally, as our responsible manager is a qualified lawyer with an extensive background and experience in consumer credit. This does not belittle the time and effort involved, but indicates that we were able to absorb the cost internally. This does however place us in the position of being keenly aware of what is necessary to generate the requirements.

Ultimate cost depends on the nature and complexity of the individual lender, including what other products are offered and their business structure. We consider the following to be estimated minimum costs: $7,500.00 to create the policies and procedures, with an ongoing service fee of $500.00 per annum, and an estimated life of five years (due to the relatively continual nature of change in the industry). This gives us a yearly estimate over time of $2,000.00.

- **Working documents**: This item requires a significant set up cost. In this category we include the operative documents of a lender - precedent credit contracts, notices, letters and assorted statutory documents (such as a Privacy Act consent form).

In practical terms, the comments made above regarding policies and procedures apply equally to these working documents.

We consider the following to be estimated minimum costs for this class of documents: $2,500.00 for creation, and ongoing service fees of perhaps $200.00 per annum (as many of the documents tend to remain the same, or only require slight adjustment). Estimated life of this class of documents could range from five to ten years. However, given that the advent of SACCs required a fundamental change in loan documents, we consider five years to be an accurate measure.

- **SACC specific compliance requirements**: This category considers that there are documents which are specific to the SACC lending environment; from procedures to deal with the protected earnings amount requirements to the warning sign required on premises. We have factored these prices into other categories as relevant.

- **Ongoing profession education**: The Credit Act requires that a licensee's representatives are 'adequately trained, and are competent, to engage in credit activities'\(^\text{59}\). Pursuant to this requirement, ASIC requires a certain amount of annual training be completed for all of the licensee's representatives, as set out in their regulatory guides\(^\text{60}\) and as a common condition of a credit licence\(^\text{61}\).

It is expected that responsible managers will complete a minimum of 20 hours training per year. Credit representatives are generally expected to complete at least 10 hours\(^\text{62}\).

Our cost of training per representative per year is currently $297.00, sourced from a registered training organisation. Assuming a small lender with one responsible manager and two representatives, and the responsible manager requiring more hours than general representatives, this equates to at least

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\(^\text{59}\) Subsection 47(1)(g) Credit Act.

\(^\text{60}\) See RG 205: Credit licensing: General licensing: General conduct obligations (Table 1) and RG 206: Credit licensing: Competence and training (generally).

\(^\text{61}\) For example, our Australian Credit Licence contains a condition to provide sufficient training to all representatives (and a mandatory minimum for responsible managers).

\(^\text{62}\) ASIC considers that below 10 hours would require justification from the licensee to be deemed acceptable, per RG206 at RG206.88.
$1,000.00 per annum in training costs. Our actual costs are much higher as we have more representatives than this.

- **Professional indemnity insurance:** It is a requirement of the Credit Act for licensees to have 'adequate arrangements for compensating persons for loss or damage'\(^{63}\). In practical terms this means the licensee must have a professional indemnity insurance policy\(^{64}\). We have recently received our insurance renewal price which is just over $1,000.00 (the premium being partially dependent on revenue - the minimum policy price is $750.00) per annum.

  We would be remiss not to point out that not only have we never made a claim on our insurance, we are also unaware of any SACC lender making a claim on any insurance policy. This may have something to do with the fact that coverage is only provided for loans of up to $5,000.00 principal and the excess payable on any claim happens to be $5,000.00.

- **External dispute resolution scheme membership:** Membership of an approved EDR scheme is required by subsection 47(1)(i) of the Credit Act, with an ‘approved’ scheme being one which is approved by ASIC. There are currently only two approved schemes - the Credit and Investments Ombudsman ‘CIO’ and the Financial Ombudsman Service. We are unaware of any other bodies seeking ASIC approval.

  We are members of the CIO, which is considered the more fitting scheme for small amount lenders. Current membership fees per annum are $375.00, plus $100.00 per representative after the first, plus $650.00 to $900.00 depending on the size of the loan book (under $1 million/between $1 million and $5 million). This does not cover any CIO services (but members are entitled to one complaint fee rebate per year, subject to conditions). Carrying on with the example lender assumed above, EDR membership would cost a minimum of $1,225.00 per annum.

Considering these costs we see a rough annual cost of ‘existence’ of:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>ASIC fees:</td>
<td>$2,771.00</td>
</tr>
<tr>
<td>Compliance documents:</td>
<td>$2,000.00</td>
</tr>
<tr>
<td>Working documents:</td>
<td>$700.00</td>
</tr>
<tr>
<td>Education requirements:</td>
<td>$1,000.00</td>
</tr>
<tr>
<td>P.I. insurance:</td>
<td>$1,000.00</td>
</tr>
<tr>
<td>EDR membership:</td>
<td>$1,225.00</td>
</tr>
<tr>
<td>TOTAL:</td>
<td>$8,696.00</td>
</tr>
</tbody>
</table>

Therefore, the average lender will face an estimated minimum cost of $8,500.00 a year to retain their ability to conduct business. If an average SACC is $500.00 for 3 months, we estimate it would take 145 SACCs with full repayment to cover this cost per annum\(^{65}\).

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\(^{63}\) Section 48 Credit Act.

\(^{64}\) Although pure lenders are exempted from having to have a professional indemnity insurance policy by Regulation 12, they must still have compensation arrangements. Such alternate arrangements are generally more expensive and troublesome for small business to implement over the cost of an insurance policy. Also, until recently, it was a condition of most Australian Credit Licences to hold professional indemnity insurance. This condition was removed without industry consultation several months ago, apparently because the only insurer providing the insurance to SACC lenders ceased provision and, at the time, it was unsure if any other insurer would commence (a new insurer has subsequently been obtained).

\(^{65}\) Calculated on the basis the maximum monthly fee of 4% is charged, and that establishment fee covers cost of production.
Establishment fees

The maximum allowable establishment fee on a SACC is 20% of the adjusted credit amount ("ACA"), therefore allowing a maximum amount of $400 dependent on the amount of the loan. The minimum is figuratively $10, on the basis that loans as low as $50 could conceivably be offered. For comparison, our range of SACC provision is $300 to $2000 (giving allowable maximum establishment fees of $60 to $400).

A plethora of work is required to produce a small loan. Table 4 is an overview of the steps necessary. It includes actions made necessary by other pieces of legislation in the provision of a SACC (but for which no additional compensation is allowable):

<table>
<thead>
<tr>
<th>REQUIREMENT</th>
<th>LEGISLATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ensure consumer has been informed of the SACC warning statement</td>
<td>Regs 28XXA, 28XXB, 28XXC</td>
</tr>
<tr>
<td>Credit guide of licensee must be provided</td>
<td>s126 Credit Act, Regs Part 3.2</td>
</tr>
<tr>
<td>Ascertain applicant's requirements and objectives of credit</td>
<td>s130 Credit Act</td>
</tr>
<tr>
<td>Obtain and verify identity of applicant</td>
<td>Anti-Money Laundering and Counter-Terrorism Financing Act</td>
</tr>
<tr>
<td>Obtain and verify information about applicant's financial situation</td>
<td>s130 Credit Act</td>
</tr>
<tr>
<td>Obtain immediately preceding 90 days of statements</td>
<td>s130 Credit Act</td>
</tr>
<tr>
<td>Ascertain status regarding past and current small amount credit contracts</td>
<td>s131 Credit Act</td>
</tr>
<tr>
<td>Protected earnings amount calculation for Centrelink recipients</td>
<td>s133CC Credit Act, Reg 28S</td>
</tr>
<tr>
<td>Applicant must consent to credit provider obtaining credit report</td>
<td>Privacy Act</td>
</tr>
<tr>
<td>Credit provider must make an assessment as to unsuitability of the proposed credit contract</td>
<td>s128, s129 and s131 Credit Act</td>
</tr>
<tr>
<td>Consumer must be provided with pre-contractual disclosure</td>
<td>Code 16, Reg 70</td>
</tr>
<tr>
<td>Mandatory disclosure requirements</td>
<td>Code 17, Reg 74</td>
</tr>
<tr>
<td>Mandatory form and expression of contract</td>
<td>Code 14, 18</td>
</tr>
<tr>
<td>Create and execute loan account for contract</td>
<td>Code 14</td>
</tr>
<tr>
<td>Drawdown and disburse loan funds</td>
<td>Code 25</td>
</tr>
<tr>
<td>Create account record for loan transactions</td>
<td>Code 26, 33</td>
</tr>
<tr>
<td>Provide copy of contract to consumer</td>
<td>Code 20</td>
</tr>
<tr>
<td>Retain documentary evidence of all steps</td>
<td>Credit Act, AMLCTF Act, Privacy Act</td>
</tr>
</tbody>
</table>

This list does not consider the ongoing costs of administration of the loan and maintaining the lender's credit licence, nor any preliminary costs such as advertising.

The purpose of an establishment fee is to recover the cost of producing a SACC, but allowable establishment fees are inadequate to compensate the cost of the work required (not to mention the risk assumed).

We are aware of only one case in Australia in which the amount of an establishment fee for a small loan was considered; the City Finance case. In this case the Victorian Consumer Affairs Tribunal refused to find that establishment fees of up to $375.00 on loans of up to $2,000.00 were unconscionable.

While we realise that this case is more indicative than compelling, we do point out that this case was considered 10 years ago in an infinitely less complicated and less onerous regulatory regime. We fail to see

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66 Director of Consumer Affairs v City Finance Loans (Credit) [2005] VCAT 1989.
how the advent of licensing, increased cost, increased compliance and 10 years of inflation can only warrant an extra $25.00 allowable as a maximum establishment fee.

However, the situation is even more dire for lenders. A $400.00 fee is only achievable on the largest SACC available by law. In reality, the average establishment fee realised is somewhat less than this amount because the average SACC provided is a good measure less than the maximum. Between 1 July, 2013 and 30 June, 2015 we provided 3,115 SACCs. The average ACA of these SACCs was $1,100.00. Therefore, our average establishment fee earned per SACC for the two year period was $220.00.

While we can only state for certainty our financial figures, we are aware that many lenders provide a greater proportion of their SACCs for smaller amounts. We postulate then that the average establishment fee per SACC across the industry is somewhat less than $200.00.

In our view, for the level of compliance and work necessary to establish a SACC, $220.00 is insufficient to cover our costs. It would be insufficient if the consumer paid the amount upfront; it is even more insufficient because the work is expended up front and not reimbursed immediately (being paid over the course of the repayments, for reasons considered below). Because of this insufficiency, we are reliant on monthly fees to partially reimburse our cost of establishing a SACC.

We also draw a connection between the establishment fees of a SACC and the permitted 'establishment' fee of $400.00 allowed for a MACC67. Although this amount is not termed as an establishment fee (and is, in fact, not termed as anything68), it has a clear correlation with the maximum permitted establishment fee of $400.00 on a SACC with an ACA of $2,000.00.

The work necessary to establish a MACC is less than that required to establish a SACC; which, as pointed out, has no proportionate representation to the amount of ACA. This should not be construed as an argument for the MACC fee to be reduced, as this would be a perverse twisting of our intent.

It is simply the case that the establishment fees allowable for SACCs are patently insufficient to cover the cost of compliance.

**Monthly fees**

Ostensibly, monthly fees represent the gross profit component of a SACC. This is clearly indicated by a process of elimination. SACCs are only permitted to charge one of the following types of fees: establishment, monthly, default, and government69, and can pass on direct debit and enforcement expenses at cost70. Establishment fees are to cover the cost of production of the SACC, as discussed above. The default, government, direct debit and enforcement categories can only be charged in an amount sufficient to reimburse the lender for their actual cost. This leaves the monthly fees as the only cost component of a SACC which is not bound by this 'at cost' restriction.

Monthly fees have to cover running costs of the business, general loan maintenance (such as transaction recording, payment processing, statement and payout provision) and specific loan requirements for which no reimbursement is possible (such as hardship determination, dispute resolution, internal debt collection and regulatory compliance).

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67 As shown by variable 'F' in the annual cost formula shown in Code subsection 32B(2).
68 No aspect of MACCs, including item 'F' in the calculation, appear in the Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 nor its explanatory memorandum.
69 Code subsection 31A.
70 ASIC Class Order 13/818, Code subsection 39B(3).
For the average SACC\textsuperscript{71}, the highest possible dollar figure that monthly fees can notionally amount to is equal to the ACA. It is notional because the figure will be reduced by a like amount for every dollar of establishment fee, default charge or government fee; and the maximum level can only be reached if the SACC is in default\textsuperscript{72}. Enforcement fees are exempted\textsuperscript{73}.

The situation is different for a SACC which does not default. If paid out within term, without default, the maximum monthly fees that can be charged amount to 48\% of the ACA\textsuperscript{74}. Our SACCs (and we would expect most of the industry’s) are never designed, nor intended, to go for the maximum 12 months. Our base standard SACC repayment term is approximately nine months as we believe this strikes a good balance between getting the loan paid off as quickly as possible (therefore saving the consumer fees) and keeping the amount of each repayment to a reasonable level (the shorter the term, the higher the repayment). The smaller the SACC the shorter the term can practically be, as capacity to meet higher repayments can only ever stretch so far.

So, while SACCs may be technically considered in terms of the return to the lender over 12 months this not a correct methodology as that term is a hard maximum and (we wager) the vast majority of lenders set payment terms of less than a year for their loans.

While the funds repaid can be re-lent in another SACC, this does not improve the return to the lender as the funds may only go back out at the same rate they were earning in the first place. The concept of ‘churning’ SACCs to improve return is a false notion (the reasoning for which is set out below under ‘Important Note’)

Likewise, there is no improvement in position if the loan goes into default: if they do so for long enough it is actually worse because the total cost cap imposes a strict ceiling on returns.

These may amount to largely philosophical concerns however. We have long been advocates, in principle, of a total cost of credit cap on small amount loans. What is more relevant are the two massive factors which overshadow the viability of monthly fees:

(a) That a portion of the monthly fees is used to make up the shortfall between the establishment fees permitted to be charged on the SACC and the actual cost of the lender in creating it. This has been covered above in the ‘Establishment Fees’ section, but is of such critical importance it cannot be overstated; and

(b) The failure to price according to the level of risk assumed in providing SACCs. Aside from the risk of inadvertently breaching one of the myriad of regulations and falling into the penalties hole (which we think is sufficiently discussed elsewhere, particularly under question 3), there is the risk of non-payment of the loan by consumers who are more likely to take out SACCs, and the inherent problem in enforcing payment.

Risk of non-payment

The inherent risk involved in providing a SACC must be factored into any discussion about the returns achievable. Pricing commensurate with risk is a necessary consideration for any service.

\textsuperscript{71} Excepting SACCs which refinance or pay any part of another SACC - for these no establishment fee is allowed to be charged (Code subsection 31A(1A)).

\textsuperscript{72} Code section 39B.

\textsuperscript{73} Code subsection 39B(3).

\textsuperscript{74} Maximum SACC term is 12 months (section 5 Credit Act), maximum monthly fees is 4\% of ACA (Code subsection 31A(3)).
Consumers who generally take out SACC loans are recognised in the Consultation Paper to be "low and middle income consumers... excluded from mainstream forms of credit". Further than this, they are often the antithesis of the sophisticated borrower. The ANZ Bank, in surveying financial literacy in 2015, found:

"As in 2011, the groups with lower financial literacy on average included:
- young people under 25 years of age,
- those with no formal post-secondary education,
- those employed in lower blue collar occupations, and
- people with relatively low levels of income and assets."

Our experience with customers is that they show little effort or desire to understand the workings of financial products past the 'holy trinity':
- How much can I get?
- When can I get it?
- How much will it cost me a week?

The extensive disclosure information which lenders are required to give consumers is invariably ignored. Like most contractual agreements, it appears the average person only wants the general gist of things and has no interest in actual interest in the terms unless something goes wrong.

Unfortunately this sentiment sometimes coincides with a particular negativity towards compliance with their SACC, ranging from apathy to outright contempt. At Annexure 2 to this submission, we include 10 SACC case studies from our loan book to show the attitudes of some of the more disagreeable consumers we deal with. To date, none of these loans have been repaid or otherwise settled - but all of these loans passed our stringent assessment criteria to ensure affordability of the loan accordingly to the consumer’s discoverable financial situation. And, every consumer freely entered into a contractual obligation to pay the loan.

The data sets in the following tables show our position for the two financial years from 1 July, 2013 to 30 June, 2015 (the first two full financial years since SACC inception). Table 5 shows an overview of SACC activity:

### Table 5 - SACC data 1/7/13 to 30/6/15

<table>
<thead>
<tr>
<th>SACCs in numbers</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number provided</td>
<td>3,115</td>
<td></td>
</tr>
<tr>
<td>Active SACCs as at 30/6/15</td>
<td>1,182</td>
<td>37.95%*</td>
</tr>
<tr>
<td>SACCs written off as uncollectable</td>
<td>286</td>
<td>9.18%</td>
</tr>
<tr>
<td>SACCs subject of concluded court action (incl. in active SACCs)</td>
<td>38</td>
<td>1.22%</td>
</tr>
<tr>
<td>Number paid out</td>
<td>1,647</td>
<td>52.87%*</td>
</tr>
<tr>
<td>Number of expected repayments</td>
<td>66,592</td>
<td></td>
</tr>
<tr>
<td>Number of active repayment attempts failed#</td>
<td>12,040</td>
<td>18.08%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SACCs in dollar figures</th>
<th>Amount</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total ACA advanced</td>
<td>$3,538,150.00</td>
<td></td>
</tr>
<tr>
<td>Total establishment fees charged</td>
<td>$707,630.00</td>
<td></td>
</tr>
<tr>
<td>Average SACC amount (incl. establishment fee)</td>
<td>$1,363.00</td>
<td></td>
</tr>
<tr>
<td>Average establishment fee charged</td>
<td>$272.60</td>
<td></td>
</tr>
<tr>
<td>SACC loan balances written off</td>
<td>$366,704.00</td>
<td>8.64%</td>
</tr>
<tr>
<td>Amount of ACA written off (% of amounts written off)</td>
<td>$255,475.00</td>
<td>69.67%</td>
</tr>
<tr>
<td>Amount of ACA written off (% of total ACA advanced)</td>
<td>$255,475.00</td>
<td>7.22%</td>
</tr>
</tbody>
</table>

* Figure does not accommodate for term, or payouts occurring after 30 June, 2015.
# Does not include: missed customer initiated payments or unprocessed direct debit attempts due to facility being suspended under Code requirements.

---

Table 6 shows select information of all delinquent SACCs entered into from 1 July, 2013 to 30 June, 2015 (with information current to 31 August, 2015). Every SACC represented in the table, just as every SACC entered into, passed affordability criteria and calculation prior to being entered into. The figures shown do not include SACCs which are unrecoverable due to the consumer being deceased.

Tables 6a to 6c further extrapolate this data by looking at the reasons for delinquency and when it occurs. Data in Table 6c has been normalised to express all loans in terms of weekly repayments (in order to provide comparable data between loans with weekly and loans with fortnightly repayments).

Table 6 - SACCs (1/7/13 to 30/6/15): Delinquent SACCs to 31/8/15

<table>
<thead>
<tr>
<th>Overview</th>
<th>Figure</th>
<th>% (of delinquent SACCs)</th>
<th>% (of all SACCs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of SACCs which became delinquent</td>
<td>404</td>
<td></td>
<td>12.97%</td>
</tr>
<tr>
<td>$ credit advanced (incl. establishment fee)</td>
<td>$516,520.00</td>
<td></td>
<td>12.16%</td>
</tr>
<tr>
<td>$ owing at time of first event (total)</td>
<td>$535,775.04</td>
<td></td>
<td>12.16%</td>
</tr>
<tr>
<td>$ owing at time of first event (av.)</td>
<td>$1,326.18</td>
<td></td>
<td>12.16%</td>
</tr>
</tbody>
</table>

Hardship profile of delinquent SACCs*

| No hardship notice                               | 385    | 95.3%                   | 12.36%           |
| Hardship notice, change declined with failure to provide requested information | 12     | 2.97%                   | 0.39%            |
| Hardship notice, change made                     | 7      | 1.73%                   | 0.22%            |

Amount of credit (incl. establishment fee):

| - $360 to $600                                   | 100    | 24.75%                  | 3.21%            |
| - $660 to $900                                   | 44     | 10.89%                  | 1.41%            |
| - $960 to $1,200                                 | 121    | 29.95%                  | 3.88%            |
| - $1,320 to $1,560                               | 17     | 4.21%                   | 0.55%            |
| - $1,620 to $1,800                               | 36     | 8.91%                   | 1.16%            |
| - $1,920 to $2,160                               | 10     | 2.48%                   | 0.32%            |
| - $2,220 to $2,400                               | 76     | 18.81%                  | 2.44%            |

* All consumers received written notice of ability to give notice of hardship and seek a change to their SACC; the majority on multiple occasions.
### Sub-Table 6a - Delinquency events by type

<table>
<thead>
<tr>
<th>Events by type - total incidences</th>
<th>Figure</th>
<th>% (of delinquent SACCs)</th>
<th>% (of all SACCs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part X bankruptcy</td>
<td>9</td>
<td>2.23%</td>
<td>0.29%</td>
</tr>
<tr>
<td>Part IX debt agreement</td>
<td>10</td>
<td>2.48%</td>
<td>0.32%</td>
</tr>
<tr>
<td>Judgment</td>
<td>32</td>
<td>7.92%</td>
<td>1.03%</td>
</tr>
<tr>
<td>Serious credit infringement</td>
<td>220</td>
<td>54.46%</td>
<td>7.06%</td>
</tr>
<tr>
<td>Default listing</td>
<td>293</td>
<td>72.52%</td>
<td>9.41%</td>
</tr>
<tr>
<td>External debt collection referral</td>
<td>164</td>
<td>40.59%</td>
<td>5.26%</td>
</tr>
<tr>
<td>Written off (low balance)</td>
<td>1</td>
<td>0.25%</td>
<td>0.03%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Events by type - weighted*</th>
<th>Figure</th>
<th>% (of delinquent SACCs)</th>
<th>% (of all SACCs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part X bankruptcy</td>
<td>9</td>
<td>2.23%</td>
<td>0.29%</td>
</tr>
<tr>
<td>Part IX debt agreement</td>
<td>10</td>
<td>2.48%</td>
<td>0.32%</td>
</tr>
<tr>
<td>Judgment</td>
<td>32</td>
<td>7.92%</td>
<td>1.03%</td>
</tr>
<tr>
<td>Serious credit infringement</td>
<td>220</td>
<td>54.46%</td>
<td>7.06%</td>
</tr>
<tr>
<td>Default listing</td>
<td>93</td>
<td>23.02%</td>
<td>2.99%</td>
</tr>
<tr>
<td>External debt collection referral</td>
<td>39</td>
<td>9.65%</td>
<td>1.25%</td>
</tr>
<tr>
<td>Other (written off, low balance)</td>
<td>1</td>
<td>0.25%</td>
<td>0.03%</td>
</tr>
</tbody>
</table>

*The weighted figures show a single incidence per SACC weighted according to severity of event. These are ordered (from highest to lowest): Part X bankruptcy --> Part IX debt agreement --> Judgment --> Serious credit infringement --> Default listing --> External debt collection referral.

### Sub-Table 6b - Number of payments honoured to first delinquency event (overall)

<table>
<thead>
<tr>
<th>Number of payments honoured (normalised to weekly if the SACC called for fortnightly)</th>
<th>Figure</th>
<th>% (of delinquent SACCs)</th>
<th>% (of all SACCs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>54</td>
<td>13.37%</td>
<td>1.73%</td>
</tr>
<tr>
<td>One</td>
<td>11</td>
<td>2.72%</td>
<td>0.35%</td>
</tr>
<tr>
<td>Two</td>
<td>37</td>
<td>9.16%</td>
<td>1.19%</td>
</tr>
<tr>
<td>Three</td>
<td>4</td>
<td>0.99%</td>
<td>0.13%</td>
</tr>
<tr>
<td>Four</td>
<td>42</td>
<td>10.40%</td>
<td>1.35%</td>
</tr>
<tr>
<td>Five</td>
<td>3</td>
<td>0.74%</td>
<td>0.10%</td>
</tr>
<tr>
<td>Six to half</td>
<td>155</td>
<td>38.37%</td>
<td>4.98%</td>
</tr>
<tr>
<td>More than half</td>
<td>51</td>
<td>12.62%</td>
<td>1.64%</td>
</tr>
<tr>
<td>Mixed (periods of payment and non-payment)</td>
<td>47</td>
<td>11.63%</td>
<td>1.51%</td>
</tr>
</tbody>
</table>

**Groupings of above data:**

| None to five                                                                         | 151    | 37.38%                  | 4.85%           |
| None to half                                                                         | 306    | 75.74%                  | 9.82%           |
| More than half                                                                       | 98     | 24.26%                  | 3.15%           |
Sub-Table 6c - Normalised payments honoured to first delinquency event (by amount of SACC)

<table>
<thead>
<tr>
<th>No. of repayments</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>&lt; 1/2</th>
<th>&gt; 1/2</th>
<th>Mixed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Figs (SACC bracket)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$360 to $600</td>
<td>15</td>
<td>1</td>
<td>12</td>
<td>2</td>
<td>5</td>
<td>0</td>
<td>44</td>
<td>10</td>
<td>11</td>
</tr>
<tr>
<td>$660 to $900</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>9</td>
<td>0</td>
<td>17</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td>$960 to $1,200</td>
<td>20</td>
<td>3</td>
<td>14</td>
<td>0</td>
<td>16</td>
<td>0</td>
<td>48</td>
<td>11</td>
<td>9</td>
</tr>
<tr>
<td>$1,320 to $1,560</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>5</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>$1,620 to $1,800</td>
<td>7</td>
<td>0</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>9</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td>$1,920 to $2,160</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>$2,220 to $2,400</td>
<td>6</td>
<td>6</td>
<td>3</td>
<td>1</td>
<td>10</td>
<td>2</td>
<td>30</td>
<td>9</td>
<td>9</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>% (of delinquent SACCs)</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>&lt; 1/2</th>
<th>&gt; 1/2</th>
<th>Mixed</th>
</tr>
</thead>
<tbody>
<tr>
<td>$360 to $600</td>
<td>3.71%</td>
<td>0.25%</td>
<td>2.97%</td>
<td>0.50%</td>
<td>1.24%</td>
<td>0.00%</td>
<td>10.89%</td>
<td>2.48%</td>
<td>2.72%</td>
</tr>
<tr>
<td>$660 to $900</td>
<td>0.50%</td>
<td>0.00%</td>
<td>0.50%</td>
<td>0.00%</td>
<td>2.23%</td>
<td>0.00%</td>
<td>4.21%</td>
<td>2.48%</td>
<td>0.99%</td>
</tr>
<tr>
<td>$960 to $1,200</td>
<td>4.95%</td>
<td>0.74%</td>
<td>3.47%</td>
<td>0.00%</td>
<td>3.96%</td>
<td>0.00%</td>
<td>11.88%</td>
<td>2.72%</td>
<td>2.23%</td>
</tr>
<tr>
<td>$1,320 to $1,560</td>
<td>0.74%</td>
<td>0.25%</td>
<td>0.25%</td>
<td>0.00%</td>
<td>0.25%</td>
<td>0.00%</td>
<td>1.24%</td>
<td>0.50%</td>
<td>0.99%</td>
</tr>
<tr>
<td>$1,620 to $1,800</td>
<td>1.73%</td>
<td>0.00%</td>
<td>0.99%</td>
<td>0.25%</td>
<td>0.25%</td>
<td>0.25%</td>
<td>2.23%</td>
<td>1.24%</td>
<td>1.98%</td>
</tr>
<tr>
<td>$1,920 to $2,160</td>
<td>0.25%</td>
<td>0.00%</td>
<td>0.25%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.50%</td>
<td>0.99%</td>
<td>0.50%</td>
</tr>
<tr>
<td>$2,220 to $2,400</td>
<td>1.49%</td>
<td>1.49%</td>
<td>0.74%</td>
<td>0.25%</td>
<td>2.48%</td>
<td>0.50%</td>
<td>7.43%</td>
<td>2.23%</td>
<td>2.23%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>% (of total SACCs)</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>&lt; 1/2</th>
<th>&gt; 1/2</th>
<th>Mixed</th>
</tr>
</thead>
<tbody>
<tr>
<td>$360 to $600</td>
<td>0.482%</td>
<td>0.032%</td>
<td>0.385%</td>
<td>0.064%</td>
<td>0.161%</td>
<td>0.00%</td>
<td>1.413%</td>
<td>0.321%</td>
<td>0.353%</td>
</tr>
<tr>
<td>$660 to $900</td>
<td>0.064%</td>
<td>0.000%</td>
<td>0.064%</td>
<td>0.000%</td>
<td>0.289%</td>
<td>0.00%</td>
<td>0.546%</td>
<td>0.321%</td>
<td>0.128%</td>
</tr>
<tr>
<td>$960 to $1,200</td>
<td>0.642%</td>
<td>0.096%</td>
<td>0.449%</td>
<td>0.000%</td>
<td>0.514%</td>
<td>0.000%</td>
<td>1.541%</td>
<td>0.353%</td>
<td>0.289%</td>
</tr>
<tr>
<td>$1,320 to $1,560</td>
<td>0.096%</td>
<td>0.032%</td>
<td>0.032%</td>
<td>0.000%</td>
<td>0.032%</td>
<td>0.000%</td>
<td>0.161%</td>
<td>0.064%</td>
<td>0.128%</td>
</tr>
<tr>
<td>$1,620 to $1,800</td>
<td>0.225%</td>
<td>0.000%</td>
<td>0.128%</td>
<td>0.032%</td>
<td>0.032%</td>
<td>0.032%</td>
<td>0.289%</td>
<td>0.161%</td>
<td>0.257%</td>
</tr>
<tr>
<td>$1,920 to $2,160</td>
<td>0.032%</td>
<td>0.000%</td>
<td>0.032%</td>
<td>0.000%</td>
<td>0.000%</td>
<td>0.000%</td>
<td>0.064%</td>
<td>0.128%</td>
<td>0.064%</td>
</tr>
<tr>
<td>$2,220 to $2,400</td>
<td>0.193%</td>
<td>0.193%</td>
<td>0.096%</td>
<td>0.032%</td>
<td>0.321%</td>
<td>0.064%</td>
<td>0.963%</td>
<td>0.289%</td>
<td>0.289%</td>
</tr>
</tbody>
</table>

More than one in eight SACCs provided in the last two financial years became delinquent at some point in time (12.97%).

On analysis it appears the predominant reason for these SACCs becoming delinquent is due to evasion of payment, whether due to apathy or intentional evasion, rather than inability to pay. Our reasoning for this is:
(i) Only a small percentage gave notice of hardship (0.61%) despite being afforded sufficient opportunity and information. 63.15% of delinquent SACC customer who did give notice of hardship failed to give sufficient reasonable information, despite request, in support of their notice. By contrast, the overall average percentage of SACC consumers to date who gave notice of hardship but did not provide sufficient information is 42.79% (see Table 1).

(ii) A very small percentage of consumers who became delinquent had received a hardship change to their SACC (1.73%);

(iii) Most delinquencies involved payment arrears of greater than 90 days, as shown by the incidence of default listing (72.52% of delinquent SACCS, 9.41% of all SACCs). We do not create a default listing on a consumer’s credit file until they are at least 90 days in arrears and we have no payment arrangement in place;

(iv) Over half of all delinquent SACCs resulted in a serious credit infringement listing (54.46%). Due to changes to the Privacy Act which commenced in March 2014, the criteria for listing a serious credit infringement on a consumer’s credit file was heightened76 to require:

- A default listing must have already been made;
- A reasonable intention must have been formed that the consumer no longer intends to be bound by their obligations regarding the consumer credit;
- The credit provider has taken reasonable steps to contact the consumer about the issue; and
- At least six months have passed since the credit provider last had contact with the consumer.

We use a combination of methods to attempt contact with consumers - physical correspondence, telephone contact, email, short message service (SMS), account references and commercial agent field visit. A serious credit infringement cannot be listed unless there are multiple instances across a combination of these categories77. From this criteria, for a serious credit infringement to be listed the consumer must either be actively evading contact, have left their place of residence and abandoned all normal contact methods (apathy), or be physically in a position where they are unable to be reasonably contacted (including consumers who have deceased or are in jail). Common sense, and our experience, indicates it is active evasion in the majority of cases;

(v) Less than 5% of delinquent SACCs were as a result of an act of bankruptcy (0.61% of all SACCs); and

(vi) Many delinquent SACCs failed to make a significant number of payments on their SACC. Over a third of delinquent SACCs made less than five repayments (the significance of which is set out below) - representing 4.85% of all SACCs. Over 75% of all delinquent SACCs make half their repayments or less (9.82% of all SACCs). While some parties may be quick to say that this is an indication the consumers are unable to afford to make their payments, we reiterate that all SACCs provided have been fully and stringently assessed to ensure that every single one of them is affordable based on reasonable enquiries made about the financial situation of the consumer. We have zero interest or motive in providing unaffordable SACCs to consumers.

76 Privacy (Credit Reporting) Code 2014 (Version 1.2), at paragraphs 12(c), and 12.1(c).
77 While we may accept a field agent’s report that the consumer has apparently left their residence from a visual inspection of the premises, this type of contact is only attempted after mail and telephone contact attempts are made.
We also see the spread of delinquency is throughout the ACA range of SACCs:

- 3.21% of SACCs $360 to $600;
- 3.88% of SACCs $960 to $1,200 (just below our average SACC amount of $1,363.00); and
- 2.44% of SACCs $2,220 to $2,400.

This indicates it is not only the larger SACCs (and therefore, more expensive) which get into trouble.

A particularly telling statistic from the delinquent SACCs is that the total amount owing at time of first delinquent event ($535,775.04) is greater than their total sum of credit advanced ($516,520.00). This correlates with the fact consumers of more than a third of delinquent SACCs make fewer than six repayments. This repayment number is important as it is the number that must be made before the 20% establishment fee is repaid; meaning nearly 5% of all SACCs advanced fail to pay either their establishment fee or any portion of principal or profit.

Effectively, we are giving 1 in 20 consumers a free loan and paying for the privilege of doing it.

Our average SACC, repayable weekly, has 37 repayments over a nine month period. Assuming an ACA of $1,000.00 this gives an establishment fee of $200.00 and total monthly fees of $360.00 (total fees of $560.00). For every one SACC for which no repayments are made a further three and a third SACCs, of equal amount and fully repaid on time, are necessary to recoup the loss:

- Actual loss on the delinquent SACC is $1,200.00 ($1,000.00 principal, $200.00 establishment fee). We will consider the monthly fees an opportunity loss;
- Payment of each following ‘perfect’ SACC gives total gross revenue of $1,560.00, from which the principal and establishment fee are deducted as reimbursement of capital and expense. This gives $360.00 to apply towards the loss; and
- $360.00 x 3.33 recurring approximately equals $1,200.00.

Therefore, every one SACC on which no repayments are made actually equals 4.33 ‘dead’ SACCs (i.e. ‘revenue neutral’). Since 54 of our SACCs had zero repayments made on them, this equates to at least 234 of the SACCs provided (or 7.51% of all SACCs entered into in the last two financial years) being ‘dead’ (i.e. revenue neutral).

The above calculations are indicative only. In actual fact, the situation is worse:

- Monthly fees are subsidising the inability of the establishment fees to cover the actual cost of producing the SACC - which means it takes more than five repayments to actually cover the establishment cost;
- A total of 4.85% of all SACCs had less than six repayments made on them, and therefore failed to have their establishment fee paid off (let alone any portion of principal); representing a further 97 SACCs for which some or part of the establishment fees is not paid (but still no portion of principal). Taking this into account would blow out the above calculations;
- 9.82% of all SACCs became delinquent before paying half of their required repayments. As it takes considerably more than half of the repayments to repay the principal (see below), at least 1 in 10 SACC consumers do not repay the amount they have obtained - effectively becoming unjustly enriched;
- General running costs of the business are not factored, and these must be paid for the time when the ‘dead’ SACCs are being processed; and
- There is no allowance made for the time taken in recouping the debts.
An even greater percentage of SACCs not only do not get their establishment fee paid - they also do not get any part of the principal repaid (leading to a capital loss).

The number of repayments necessary to repay principal is as follows. Recalling the first five repayments on our SACCs cover the establishment fee, the next 23 repayments after the first five repay the principal:

- The total payable on the SACC is $1,560.00 over 37 repayments;
- Principal plus establishment fee is 76.92% of the total amount payable ($1,200/$1,560); and
- 76.92% of the total 37 repayments is 28.46 (all our repayments, save the last one, or of equal amount).

It is not until the 29th repayment (out of 37) that any portion of gross profit is actually paid by the consumer - seven months after the creation of the SACC. This is a considerable time to wait for a return in the circumstances, especially when (unlike a bank) we are often unable to leverage our debt.

In relation to current overdue SACCs, as at 12 October, 2015, we have approximately 950 active SACCs which are behind schedule in one or more repayments (for whatever reason). This figure does not include SACCs which are considered written off. These SACCs represent:

- Overdue repayments of more than $760,000; and
- Outstanding balances of approximately $940,000.

This information shows that the risk of non-payment of a SACC is not only real, it is statistically apparent; and it feeds into the next issue which is the problems experienced in enforcing SACCs.

Problems in enforcement

When the risk of non-payment becomes an actuality, the limited options available to enforce a SACC become apparent. We submit the incidence of delinquency in our SACCs (nearly 13% of SACCs entered into) as a clear indication of this.

Fundamentally speaking, the repayment of a loan originates from any of three sources:

(i) The consumer, pursuant to their contractual promise to pay;

(ii) From realisation of some property put up by the consumer as collateral against the debt (i.e. security); or

(iii) A third party to the loan who agrees to make payment in the consumer’s stead (i.e. a guarantor) by their promise to pay or by item of collateral (i.e. third party security).

The traditional method of enforcing repayment of a loan when the promise to pay is not fulfilled - through the taking of security - is not available on SACCs. While the definition of a SACC is specifically silent about whether a guarantee is prohibited, a guarantee is legally a form of security for payment of a loan - thereby being unavailable for a SACC. Accordingly, the only available source for repayment of a SACC is the consumer’s contractual promise to pay.

When the promise to pay is broken lenders must, unless they walk away from the debt, either convince the consumer to honour their promise or institute legal proceedings.

78 Per the definition of small amount credit contract, in section 5 of the Credit Act.
Convincing a consumer to pay is achievable, but is totally dependent on the consumer’s mindset. We do have many instances of consumers who wish to do the right thing and pay off their SACC. Good intentions, as well received as they are, though, do not assist a lender when cash flow becomes an issue.

There is however a strong reason to be supportive of a consumer’s situation to help them through hardship periods (aside from the legislated compulsion). By doing so the lender increases their esteem with their consumer and improves their chances of ultimately receiving a better return on the SACC, because the complicity of the consumer is so integral to the lender’s ability to obtain repayment.

Another form of positive reinforcement lays in the consumer’s hope that with good standing in the eyes of the lender they will be able to obtain further credit from them in the future. Unfortunately, the presumption of unsuitability in the Credit Act for more than two SACCs in any 90 day period has degraded this aspect.

If obstinate about complying with their promise, the lender can attempt to convince the consumer to pay using negative reinforcement. This involves the threat of legal sanctions as a means of encouragement.

Informally, this means the undertaking of debt collection action by the lender or a debt collector. Part of this involves reminding the consumer of their obligations and appealing to their sense of obligation; part concerns making concessionary deals and discounts to entice the consumer to pay; and part involves stating the threat of the other, less palatable, methods of enforcement. Ultimately, its success is reliant on the degree to which the consumer wishes to avoid further action.

The formal method begins with communicating an intention to list a default on the consumer’s credit file if payment is not made\textsuperscript{79}. In this, the effectiveness relies on the degree to which the consumer is afraid that the default listing will have a negative impact on their ability to obtain finance within the next five years (in which the default listing will remain on their credit file). We can see from the high incidence of default listing on our delinquent SACCs (9.41% of all SACCs), this is not a particularly effective method. In our experience, it may become effective at some point in the ensuing five year period, when the consumer’s concern about the listing may have increased to a point where it prompts them to take action - but this is often well past the point of the lender making a commercial return of the loan.

A further enforcement option lies in instituting legal proceedings against the consumer, which may be the ultimate step if the other options are attempted and unsuccessful. We understand many lenders do not attempt this avenue as it can be difficult, proportionately costly and time consuming. Many lenders, especially small ones, do not possess the skills necessary to traverse the legal system without engaging legal representation.

Many states in Australia relegate matters of this particular quantum to their small claims jurisdiction. In Queensland, for example, civil claim matters up to $25,000.00 are dealt with in the Queensland Civil and Administrative Tribunal. Legal representation is generally not afforded as of right in such bodies, requiring the lender to self-represent. While matters may be commenced in the Federal Circuit Court, which does allow legal representation, it is cost prohibitive to do so\textsuperscript{80} and the civil procedure rules are more complicated than in the small claims venues.

Providing that a lender is willing to undertake legal proceedings, there is then consideration of the time necessary to see the matter through to judgment. The steps, and time, involved are shown in Table 7.

\textsuperscript{79} Intention to list a serious credit infringement can be communicated to the consumer but is of marginal effectiveness, as the Privacy Code requires that a lender must not have had communication with the consumer for six months before they can make such a listing. By that time consumer concern will have decreased.

\textsuperscript{80} Filing a small claim matter in the Federal Circuit Court is $210.00 for claims less than $10,000; as opposed to between $23.80 and $108.70 for the same level of claim in QCAT.
Table 7 - Legal proceedings steps and time frames for uncontested matters (QCAT)

<table>
<thead>
<tr>
<th>Step</th>
<th>Time Frame</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engrossing legal process</td>
<td>Undeterminable</td>
</tr>
<tr>
<td>Service of process</td>
<td>Up to 28 days allowed before an order for extension is required</td>
</tr>
<tr>
<td>Period for respondent to file a response</td>
<td>28 days from date of service</td>
</tr>
<tr>
<td>Engrossing application for default decision</td>
<td>Undeterminable</td>
</tr>
<tr>
<td>Demand for payment of decision</td>
<td>Minimum 14 days recommended</td>
</tr>
<tr>
<td>Engrossing application for default judgment for filing with Magistrates Court</td>
<td>Undeterminable</td>
</tr>
<tr>
<td>Judgment obtained</td>
<td></td>
</tr>
</tbody>
</table>

In the matter is defended by the consumer, this can add a matter of months to the claim before it can be determined.

Taking legal action on a SACC also effectively stops the debt from further accumulating. Tribunals may allow interest on the debt to be recovered[^1], but SACCs do not allow interest to be charged and the civil procedure rules of these bodies are not compatible with the allowable fee structures of a SACC.

Once judgment is obtained, there is then the matter of how to enforce it. Warrants of execution and garnish orders, while technically available, are of little use for such relatively small amounts. Garnish orders are subject to Registrar’s discretion, and involve substantial further effort to set up and maintain. Warrants of execution often involve prohibitive expense to arrange, with little prospect of success unless the judgment debtor has significant asset equity in items which may be able to be seized (and if they did, they probably wouldn’t need a SACC in the first place). Neither option is viable against Centrelink recipients, who have been dubbed ‘judgment proof’, because:

- With means testing qualification for Centrelink benefits there are effectively no assets which could be seized; and

- Social security benefits are immune to garnish.

For a SACC lender, the real value in obtaining a judgment is that it creates a seven year listing on the consumer’s credit file with all credit reporting bodies. This makes it marginally better than a serious credit infringement, but still requires the consumer being concerned about their credit standing in order to be actually effective. That is to say: better than nothing, but not by much.

**Important Note**

The nature of the monthly fees as a flat percentage per month or part thereof may create the impression that the return can be increased if full repayment can be achieved within a one month period; but it is a false one. To explain (assuming the SACC is legally compliant):

- A lender makes a SACC with a consumer for $300.00 with a term of 17 days (the minimum allowable);

- The lender is entitled to charge a maximum of $72.00 for the SACC ($60.00 establishment fee and $12.00 monthly fee);

- The consumer pays the $372.00 on day 17 and the lender immediately lends it out again;

- Assuming the lender can continue to roll these funds over for a full year this equates to 22 SACCs, with a total return across them of 88% on the $300 ACA for $264.00 (assuming that each SACC is paid in full

[^1]: For example, section 14 of the *Queensland Civil and Administrative Tribunal Act (2009) Qld.*
on its due date: 22 x 4% monthly fees). This is instead of a return of 48% for a SACC taken out for a full year ($144.00);

- However, aside from the issue of needing a supply of new consumers to take up these SACCs the lender now has to establish 22 individual loans for which they can charge maximum establishment fees of $1,320.00. $60.00 to establish a SACC is clearly inadequate to cover the actual cost of the work necessary;

- If the actual cost to the lender of establishing a SACC was, say, $70.00 (which we still consider to be vastly too low, but will use for illustration purposes), the lender would have a gross profit margin of $2.00 per loan. This equates to $44.00 per year total gross revenue on the 22 SACCs; and

- Assuming the same hypothetical cost of establishing the SACC; if the lender had instead made one SACC loan of the $300.00 for 12 months the gross profit margin would be $134.00 ($60 establishment fee, 12 months of $12.00 monthly fees, less $70.00 assumed actual cost).

There is no incentive to churn loans faster due to the cost of establishment being greater than the amount realisable, and therefore eating into any profitability potentially created by the monthly fees.

Larger SACCs would not make the situation any different:

- Establishment fees cannot be charged at greater than cost by law (and our opinion is that they generally don’t come close anyway); and

- The affordability required to repay a large SACC in a small time is overly prohibitive.

The inherent inadequacies of the cap (aside from quantum)

We understand the items listed here may be beyond the scope of the Review to pass comment on. Our aim, instead, is to bring them to the Review’s attention as factors requiring attention in consideration of those issues which are within scope.

(a) The way in which establishment fees are calculated. The Credit Act sets the maximum establishment fee for SACCs as a variable amount depending on the ACA of the SACC. However, the work that is needed to be done to assess, create and administer the SACC is completely independent of its ACA. There is no actual difference between the work necessary for a $100 SACC as against a $2000 SACC.

We would further wager that the work necessary to create a SACC is at least commensurate, and probably greater, than any other form of credit contract. We again point to the Consultation Paper’s comment on page 16 that the SACC regulatory framework has “a greater amount of complexity... than for credit providers offering other products.” In any event, it is certainly the case that SACC lenders enjoy a much lower reward to risk ratio than other lenders and an increased regulatory penalty risk.

Comment has already been made in answer to this question about the work necessary and the amounts realisable.

(b) Inability to achieve a return on delayed payment of establishment fees. The Credit Act prohibits this by requiring monthly fees (the only time based fee allowable) to be calculated with respect to the ACA. Other forms of consumer credit allow fees and charges to be capitalised and, thereafter, interest bearing.

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82 Due, in part, to the presumption of unsuitability if the consumer has had two or more SACCs in the preceding 90 days.

83 22 lots of $60.00 establishment fees (at 20% of the $300.00 ACA).
It is counterproductive for consumers to pay the establishment fee on a SACC up front (the reasoning for which is explained below in Part 3). This means practically all SACCs, and definitely all of ours, involve the lender performing work (establishment) for which they will not be paid until a later date – if at all. It is inequitable that SACC lenders should be forced into this situation for every contract they create.

(c) Establishment fees are designed to be a ‘cost recovery’ exercise, and not to include a profit component. The Code clearly contemplates this restriction. It directs the court, in considering whether an establishment fee is unconscionable, to have regard to:

“whether the amount of the fee... is equal to the credit provider’s reasonable costs of determining an application for credit and the initial administrative costs of providing the credit or is equal to the credit provider’s average reasonable costs of those things in respect of that class of contract.”

Conclusion

We obviously have not provided information about our actual amount of revenue above. This is for three reasons:

(a) It is commercially sensitive information we would prefer was not published. In this we note the comments at page 2 of the Consultation Paper;

(b) It should be rather obvious from the information provided in this section that our profitability is heavily constrained by the cap and the relevant factors affecting it; and

(c) As an adjunct to (b), it is embarrassing the amount of work undertaken for so little return.

The level of compliance and work necessary on a SACC is overbearing. It would be bad enough if we were able to make a decent return for that. That we are prohibited from doing so is, quite frankly, insulting. To add insult to injury, we are further forced to bear the lies and slander from certain sectors that we are making huge profits - particularly through deceitful manipulation of the nature of the cap!

We have seen our business dwindle over the past couple of years since the advent of the cap due to lack of profitability. We have been forced to cut costs and non-essential services in that period to accommodate. Half of our staff and credit representatives have had to be let go. Our business has moved from predominantly ‘bricks and mortar’ shopfronts to being purely online, in an effort to cut cost. We consider ourselves fortunate that our responsible manager volunteers his services to the company, as it is highly doubtful that we could afford to pay adequate wages to employ one.

All of this has been done in an effort to survive long enough to see whether the outcome of this Review will make the business environment tolerable. It is no exaggeration that if conditions do not dramatically improve as a result we will be faced with either voluntarily exiting the industry or slowing winding down to inevitable ruin. These are the only foreseeable outcomes.

Simply put (and it really should not be complicated):

(i) There is no transparency or discernible reason behind the pricing structure, which shows in its unsuitability;

(ii) The cap is insufficient to allow enough return for lenders to remain viable;

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84 National Credit Code, sub-section 78(3).
85 Referenced in our response to Question 1.
(iii) The compliance regime is overbearing, putting pressure on already intolerable price caps; and

(iii) SACCs are difficult to impossible to enforce, further constraining any hope of being able to achieve a decent return.

Part 3: The treatment of ASIC Class Order 13/818

The reasons behind the Class Order are revealed when its explanatory memorandum is considered.

The ‘temporary exemption’ for certain Medium Amount Credit Contracts (MACCs) relates to the crossover ACA range of $1,601 to $2,000, and the imprecise understanding of legislators about the way in which credit works.

The definition of a SACC provides a maximum credit limit of $2,000 for a SACC. Government’s anticipation, as we understand it, was that consumers would pay their establishment fee up front (thereby allowing them to obtain a maximum ACA of $2,000). However, this is not only not the common practice it is also counterproductive, because:

- The maximum establishment fee on a $2000 ACA SACC is $400 (20%). The maximum monthly fee on that loan is $80;

- If the consumer has the $400 to pay the establishment fee, they are actually better off financially to apply the $400 to the loan purpose and get a SACC with an ACA of $1,600; and

- A $1,600 ACA SACC would have a maximum establishment fee of $320, and a maximum monthly fee of $64 – creating a cheaper product overall (because of the legislated inability for any time cost to be imposed on the fees of a SACC). Further, the repayments are likely to be less.

This reasoning is not unique to SACCs, it applies to any form of loan product (except that in the case of a credit contract in which the establishment fees can attract interest, it becomes a no benefit situation).

The issue of direct debit charges stemmed from the restrictive nature of fees that may be charged under a SACC – restricted to only establishment, monthly, default, government and enforcement. Direct debit charges do not fall within any of these categories, yet represent a deemed necessity for credit products.

Many banks are unwilling to provide direct debit facilities to lenders; necessitating obtaining them from a third party provider. Without an exemption, the cost of these services would create a further impact on the already constrained revenue of lenders.

These issues were brought to Treasury’s attention by industry participants. We are certain of this because, for example, we made a submission to Treasury’s Consumer Credit Unit on 17 August, 2012 concerning the proposed regulations to the Credit Act and informed them accordingly.

Despite this, Treasury was unable to finalise the regulations prior to the Consumer Credit Legislation Amendment (Enhancements) Act 2012 coming into operation. Therefore, Treasury requested ASIC to issue the Class Order. As the explanatory memorandum states:

“Treasury has advised industry stakeholders that regulations will be made to address these problems. However, as regulations will not be finalised by 1 July 2013, Treasury has requested ASIC to exercise its

86 Section 5 of the Credit Act.
discretionary powers to give effect to the intended changes and facilitate the implementation of the Enhancement Act provisions in the way intended.”

We seriously question why the issue of the exemptions being made into regulations is a matter for consultation. From our viewpoint, Treasury has given a clear indication of intention, and a representation to industry, that it will do so; and that doing so is necessary to facilitate the legislation’s determined intention.

ASIC Class Order 13/818, Explanatory Memorandum at Item 1: Background.
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?

Is the protection working effectively?

We understand the protected earnings amount provision is being well observed by industry. In this we take our information from ASIC’s Report 426 (at paragraphs 131 and 132) which showed that all of the reviewed contracts were in compliance with the requirement.

Our treatment of the situation is somewhat akin to the findings in paragraph 129 of Report 426. As a part of our standard assessment procedure we calculate affordability against two filters; one of which is a protected earnings amount of 80% of the consumer’s income (thereby allowing a maximum affordability of 20%). Except in extenuating circumstances, maximum affordability for the proposed loan is set at the lower amount calculated under the filters – meaning that the limit of affordability is set at 20% of income or lower. This is done separately and in addition to the calculation for Social Security Act payment recipients.

This rationale aligns with our opinion on the effectiveness of the provision. The provision is somewhat effective as part of the overall responsible lending obligations, but it is not effective when considered in isolation and negatively affects certain individuals by placing a possible restriction on the amount of credit they can obtain.

The provision acts as an absolute ceiling, but it does not necessarily dictate how close a proposed SACC can get to the ceiling. A proper assessment of the consumer’s financial situation will determine for a lender their limit of affordability and is the ‘proper’ determination. The provision operates to restrict that to the 20% calculation at a maximum. However, if the proper determination of affordability is less than the 20% then the responsible lending obligations operate to restrict the SACC to a lesser amount (if it is still suitable at such level).

It is entirely possible that a welfare recipient’s circumstances could be such that they can notionally afford to commit more than 20% of their income towards loan repayments. However, because of the provision, they are precluded from doing so and this in turn restricts their ability to obtain financial accommodation from the industry. This may simply be a restriction on SACC lenders rather than an actual protection for consumers however, since the provision only operates for SACC loans and other credit providers are not bound. If the protection is really about consumers, it should apply to all methods of finance for the vulnerable class of consumer.

Perhaps the reason for its existence, and the reason it is so fully observed, is that it is absolutely and easily determined. The same cannot be said for the responsible lending obligations as a whole since they are so open to interpretation. If a proper assessment of affordability is done, then this provision would simply be unnecessary.

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88 Section 133CC of the Credit Act provides that the restriction only applies to small amount credit contracts.
**Should the protection be extended to additional groups?**

We do not see any requirement for extending the provision to other groups. Our rationale is:

(i) The responsible lending obligations impose sufficient protections for all consumers in respect of consumer credit;

(ii) Any arbitrary limit imposed for a particular class only serves to restrict the availability of finance for that class if they would otherwise be able to afford it. If they cannot afford it, then the responsible lending obligations operate to preclude the situation; and

(iii) If the protection is extended as only being applicable in relation to SACCs then this would unfairly restrict the operation of industry. Other classes of credit providers not being so restricted would negatively impact the SACC industry’s ability to compete for any overlap in credit provision with other market participants.
**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?

**Is there sufficient information available to lenders?**

Yes, sufficient information is available to lenders on the proviso that consumers are truthful about their situation. As it currently stands there is no overt prohibition or penalty upon consumers for giving false or misleading information to a lender when making an application for credit. There is correspondingly little incentive to avoid doing so.

If the consumer gives full and accurate disclosure, the lender should have sufficient ability to discover their SACC situation. The primary tool in doing so is reviewing the consumer’s bank transactions. Most lenders use some form of electronic funds transfer method (predominantly direct debit) in order to process loan repayments. By reviewing the bank statements, regular transfers/deductions from the consumer’s account will become apparent and provide a trigger for the lender to make the appropriate enquiries of the consumer.

We do not suggest that this should be the only enquiry made but, instead, that this method is often the most telling.

Problems arise where:

(a) A consumer makes payments from an account which is not the account into which their income is paid (it could be a secondary account, or an old account). As the law currently stands the only absolute requirement is to obtain transactions on the income account.

While any secondary accounts may be relevant in ascertaining the overall financial position of the consumer, their existence can be difficult to impossible to discover. This is particularly the case if the consumer is overtly attempting to hide the account as discovery may limit their ability to obtain credit.

The consumer may have transfers to another account in the listings of their income account without any notation (or a misleading one). While further enquiry can (and should) be made about unobvious transfers, if the consumer is not truthful about their nature there is little the lender can do - because if the consumer is being truthful and the target account belongs to a third party it is not only not relevant but would be a possible breach of privacy to obtain the information. It is not uncommon to see transfers in transaction listings which give the impression of being, for example, a transfer of money to a spouse or child.

There is no practical or satisfactory way of discovering the ownership of these accounts. There is likewise no ability for a lender to compel or otherwise discover the extent of bank accounts held by the consumer. The only ability the lender does have if they suspect anything untoward is to decline the application, which is hardly suitable for businesses.

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89 There are criminal offences under the category of ‘fraud’ that do cover this situation. However, these are administered by state and federal police who are traditionally unwilling to take any action in the situations such as these. This is due to a combination of lack of resources to adequately police this type of offence, the small amounts often involved and the relative inherent complexity requiring some degree of specialist knowledge.
(b) A consumer is in default of a SACC (or another loan type, for that matter), the information is not obvious and the consumer is not forthcoming.

Typically, entries in a bank transaction listing showing a dishonoured payment to a SACC lender are a clear indication that there may be a default. In light of (a) above and the following scenarios, that can become much more difficult.

The law currently requires that the lender cease direct debit attempts on a SACC loan where there have been two dishonours for a payment and the lender has been unable to make contact with the consumer about these\(^{90}\). Unfortunately, it is extremely common for consumers to evade contact when they dishonour payments\(^{91}\). Once the direct debit is turned off, it cannot be turned back on until the repayment is obtained.

Another issue is that direct debit facilities are extremely easy to turn off - despite what consumer advocates often cry to the contrary. It only takes a consumer giving a direction to their bank, the lender or the direct debit facility provider to do so. A consumer can call the lender, direct them to turn off the DDR and refuse to make any alternate payment arrangement; and there is nothing the lender can do but comply.

It is far more common, however, that the direction is given by the consumer to their bank, and no notice is provided to the lender. This is the predominant occurrence that we encounter, and it is by no means rare. We even have multiple instances of consumers obtaining a loan, giving a direct debit authority and cancelling it before the first repayment attempt.

Regardless of the manner of default, it is then only a matter of time until any of the relevant transactions fall outside the 90 days and the consumer’s income account becomes 'clean'.

The only other ability for the lender to be able to discover the consumer’s SACC situation lies in the credit reporting regime - which is inherently flawed. The inadequacies are due to:

(i) The required lag time in any form of default listing being made due to the requirements of the Privacy Act and the Privacy (Credit Reporting) Code 2014 ("Privacy Code"). The practical application of these gives the result that it is likely to be more than 90 days before a default listing can be made on the consumer’s credit file;

(ii) Credit reporting bodies do not share their information. Accordingly, only the body which the lender provides the information to will show it in their records; and

(iii) There are indications that more and more SACC lenders are leaving the credit reporting regime altogether due to factors of cost, complexity, usefulness (see (ii)) and lack of effectiveness as a tool to encourage good consumer behaviour. We do not, and we are not aware of any SACC lenders who, subscribe to the positive credit reporting regime. Unfortunately, the more lenders that decline to use credit reporting the less relevant it becomes.

The credit reporting regime is therefore a patchy and, ultimately, ineffective tool in aiding discovery. Further comment about positive credit reporting is made below.

Accordingly, the best and most available tool for lenders lies in the veracity of the consumer.

\(^{90}\) Regulation 79C, National Consumer Credit Protection Regulations.

\(^{91}\) Further discussed in our response to Question 8.
**Would a database/alternative be more effective to meet responsible lending obligations?**

**Consideration of a database**

We accept the *notion* that a database would be an effective tool in meeting responsible lending obligations. However, that concession comes with grave concerns for its application.

Responses to the specific queries posed in the Consultation Paper are given in the "Factors for consideration of a database" section, below.

**The problem with positive credit reporting**

We believe that the comprehensive credit reporting (CCR) regime (as comprising the negative credit reporting and the new positive credit reporting regimes) is not a viable consideration. As it stands, credit reporting in Australia is fractured and inefficient - and the introduction of positive credit reporting has done nothing to improve the situation.

The Consultation Paper states *"major banks are still in the process of working to participate in the regime"*. To us, this is very telling and is indicative of the reasons why the CCR is not viable.

These include:

(a) **The CCR is complex.** Dealing with privacy matters, in general, involves an arduous navigation of the various requirements ensconced in the Privacy Act and Privacy Code. The negative credit reporting regime added another layer of complexity on top of that, and positive credit reporting another layer on top of that. Credit providers in general (and SACC lenders in particular) are already in regulatory shock from the level of compliance required under the Credit Act. To comply with the requirements of both Acts may be beyond the reasonable ability of the average SACC lender;

(b) **Credit reporting is fractured.** Information held by a credit reporting body ("CRB") belongs to that CRB. We know of three major, and one minor, CRBs in Australia92. It currently stands there is no requirement (and apparently, no ability nor incentive) for the CRBs to exchange information between themselves. For any lender to get a complete view of a consumer's credit file they must individually access that consumer's credit file with each CRB. This obviously increases, if not outright multiplies, the other factors of complexity, compliance and cost.

(c) **The cost of being able to participate.** To participate at all in positive credit reporting, lenders have to fully participate. It is a requirement, for example, that lenders who wish to obtain positive credit reporting information must also contribute their information; and do so in a strict manner. This requires the lender's software systems be compatible and able to interface with the systems of the CRB to allow regular uploading of the (sometimes unique) data sets required.

The ability to calculate and interface the required data with the CRBs will undoubtedly require extensive alteration to a lender's loan database software. Except for the very largest (and, even then, it is doubtful), we warrant that no SACC lender has sufficient internal resources to cope with this level of alteration - let alone the inherent level on on-going maintenance that would be required;

(d) **The cost of actually participating.** Accessing a consumer's credit file can comparatively expensive compared to the returns achievable on SACCs, and the cost of doing so is not extraneous to the cap. CRBs' charges are volume based, so it is difficult to get an accurate picture for all lenders of their costs.

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To give an indication, our costs for accessing credit information under the negative credit reporting
regime only are (including GST as we are an input taxed industry):

<table>
<thead>
<tr>
<th>Fee Type</th>
<th>Veda</th>
<th>Dun &amp; Bradstreet</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monthly access charge</td>
<td>$60.50</td>
<td>Nil</td>
</tr>
<tr>
<td>Credit file search</td>
<td>$17.93</td>
<td>$3.52</td>
</tr>
<tr>
<td>Monthly debt recovery alert (per listing)</td>
<td>$1.09</td>
<td>Nil</td>
</tr>
</tbody>
</table>

It is worth noting that Veda has the largest database of consumer credit files out of any of the CRBs,
making accessing the most pertinent information the most expensive option; and

(e) **The compliance impediment.** The level of compliance required for the privacy legislation is below that
required for the Credit Act; but it is a worthy second and only very slightly overlaps. Recent changes to
the regime which were introduced alongside with the CCR have increased this level of compliance,
restricted the ability to use negative credit reporting\(^93\). The changes also saw the implementation of a
penalties regime for non-compliance.

In short: the CCR is complex to deal with, expensive to deal with, and won't necessarily give you the
information you require unless you deal with multiple CRBs (making it even more complex and expensive).

**Factors for consideration of a database**

(a) **Cost:** We anticipate the design and creation of any database is not likely to be a cheap exercise –
particularly as it appears the work would be tendered out to private enterprise. An accurate estimate
of cost is impossible without a likewise accurate idea of what the database would entail. However,
the cost of creation of the Personal Property Securities Register may be somewhat indicative.

(b) **Privacy concerns:** Ultimately any database will hold sensitive personal and financial information
about private citizens which will, of course, be subject to the controls of the Privacy Act. Lenders will
have to implement and operate a further level of privacy control into their operations to seek and
obtain consent from consumers to the communication of the information (and, where their existing
consent documentation does not cover it – obtaining the information in the database).

We do not concur with the apparent reasoning in the Consultation Paper that only “new categories”
of information would cause a potential breach of privacy. In our view, providing personal information
to the database would constitute a use or disclosure of personal information under Australian Privacy
Principle 6, therefore requiring the appropriate consent.

If this information is treated similarly to that held by a credit reporting body, it will also be subject to
the obligations in the Privacy Code regarding access and correction. We see no reason why it will not.

The ultimate holder of the information will also be subject to the privacy requirements (therefore
adding to compliance, and cost).

If the information is held or communicated overseas, a further level of consent will be required
because of Privacy Principle 8 – cross-border disclosure of personal information. Lenders may
inadvertently breach this Principle if the database information is held overseas (such as if it is stored in ‘cloud’ format) and they are not informed; so as to be able to inform the consumer.

(c) **Multiple databases in parallel:** We are unsure of what is actually proposed by this idea. Multiple
iterations of a database would (unless the information was common throughout) require lenders to

\(^{93}\) For example: the minimum amount for listing a default has increased, mandatory notices and a shorter window of opportunity for listing a default have been introduced and making a serious credit infringement listing has been greatly restricted.
access multiple points of inquiry. This is completely inefficient, adds complexity and allows for increased potential points of failure. It is also costly to replicate as the database architecture and interface are the most costly parts of the process. If the information is common throughout multiple databases, there is no point having more than one.

(d) **Assistance to SACC lenders:** A database holding relevant information, so long as it is current, accessible and accurate, would be of assistance in making an assessment on a potential SACC. As contemplated in the section ‘Is there sufficient information available to lenders?’ above, SACC lenders are potentially at the mercy of consumer representations in making their assessments. A well designed and operated database would remove some of the guesswork involved.

It could also assist SACC lenders in obtaining payment of outstanding loans. Currently, a consumer is potentially able to obscure their SACC history in order to obtain further credit under other SACCs. As well as increasing consumer indebtedness, this often results in the previous SACC not being paid. Access to a database which clearly sets out a consumer’s status would help ensure payment of outstanding SACCs by denying the ability (subject to the Credit Act presumptions) to obtain more credit without addressing their delinquency. While this sentiment may not consistent with our other comments, our standpoint is it is a ‘silver lining’ on what is otherwise an imposition.

(e) **Information to be included:** We would anticipate the following types of information (at a minimum) would need to be recorded to ensure a useful database:

- Full name;
- Residential address;
- Date of birth;
- Unique identification number (such as driver’s licence, passport or proof of age card number);
- Name/credit licence of lender;
- A temporary record of search by a lender\(^\text{94}\), which would automatically wipe after a prescribed period of time (say 30 days);
- Date opened of each SACC;
- Anticipated term according to SACC; and
- Date closed of each SACC.

Lenders should also be able to quickly and easily access an interactive report of all current SACCs and searches they have in the database.

(f) **Management (by whom):** Due to the information concerned, it would be sensible for any database to be administered by a government agency; similar to manner of the Personal Property Securities Register. Management by any private enterprise would necessarily include a profit component for them and drive the cost of use upwards. It would also increase the propensity for the data to be used for a commercial purpose (other than that intended).

(g) **Funding:** Industry should not be required to fund this, and we consider any such requirement to be highly inequitable. We are collectively already overburdened with compliance cost and the capping

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\(^{94}\) See ‘Requirement to check and when’ at item (i).
provisions. Any database would be required as a result of government legislature – not because industry particularly wants nor needs it. Its creation should be funded from general revenue.

(h) **Voluntary or mandatory reporting:** There is little point in implementing such a system unless it is mandatory. Reliance on a voluntary system with incomplete information is useless, and unlikely to be taken up by industry.

(i) **Requirement to check and when:** The obvious point at which a database should be checked is immediately prior to any SACC being assessed as ‘not unsuitable’. It would be impossible to finalise an assessment without ascertaining the database information (assuming it is mandatory), and it makes no sense to check earlier as the information would no longer be up to date.

The downside to this is that a period will undoubtedly exist between the making of the assessment and the entering into of the SACC. This is why we have suggested a temporary record of access of search to exist for a period. This would give sufficient time for a lender to enter into a SACC and serve as a warning to other lenders who may be dealing with the consumer. It would be improper to create a SACC listing in the database until actually entered into.

Further, lenders would obviously need to ‘close’ the SACC in the database when it is finalised.

(j) **Fees (plus inclusion in cap):** We do not support any fee structure for a database which must be included in the current revenue cap, due to factors given in our response to Question 8.

On the basis, as outlined, that SACC lenders would perform a preliminary search, create a registration or close a registration, we consider there should be:

- No fee for preliminary search;
- A cost recovery fee (only) for creating a registration; and
- No fee for closing a SACC.

Even though we submit that fees should be able to be passed on the consumers, lenders will necessarily carry the cost of them until they are reimbursed (if they are) in the repayment of the loan. We further point out that the requirements on lenders that they not add cost to third party expenses incurred in relation to loans.

(k) **Permitted access:** Access should only be open to:

- Australian Credit Licensees who provide SACCs, in the course of so transacting;
- Government regulators as part of a current investigation of a particular matter (on a request made basis); and
- The administrator of the database for maintenance reasons.

The following parties should specifically not be entitled to access:

- Australian Credit Licensees who do not provide SACCs;
- Australian Credit Licensees who are authorised deposit-taking institutions. We consider this prohibition legitimate on the basis of anecdotal reports that ADIs discriminate against consumers who have applied for, or been debtors under, SACCs; and
- Government regulators who are not investigating a particular matter. We do not consider that the implementation of a database should constitute a tool for regulators to identity particular lenders to target for investigation, or consumers to contact in order to fuel an investigation.

(l) **Accuracy mechanism:** We believe the information sets identified above should allow sufficient accuracy in achieving purpose. For the purposes of ensuring the content’s accuracy, we propose:

- Before the expiry of the preliminary search listing, if that lender has not created a SACC registration in the database, an email reminder is sent to prompt them to review whether one should be made;

- Upon the date anticipated for finalisation being reached for a SACC registration, an email be sent to the lender to prompt them to close the registration if it has been finalised. A follow up email should be sent after that if the closure is not made (at, say, 14 days); and

- A civil penalty provision to cover lenders who fail to update the database within a reasonable time period of an event occurring, or who access the database without legitimate reason.

Registrations should not automatically be deleted from the database or, if this is not acceptable, they should remain for a minimum of six years past the anticipated finalisation date (to accommodate the various limitations statutes). This aside, closure of a registration should only be allowed by the lender creating it or the database administrator subject to adequate verification requirements.

(m) **Interaction with responsible lending obligations:** In the event that a database is implemented, we don’t see that it should replace any responsible lending obligations. The complexity and functionality (also cost) of a database that could conceivably do that would be prohibitive. Rather, it would simply form part of the litany of requirements that lenders are obliged to fulfil in order to comply with the legislation.
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?

While we understand the restrictions on the Review placed by section 335A of the Credit Act and the Terms of Reference, we note the irony in the situation that:

- “Ensuring the industry remained viable” is an objective of the legislation;
- Per the consultation paper: “this regulatory framework results in a greater amount of complexity for SACC providers than for credit providers offering other products”;
- The only concern for industry viability (albeit a gratefully received one) lies in respect of pricing caps;
- There is no apparent capacity for the fundamental aspects of SACCs to be reviewed (only specific provisions); and
- The Review is tasked to look at whether we need any more regulation (but not less).

This situation could perhaps be summed up as: “You’re the most the regulated form of credit in the country. We don’t know how that’s working out for you, so let’s see if you should have some more.” While we appreciate the positioning involved, it is not best practice to change a situation in flux whilst on the run.

These concerns aside, we see the following areas where the SACC provisions could be expanded.

Allowing security to be taken for SACCs

By definition, SACCs do not allow security to be taken for the credit. This creates a massive detriment to lenders’ ability to enforce the contracts, particularly in the higher SACC amounts.

If a consumer does not pay their SACC the lender is currently restricted in enforcement options to professional debt collection, default listing on the consumer’s credit file (where available) and court action.

Professional debt collection is largely unviable, effectively being the ‘same old thing from a different person’. Further, because of the operation of the ASIC/ACCC Debt Collection Guideline, this option is restricted as to how often it can be used (in terms of amount of contact) and when a consumer ultimately refuses to pay then the lender is relegated to the other two options.

Listing a default against a consumer is not an active form of enforcement. Recent amendments to the Privacy Act 1988 now require that notice of an impending listing must be sent to a consumer at least 14 days before the listing can be made. We have seen no discernible increase in consumers making efforts to reconcile their debts for having received these notices. From there, the listing remains on their credit file for five years (seven if a serious credit infringement).

Whether this listing provides benefit to the lending in having the debt met then relies on what that negative listing is worth to the consumer (which is completely outside the control of the lender). Added to this, it often takes an amount of time before having an effect (if it ever does). This amount of time is often ‘dead time’ for which the lender cannot realise a return, especially if the SACC reaches the maximum cap on charges of twice the adjusted credit amount. To add to the complexity of this option is the fractured nature of credit reporting
(in that credit reporting bodies do not share information) and the anecdotal information of increased reticence by many lenders to participate in the credit reporting regime.

Court action is a more absolute form of enforcement in that it provides a certainty for the debt. It is, however, an investment of time and expense which may not result in any great benefit. Consumers may enact external dispute resolution to place a stay of proceedings, which can result in an ombudsman decision which is not binding on the consumer (but is on the lender) – giving the consumer a viable option to disrupt proceedings with little risk to them.

Even once obtained, judgments still need to be enforced somehow and the lender is often in no better position than they were under the SACC. This is particularly the case in respect of consumers who are welfare recipients, whom consumer advocates regularly expound as being ‘judgment proof’ in an effort to dissuade legal action being taken against them95. As an added point: while court proceedings often allow interest to accrue on the debt where the agreement between the parties provides for it, they are not sufficiently flexible to allow for the types of fees that SACCs allow. Because interest cannot be charged under a SACC, the option of taking legal action freezes the debt.

It also stands that if a consumer goes bankrupt owing on a SACC there is no ability for a lender to protect themselves (such as if they had the ability to take security for the loan).

Accordingly, we suggest that SACC lenders be provided with the ability to take security for their loans and recommend to the Review that this option be investigated. With the already existing consumer protections in the legislation, we see that this option has the potential to greatly increase industry’s viability without severely impacting or watering down any of the existing consumer protections.

**Provisions concerning reliance on information from consumers**

The vast responsibility in assessing an application for credit under the Credit Act lies with the credit provider. Under the responsible lending provisions the lender must ‘obtain and verify’ information about a consumer’s financial situation sufficient to enable it to make an assessment of suitability of credit. It must do this to a ‘reasonable’ level.

ASIC considers what is reasonable for particular consumer to be ‘scalable’96 in Regulatory Guide 209. However, the Guide goes on the provide that many factors affect scalability with the net effect being that it really isn’t scalable at all (for example, any reduction in onus achieved by the loan being for a ‘small amount’ is wiped away when consideration is given to the capacity of the consumer).

In making enquiries the lender will necessarily have to rely on information obtained from the consumer that is not able to be verified, due to its nature or overwhelming impracticality. For example, the lender must rely on information concerning:

(a) Whether the consumer has other bank accounts past those capable of discernment from information to hand;

(b) Whether the consumer has obtained credit which isn’t apparent. This could include loans with payments coming out of undisclosed bank accounts, which are paid in cash, which have only recently been obtained and have had no transactions or which are in default and have had no recent activity on them;

(c) The consumer’s regular expenditure which isn’t supported by readily obtained evidence (such as groceries, entertainment, clothing and medical expenses); and

95 Further discussed in our response to Question 8 under the heading “Problems in Enforcement”.

96 Per Regulatory Guide 209: Credit licensing: Responsible lending conduct, at RG 209.19.
(d) That there are not any impending events the consumer is aware of which could negatively affect the consumer’s ability to service the loan.

As it stands there is not only no practical repercussions on consumers for making false statement or failing to fully disclose relevant information, there is not even any solid requirement for them to avoid doing so.

We suggest that provisions requiring both parties to engage with the ‘duty of utmost good faith’ be enacted, similar to the requirement imposed by section 13 of the *Insurance Contracts Act 1984 (Cth)*. From the lender’s point of view, this is already a de facto requirement placed on them by the Credit Act. The practical effect, it is hoped, is that such a requirement will be taken into account by external dispute resolution providers and the regulator when considering the lender’s actions in any situation where the consumer has breached the duty. This could be seen to alleviate the lender’s onus of proof in situations where it can be demonstrated the consumer has improperly failed to provide relevant information to the lender.

It is acknowledged some coverage can be seen in the crime of fraud, but we submit this is of no worth to SACC lenders. Law enforcement is neither interested nor willing to take action due to the amounts involved.

**Increased protection of lenders by removal of punitive mechanisms**

There are opportunities in the Credit Act and broader regulatory regime for compliant lenders to be financially damaged by parties who are opposed to the industry. There are three mechanisms (the first three current, and fourth proposed) which are clearly identifiable:

(a) The use of external dispute resolution;
(b) Encouraging avoidance of repayment;
(c) Pressuring banks to stop servicing the industry; and
(d) Using ASIC’s powers of reimbursement of investigation/audit costs.

**Use of external dispute resolution**

Some of the foundations of external dispute resolution (EDR) coincide to create a great potential risk to small amount lenders:

(i) Membership of and compliance with an approved EDR scheme is compulsory for ACL holders. Failure to comply will result in cancellation of their ACL;

(ii) All costs of EDR are payable by the lender. Use is completely free to the consumer;

(iii) EDR decisions are binding on the lender. They are not binding on the consumer; and

(iv) All lenders must prolifically invite consumers to make complaint to the lender’s EDR.

In our experience with EDR schemes, they will accept and register a consumer’s complaint before seeing if it has any real merit. Our EDR scheme, the Credit and Investments Ombudsman, currently charges $195.00 to register a complaint (fees increase from that point).

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97 All credit guides, information statements, default notices, notices declining hardship change, for example, must contain the name and contact details of the lender’s EDR, state that the consumer may apply to the them if they have a complaint about the lender and that the service is free and independent.

This amount, payable regardless of ultimate determination of the complaint, for one complaint is equivalent to:

- five months of monthly fees on a SACC with an ACA of $1,000.00; or
- the total monthly fees chargeable on 16 one month SACCs with an ACA of $300.00.

Because of these factors, the making of malicious complaints to a lender’s EDR scheme, for which the lender will be forced to pay or lose their licence, will effectively put them out of business.

(b) Encouraging avoidance of repayment

The ramifications of repayment avoidance, and the lack of capacity to enforce, are more fully considered in our response to Question 3. We are aware of instances where consumers have been overtly advised to simply not pay a SACC:

- A website of a consumer advocate, now removed, encouraged consumers not to pay their SACC as it was unable to be enforced; and
- A website encouraging consumer’s to evade payment by closing their bank account, switching banks and to “keep details of this new account away from all your lenders”

Aside from the unethical nature of encouraging people to shirk their contractual obligations, if this happens in sufficient quantity it can severely damage the lender’s cash flow.

(c) Pressuring banks to stop servicing the industry

We are aware from reports within the industry that consumer advocates have been lobbying Australian banks to withdraw services from SACC lenders or face (at a minimum) adverse publicity. There is already concern that banks are intolerant towards the sector, despite not servicing the market and apparently not wanting to.

We have already seen reports of banks withdrawing credit products from the industry’s biggest lenders. There are now reports that banks have:

- Given notice of account closures (including personal accounts) to lenders and connected private citizens; and
- Refused service to lenders seeking to open new accounts; even opening an account before closing is within a matter of hours, in one instance.

This practice is cause for major concern within the industry as being unbanked can effectively cripple and kill any financial institution.

In some instances this threat can be staved off as the act is potentially contrary to the Code of Banking Practice; but this code only products individuals and small businesses, and does not offer absolute protection.

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100 See various media publications concerning Westpac revoking credit facilities to Cash Converters and Money3, and ANZ, Commonwealth and NAB ‘cutting all exposure’ to lenders, for example: www.abc.net.au/news/2015-08-05/payday-lenders-hit-as-westpac-cuts-off-finance/6673692.
(d) **Using ASIC’s powers of reimbursement**

ASIC presently has the ability to charge lenders for its costs of investigation\(^{101}\) where an offence is determined. This can be disquieting enough when it is considered that the legislation is still very open to interpretation.

A recent announcement by ASIC has indicated that it "will consider making an order for the recovery of its investigation expenses and costs in each case where the legislative requirements are met"\(^{102}\). With the current review into ASIC’s funding and an anticipated move to a 'user pays' system, we see a clear potential that ASIC may seek to recover the cost of investigation for all undertakings.

It already has significant power to undertake such activities at its own behest. The primary concern, however, is that a concerted effort by anti-industry proponents could prompt ASIC to undertake a lengthy (and therefore expensive) investigation of a lender.

**But what are the chances that any of this will happen?**

While the above concerns may appear 'alarmist', the simple fact is that these mechanisms are already being used by anti-industry proponents - particularly the well organised, funded and connected consumer advocates.

As evidence of this, we submit information from a presentation entitled “Dealing with Payday Loans: Tips and Traps”, delivered jointly by the Consumer Credit Law Centre (now Financial Rights Legal Centre) and Legal Aid NSW in late 2012. We hold a filmed copy of the presentation.

The presenters are from both organisations and, of critical importance, one of the presenters is a past board member of the Credit and Investments Ombudsman (then called the Credit Ombudsman Service). The presenters are highly critical and prejudicial of 'payday' lenders, clearly have an agenda to damage the industry and clearly encourage that aim.

Within the video, the presenters state:
- They are on a "mission to crush payday lending";
- "We're doing a lot of work with ASIC, and hopefully soon with [CIO], to get some changes made";
- Lenders are "complete shonks";
- The only reason consumers repay loans is because of direct debiting;
- Cash Converters are a "giant evil pile of rip off the poor people";
- Loans are "designed to default";
- 'Payday' lending is a "completely evil business model";
- They apply no methodology in identifying lenders - "If they have some dollars direct of cash something or whatever [in their name], I just immediately assume they're some dodgy mob who is a payday lender";
- They are "yet to find a borrower that can afford their loan", while acknowledging that they don't fully consider all aspects of the loan. One presenter states she doesn’t believe such a person exists;

\(^{101}\) Section 91 of the *Australian Securities and Investments Commission Act 2001* (Cth).

\(^{102}\) ASIC media release “15-200MR ASIC moves to recover costs of its investigations”, ASIC, 29 July 2015.
"They have a [credit] licence, which is great. It means they have to be in dispute resolution... that's fantastic. That means we can freely just torture them to death in dispute resolution";

In response to a question from the audience about how 'fun' it is to take action against 'payday' lenders: "It's the good thing about knowing you're right and they're seriously wrong";

The Legal Aid NSW have been told by ASIC not to commence litigation, and to wait for ASIC to take action;

They wanted a 48% interest rate cap to "limit the market", and will have to go back to arguing on responsible lending which they wanted to avoid having to do;

They wanted to limit the number of lenders and make the lenders' jobs harder;

Consumers should always cancel their direct debit authority, but were silent about making alternate payment arrangements;

In considering a consumer's circumstances to go 'straight to the Henderson Poverty Index' rather than take into account the consumer's individual circumstances;

That all of the new legislative requirements are tools to fight 'payday' lending;

Loans should be sent to EDR and ASIC "in every circumstance... every circumstance" and to send every 'payday' loan to ASIC for action "every time";

That challenging a loan will "get it written off. If not, come to us";

To definitely go to EDR to get enforcement put on hold;

They have pro-forma EDR submissions for people to use;

They want everything referred to EDR "with our full support" to 'pump up numbers' and force the EDR to instigate change;

There is no need for a relationship with 'payday' lenders;

"It's literally a war, and it's a good one. It's just a war"; and

In referring to a meeting attended by 'payday' lenders, one presenter stated "I almost jumped across the table and punched one".
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?

Understanding of the term 'avoidance'

The prevailing sentiment in respect of ‘avoidance’ is misplaced, especially as the implications of actually complying with the legislation are overly onerous.

In our view, both the legislative and regulatory framework should foster industry to want to comply with the requirements. As it stands, lenders are subjected to extensive and arbitrary requirements, horrendous consequences for any errors and an uninformed pricing cap which makes viability questionable even before the consideration of the previous two factors. In short, there is every incentive for lenders to avoid the operation of the Credit Act. The fact that more don't attempt speaks only to the lack of options to do it and the penalties for getting it wrong - rather than any sort of misguided belief that the legislation is somehow worthy.

Sentiment aside, it is not illegal to avoid the operation of the Credit Act; and nor should it be. The way in which the Credit Act works (specifically including the National Credit Code, to be clear) is that it is all encompassing - but only so long as the particular activities fit within the defined band of activities stated to be regulated.

In this the Credit Act is subjugated to the Code, wherein lies the provisions that determine what the Code (and therefore the Credit Act) can govern. If a particular pattern of conduct is pursued which does not fall within the ambit of the Code, and that conduct is not otherwise illegal, then it should not be treated or pursued as a breach of the Credit Act.

It is clear to us that legislative, executive and, by extension, some judicial interpretation of the legislation is that it applies simply on ‘say so’. It is accordingly difficult to impossible for that notion to be negatived. That is simply not the way the legislation is meant to work and, quite frankly, extremely prejudicial. Informed judicial determination has found that presupposition of Code application from the outset is incorrect103 but, for some reason this is by and large ignored (even by the justice system).

That approach is wrong. It is a fundamental basis of our society that someone is ‘innocent until proven guilty’. The treatment of the application of the Credit Act demonstrates that basis being eroded; and the incorrect notion of demonising avoidance of the Credit Act is a strong symptom of that very erosion. That lenders are afforded less rights than the average ‘person on the street’ is a sad indictment indeed.

Comment regarding the proposed anti-avoidance provision previously rejected

We note the comments in the consultation paper regarding the previous proposal to legislate a very broad ‘anti-avoidance’ provision into the Credit Act. We commend to the Review a very excellent submission made by the Finance Industry Delegation regarding that attempt104, whose reasoning we support.

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103 Bahadori v Permanent Mortgages Pty Ltd [2008] NSWCA 150, per Tobias, JA at paragraph [159].
Are stakeholders aware of any avoidance practices in relation to the Credit Act?

In line with our reasoning above, we do not consider the adoption of legitimate, alternate means of business operation to be ‘avoidance’. We further recommend that the Review also adopts that reasoning in the interests of common sense.

We are not aware of any other activities which could be considered an avoidance practice.

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

National Credit Code

The Credit Act is subjugated to, and reliant on, the National Credit Code. When the notion of avoidance is considered, it is predominantly avoidance of the Code which is in question - so we will address this first. The National Credit Code already contains powerful mechanisms to ensure compliance. These include:

(a) The 'gatekeeper' provisions\textsuperscript{105} which widely determine the scope of transactions which fall within the ambit of the Code;

(b) The presumption of applicability\textsuperscript{106} which forces the presumption of applicability of the Code to any credit code until proved otherwise; and

(c) The voiding of any attempts to contract out of, or modify, the effect of the Code\textsuperscript{107}.

The Code was never intended to be all encompassing. However, whether ignorantly or not, regulators, consumer advocates and courts seem hell bent on making it so. When the first iteration of the Code was tabled (as the then Consumer Credit Code) in the Queensland Parliament as part of the Consumer Credit (Queensland) Bill 1994, then Minister Tom Burns announced that there were dual goals to be achieved:

- "Ensuring that strong consumer protection remains a cornerstone...";
- "...but at the same time recognises that competition and product innovation must be enhanced and encouraged by the development of non-prescriptive flexible laws."\textsuperscript{108}

Unfortunately, it seems that the identified groups concentrate entirely on the former and completely neglect the latter. The term "consumer credit" (in the broad sense of credit given to a consumer) has unfortunately become indistinguishable from Code regulated consumer credit. We feel this has contributed to instances of businesses being unfairly held up to the Code (and Credit Act) requirements simply because they have deferred a consumer’s debt. This has not been helped by overly expansive and ambiguous definitions and interpretation\textsuperscript{109}. It is this type of eventuality which informs our comments on consumers’ rights being elevated above those of lenders.

The Code’s true ambit can be seen from not only its self-limiting provisions, but also that it specifically excludes certain types of credit transactions\textsuperscript{110}. This is obviously not meant to be an exhaustive list of what the

\textsuperscript{105} National Credit Code, various sections but particularly sections 3 and 5, and definitions section 204.
\textsuperscript{106} National Credit Code, section 13.
\textsuperscript{107} National Credit Code, Section 191.
\textsuperscript{108} Queensland Hansard, Legislative Assembly, 4 August 1994, at pages 8828-8829, Hon. T J Burns OAM.
\textsuperscript{109} For example, the definition of ‘contract’ in section 204 of the Code as including ‘a series or combination of contracts, or contracts and arrangements’ being used to conjoin unrelated contracts from various parties together as one credit contract because doing so fits the purposes of the regulator or the consumer - despite their being a body of higher court case law which deems otherwise (see, for example, Australian Finance Direct Limited v Director of Consumer Affairs Victoria [2006] VSCA 245 at [23], [28 - 30], [135]).
\textsuperscript{110} National Credit Code, section 6.
Code does not regulate, but rather a list of factors that are deemed excluded because they would otherwise be caught. Simply because a particular transaction does not appear in the list does not mean that it is (or should) be subject.

When the range of provisions already within the Code are considered, we consider that sufficient powers to curb unlawful avoidance already exist. When those powers are considered in light of the expansive treatment which is afforded to them, it is our opinion that the relevant Code provisions should be redrafted to provide greater certainty and decrease the capacity for inflammatory interpretation outside its reasonable bounds. To do otherwise fails the dual goals behind the advent of the Code.

**Credit Act**

We are neither aware of any avoidance practices relating to the Credit Act, nor any method by which it might be achieved.
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 Consultation Paper states: “there are no requirements to document this assessment.” We disagree with this statement, and point out:

(a) The Credit Act expressly implies that assessment must be documented. For example, section 132 of the Act states that a lender must give a consumer a ‘copy of the assessment’ if requested;

(b) The Credit Act further gives ASIC the powers to inspect ‘books’ of a credit licensee pursuant to Part 6-3. In being able to comply with this requirement, and the broader requirements to be able to substantiate its activities, it is expected that the licensee will have accurate and adequate documents and records;

(c) ASIC Regulatory Guide 209 contemplates that the assessment will be documented; stating “you must record the assessment in a form that allows you to provide a written copy promptly to the consumer”\(^\text{111}\);

(d) It is a standard condition of an Australian Credit Licence for licensees to “keep a record of all material that forms the basis of an assessment... in a form that will enable the licensee to give the consumer a written copy of the assessment if a request is made...”\(^\text{112}\);

(e) Credit providers are subject to compliance with the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth). Part 10 of the AMLCTF Act requires that information relating to designated services must be kept for seven years after it is made. Pursuant to section 6 of the AMLCTF act, making a loan in the course of carrying on a loans business is a designated service; and

(f) Perhaps not of direct application, but various pieces of legislation expect business participants to keep records of their business activities (eg Corporations Act and income tax legislation).

How do we comply with the requirement to make an assessment and keep records of it?

Our entire application and assessment processes are indivisible. Each relevant document and piece of information provided as part of a consumer’s application is retained as part of the permanent record in a consumer’s file, including:

- Application form (incorporating Privacy Act consent);
- Bank statements;
- Evidence of income;
- Credit file history search;
- Verification of identity and residential address;
- SACC history disclosure;
- Representations as to use of credit, outstanding bills and current liabilities; and
- Full actual and proposed budgets.

\(^{111}\) RG 209.87, RG 209.138.

\(^{112}\) Also contemplated in RG 209 in the note at RG209.138.
Additional documents are created or obtained as warranted in the situation (such as a calculation of protected earnings if the consumer is in receipt of payments under the Social Security Act).

The information realised from the above is either used to directly complete the assessment document, or acts as a ‘gatekeeper’ which without compliance would not allow the application to process to final assessment.

All our lending files are now kept electronically. No loan can proceed to the stage of loan documents being engrossed, and thereafter draw down of funds, unless each relevant document and the assessment is uploaded and stored in our records database.

**What is the most efficient and effective way to document assessments?**

We consider the above method to be the most efficient and effective way to do so. A separation of the assessment process from the application process provides too much scope for an unnecessary duplication of work (at best), for a failure of pertinent information to be taken into account in the assessment (worse) or for the assessment to be missed completely (worst).

**Should SACC providers be required to document the assessment?**

We do not see the efficacy of considering this option. Even if there was an express provision in the Credit Act that SACC lenders did not have to document their assessment, there is sufficient third party legislation which would continue to impose the requirement that it must be documented and kept.
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?

We do not, and do not have any intention to, provide consumer leases. However, we have concerns with the Consultation Paper’s approach to the issue; in particular:

- That "similar economic outcomes" is a valid reason for aligning regulation; and
- The incorrect notion that the Code adopts a 'form' over 'substance' interpretation of consumer leases.

The old adage "there are many roads that lead to Rome" is apt here.

We are seeing an unfortunate propensity for the outcome of a particular transaction to be considered in isolation, and the 'means' then being reverse engineered in light of the outcome. This is both morally and legally wrong.

Ignoring the totality of a contract and simply focussing on the outcome ignores the intentions of the parties and their rights in observation of the agreement. In considering a lease, consideration should be given to factors such as:

- Does the lessee obtain ownership of the good as part of the agreement?
- If so, at what stage and under what circumstances?
- At whose risk is the good?
- What obligations does each party have for maintenance, repair and upkeep of the good?
- If the good is faulty, what rights and obligations does each party have?
- If a warranty is involved, what are the circumstances?
- If the lessee wishes to return or exchange the good, what rights do they have?
- If the good is damaged or broken, is the lessor obligated to repair or replace it (subject to other rights)?

The determination of what is a lease and what is not should be made from consideration of all the relevant factors.
This view aligns with prevailing judicial precedent regarding contractual interpretation:

(a) In *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Ltd*\(^{113}\) the Federal Court held:

- "The character of a transaction is to be determined by reference to its legal nature, not to its economic effect"\(^{114}\);
- "... the arrangements are not of the same legal character. They are different means of achieving the same result. Put another way, while the economic substance of the transactions...may be similar, the legal mechanism by which they are effected is fundamentally different"\(^{115}\); and
- In respect of implying a term, "the term is sought not so much to make the [contract] work, but to help convert it... That is not a proper foundation for the implication of a term."\(^{116}\)

(b) The Privy Council considered the question of equivalency in economic outcome as applying to bills of exchange, in *Chow Yoong Hong v Choong Fah Rubber Manufactory*\(^{117}\):

- "The business of buying bills at a discount, that is, for their value at the date of purchase, is well known and is quite distinct from moneylending. Nowadays the buyer is usually a bank or a discount house, but the fact that he cannot be put into either of those categories does not alter the nature of the transaction, neither does the designation of the discount as interest";
- "There are many ways of raising cash besides borrowing. One is by selling book-debts and another by selling unmatured bills, in each case for less than their face value. Another might be to buy goods on credit or against a post-dated cheque and immediately sell them in the market for cash. Their Lordships are, of course, aware, ... that transactions of this sort can easily be used as a cloak for moneylending. The task of the court in such cases is clear. It must first look at the matter of the transaction which the parties have agreed. If in form it is not a loan, it is not the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money."

(c) In the South Australian Supreme Court in *Dyda Pty Ltd & Anor v Commissioner of State Taxation*\(^{118}\) it was held:

- "While it is the instrument that is to be assessed, not the transaction, a court may require an understanding of the transaction from which the instrument emanates in order to properly characterise the instrument. There is no room for concepts of economic equivalence."

(d) The High Court recently held in *Electricity Generation Corporation v Woodside Energy Ltd*\(^{119}\):

- "... this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used

---

\(^{113}\) [2008] FCA 594.
\(^{114}\) Beconwood, at paragraph [42].
\(^{115}\) Beconwood, at paragraph [53].
\(^{116}\) Beconwood, at paragraph [55].
\(^{119}\) [2014] HCA 7, at [35].
by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract."

(e) This coincides with the High Court’s previous decision in Byrnes v Kendall\textsuperscript{120}:

- "Contractual construction depends on finding the meaning of the language of the contract - the intention of the parties expressed, not the subjective intentions which they may have had, but did not express. A contract means what a reasonable person having all the background knowledge of the 'surrounding circumstances' available to the parties would have understood them to be using the language in the contract to mean."

Or, in other words, the concept of 'economic equivalence' should not be applied. Allow otherwise creates the ability to subjectively determine the nature of any agreement according to the wishes of only one of the parties, or a third party – which is not the way our legal system works (at least according to the High Court).

This brings us to the statement that the Code adopts a ‘form’ over ‘substance’ definition of consumer leases. This is patently incorrect.

The Code provides:

"For the purposes of this Code, a consumer lease is a contract for the hire of goods by a natural person or strata corporation under which that person or corporation does not have a right or obligation to purchase the goods."\textsuperscript{121}

The Consultation Paper statement completely ignores an important part of the definition in the phrase "contract for the hire of goods". A fundamental aspect of a lease is that it is a temporary provision of rights by an owner to another party for a period of time.

While it can be understood a layperson’s perspective may be that it is an issue of semantics, the same can be said of many legal issues if looked at superficially. That is simply not the way matters may reasonably be viewed.

\textsuperscript{120} [2011] HCA 26, at [98].
\textsuperscript{121} Code section 169.
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?
- If greater consistency between SACCs and comparable consumer leases is considered warranted, which SACC provisions should be extended to those leases?

We see consumer leases as fundamentally different to consumer credit contracts, and do not consider that they should be treated commensurately.

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?
- If not, what alternative approach could be used to determine a cap on costs for leases?

We do not consider that consumer leases should attract any form of pricing cap.
**ANNEXURE 1: TABLES**

### Table 1 - Hardship notices and outcomes by calendar year

<table>
<thead>
<tr>
<th>Calendar Year</th>
<th>No. hardship notices</th>
<th>No response to information request*</th>
<th>Part response to information request</th>
<th>Percentage w/ insufficient info.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>80</td>
<td>19</td>
<td>1</td>
<td>25%</td>
</tr>
<tr>
<td>2014</td>
<td>60</td>
<td>23</td>
<td>1</td>
<td>40%</td>
</tr>
<tr>
<td>2015 (to 30/9/15)</td>
<td>71</td>
<td>40</td>
<td>5</td>
<td>63.38%</td>
</tr>
</tbody>
</table>

*All hardship notices receive requests to provide information.

### Table 2 - ASIC regulatory outcomes for credit: January 2014 to June 2015

<table>
<thead>
<tr>
<th>PERIOD</th>
<th>CRIMINAL ACTIONS</th>
<th>CIVIL ACTIONS</th>
<th>ADMINISTRATIVE REMEDIES</th>
<th>ENFORCEABLE U'TAKINGS/NEGOTIATED</th>
<th>TOTAL MATTERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan - Jun 2014</td>
<td>2</td>
<td>1</td>
<td>16</td>
<td>5</td>
<td>24</td>
</tr>
<tr>
<td>Jul - Dec 2014</td>
<td>2</td>
<td>1</td>
<td>12</td>
<td>7</td>
<td>22</td>
</tr>
<tr>
<td>Jan - Jun 2015</td>
<td>2</td>
<td>1</td>
<td>21</td>
<td>4</td>
<td>28</td>
</tr>
</tbody>
</table>

### Table 3 - Selected penalty provisions in Credit Act (excluding National Credit Code)

<table>
<thead>
<tr>
<th>Section</th>
<th>Nature</th>
<th>Civil Penalty Units</th>
<th>Criminal Penalty (Units/yr)</th>
<th>Strict Liability?</th>
</tr>
</thead>
<tbody>
<tr>
<td>29</td>
<td>Engaging in credit activities without a licence</td>
<td>2000</td>
<td>200/2 yr</td>
<td></td>
</tr>
<tr>
<td>30</td>
<td>Holding out/advertising as holding a licence when not entitled to do so</td>
<td>2000</td>
<td>50/1 yr</td>
<td></td>
</tr>
<tr>
<td>31</td>
<td>Conducting business with unlicensed persons</td>
<td>2000</td>
<td>200/2 yr</td>
<td></td>
</tr>
<tr>
<td>32</td>
<td>Charging a fee when unlicensed</td>
<td>2000</td>
<td>50/1 yr</td>
<td></td>
</tr>
<tr>
<td>49</td>
<td>Failure to provide a statement/audit report</td>
<td>2000</td>
<td>35/6 mth</td>
<td>Yes</td>
</tr>
<tr>
<td>50</td>
<td>Failure to give information to ASIC required by regulation</td>
<td>2000</td>
<td>35/6 mth</td>
<td>Yes</td>
</tr>
<tr>
<td>51</td>
<td>Failure to provide reasonable assistance to ASIC</td>
<td>2000</td>
<td>25/6 mth</td>
<td></td>
</tr>
<tr>
<td>52</td>
<td>Failure to cite Australian Credit Licence number</td>
<td>2000</td>
<td>10</td>
<td>Yes</td>
</tr>
<tr>
<td>53</td>
<td>Failure to lodge annual compliance certificate</td>
<td>2000</td>
<td>60</td>
<td>Yes</td>
</tr>
<tr>
<td>69</td>
<td>Giving authorisation which has no effect</td>
<td>2000</td>
<td>100/2 yr</td>
<td></td>
</tr>
<tr>
<td>70</td>
<td>Failure to vary/revoke authorisations which cease to have effect</td>
<td>2000</td>
<td>100/2 yr</td>
<td></td>
</tr>
<tr>
<td>71</td>
<td>Failure to notify ASIC about authorisation of credit representatives</td>
<td>2000</td>
<td>25/6 mth</td>
<td>Yes</td>
</tr>
<tr>
<td>73</td>
<td>Improper use of information given by ASIC about credit representatives</td>
<td>2000</td>
<td>50/1 yr</td>
<td></td>
</tr>
<tr>
<td>82</td>
<td>Acting contrary to a banning order</td>
<td>2000</td>
<td>100/2 yr</td>
<td></td>
</tr>
<tr>
<td>88</td>
<td>Failure to keep financial records</td>
<td>2000</td>
<td>200/5 yr</td>
<td></td>
</tr>
<tr>
<td>95</td>
<td>Failure to keep financial records for seven years</td>
<td>2000</td>
<td>50/6 mth</td>
<td></td>
</tr>
<tr>
<td>102</td>
<td>Failure to give proper access and assistance to auditor</td>
<td>2000</td>
<td>100/2 yr</td>
<td></td>
</tr>
<tr>
<td>126</td>
<td>Failure to provide credit guide</td>
<td>2000</td>
<td>50</td>
<td>Yes</td>
</tr>
<tr>
<td>128</td>
<td>Failure to make a credit assessment</td>
<td>2000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>130</td>
<td>Failure to make reasonable enquiries</td>
<td>2000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>131</td>
<td>Failure to make an 'unsuitable' assessment</td>
<td>2000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>132</td>
<td>Failure to give assessment when required</td>
<td>2000</td>
<td>50</td>
<td>Yes</td>
</tr>
</tbody>
</table>
### Table 4 - Mandatory SACC steps - assessment to provision

<table>
<thead>
<tr>
<th>REQUIREMENT</th>
<th>LEGISLATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ensure consumer has been informed of the SACC warning statement</td>
<td>Regs 28XXA, 28XXB, 28XXC</td>
</tr>
<tr>
<td>Credit guide of licensee must be provided</td>
<td>s126 Credit Act, Regs Part 3.2</td>
</tr>
<tr>
<td>Ascertain applicant’s requirements and objectives of credit</td>
<td>s130 Credit Act</td>
</tr>
<tr>
<td>Obtain and verify identity of applicant</td>
<td>Anti-Money Laundering and Counter-Terrorism Financing Act</td>
</tr>
<tr>
<td>Obtain and verify information about applicant’s financial situation</td>
<td>s130 Credit Act</td>
</tr>
<tr>
<td>Obtain immediately preceding 90 days of statements</td>
<td>s130 Credit Act</td>
</tr>
<tr>
<td>Ascertain status regarding past and current small amount credit contracts</td>
<td>s131 Credit Act</td>
</tr>
<tr>
<td>Protected earnings amount calculation for Centrelink recipients</td>
<td>s133CC Credit Act, Reg 28S</td>
</tr>
<tr>
<td>Applicant must consent to credit provider obtaining credit report</td>
<td>Privacy Act</td>
</tr>
<tr>
<td>Credit provider must make an assessment as to unsuitability of the proposed credit contract</td>
<td>s128, s129 and s131 Credit Act</td>
</tr>
<tr>
<td>Consumer must be provided with pre-contractual disclosure</td>
<td>Code 16, Reg 70</td>
</tr>
<tr>
<td>Mandatory disclosure requirements</td>
<td>Code 17, Reg 74</td>
</tr>
<tr>
<td>Mandatory form and expression of contract</td>
<td>Code 14, 18</td>
</tr>
<tr>
<td>Create and execute loan account for contract</td>
<td>Code 14</td>
</tr>
<tr>
<td>Drawdown and disburse loan funds</td>
<td>Code 25</td>
</tr>
<tr>
<td>Create account record for loan transactions</td>
<td>Code 26, 33</td>
</tr>
<tr>
<td>Provide copy of contract to consumer</td>
<td>Code 20</td>
</tr>
<tr>
<td>Retain documentary evidence of all steps</td>
<td>Credit Act, AMLCTF Act, Privacy Act</td>
</tr>
</tbody>
</table>
### Table 5 - SACC data 1/7/13 to 30/6/15

<table>
<thead>
<tr>
<th>SACCs in numbers</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number provided</td>
<td>3,115</td>
<td></td>
</tr>
<tr>
<td>Active SACCs as at 30/6/15</td>
<td>1,182</td>
<td>37.95%*</td>
</tr>
<tr>
<td>SACCs written off as uncollectable</td>
<td>286</td>
<td>9.18%</td>
</tr>
<tr>
<td>SACCs subject of concluded court action (incl. in active SACCs)</td>
<td>38</td>
<td>1.22%</td>
</tr>
<tr>
<td>Number paid out</td>
<td>1,647</td>
<td>52.87%*</td>
</tr>
<tr>
<td>Number of expected repayments</td>
<td>66,592</td>
<td></td>
</tr>
<tr>
<td>Number of active repayment attempts failed#</td>
<td>12,040</td>
<td>18.08%</td>
</tr>
</tbody>
</table>

### SACCs in dollar figures

<table>
<thead>
<tr>
<th>SACCs in dollar figures</th>
<th>Amount</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total ACA advanced</td>
<td>$3,538,150.00</td>
<td></td>
</tr>
<tr>
<td>Total establishment fees charged</td>
<td>$707,630.00</td>
<td></td>
</tr>
<tr>
<td>Average SACC amount (incl. establishment fee)</td>
<td>$1,363.00</td>
<td></td>
</tr>
<tr>
<td>Average establishment fee charged</td>
<td>$272.60</td>
<td></td>
</tr>
<tr>
<td>SACC loan balances written off</td>
<td>$366,704.00</td>
<td>8.64%</td>
</tr>
<tr>
<td>Amount of ACA written off (% of amounts written off)</td>
<td>$255,475.00</td>
<td>69.67%</td>
</tr>
<tr>
<td>Amount of ACA written off (% of total ACA advanced)</td>
<td>$255,475.00</td>
<td>7.22%</td>
</tr>
</tbody>
</table>

* Figure does not accommodate for term, or payouts occurring after 30 June, 2015.
# Does not include: missed customer initiated payments or unprocessed direct debit attempts due to facility being suspended under Code requirements.

### Table 6 - SACCs (1/7/13 to 30/6/15): Delinquent SACCs to 31/8/15

<table>
<thead>
<tr>
<th>Overview</th>
<th>Figure</th>
<th>% (of delinquent SACCs)</th>
<th>% (of all SACCs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of SACCs which became delinquent</td>
<td>404</td>
<td>12.97%</td>
<td></td>
</tr>
<tr>
<td>$ credit advanced (incl. establishment fee)</td>
<td>$516,520.00</td>
<td>12.16%</td>
<td></td>
</tr>
<tr>
<td>$ owing at time of first event (total)</td>
<td>$535,775.04</td>
<td>12.16%</td>
<td></td>
</tr>
<tr>
<td>$ owing at time of first event (av.)</td>
<td>$1,326.18</td>
<td>12.16%</td>
<td></td>
</tr>
</tbody>
</table>

**Hardship profile of delinquent SACCs**

| No hardship notice                                                     | 385    | 95.3%       | 12.36%          |
| Hardship notice, change declined with failure to provide requested information | 12     | 2.97%       | 0.39%           |
| Hardship notice, change made                                           | 7      | 1.73%       | 0.22%           |

**Amount of credit (incl. establishment fee):**

- $360 to $600                                                         | 100    | 24.75%      | 3.21%           |
- $660 to $900                                                         | 44     | 10.89%      | 1.41%           |
- $960 to $1,200                                                       | 121    | 29.95%      | 3.88%           |
- $1,320 to $1,560                                                     | 17     | 4.21%       | 0.55%           |
- $1,620 to $1,800                                                     | 36     | 8.91%       | 1.16%           |
- $1,920 to $2,160                                                    | 10     | 2.48%       | 0.32%           |
- $2,220 to $2,400                                                    | 76     | 18.81%      | 2.44%           |

* All consumers received written notice of ability to give notice of hardship and seek a change to their SACC; the majority on multiple occasions.
### Sub-Table 6a - Delinquency events by type

<table>
<thead>
<tr>
<th>Events by type - total incidences</th>
<th>Figure</th>
<th>% (of delinquent SACCs)</th>
<th>% (of all SACCs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part X bankruptcy</td>
<td>9</td>
<td>2.23%</td>
<td>0.29%</td>
</tr>
<tr>
<td>Part IX debt agreement</td>
<td>10</td>
<td>2.48%</td>
<td>0.32%</td>
</tr>
<tr>
<td>Judgment</td>
<td>32</td>
<td>7.92%</td>
<td>1.03%</td>
</tr>
<tr>
<td>Serious credit infringement</td>
<td>220</td>
<td>54.46%</td>
<td>7.06%</td>
</tr>
<tr>
<td>Default listing</td>
<td>293</td>
<td>72.52%</td>
<td>9.41%</td>
</tr>
<tr>
<td>External debt collection referral</td>
<td>164</td>
<td>40.59%</td>
<td>5.26%</td>
</tr>
<tr>
<td>Written off (low balance)</td>
<td>1</td>
<td>0.25%</td>
<td>0.03%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Events by type - weighted*</th>
<th>Figure</th>
<th>% (of delinquent SACCs)</th>
<th>% (of all SACCs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part X bankruptcy</td>
<td>9</td>
<td>2.23%</td>
<td>0.29%</td>
</tr>
<tr>
<td>Part IX debt agreement</td>
<td>10</td>
<td>2.48%</td>
<td>0.32%</td>
</tr>
<tr>
<td>Judgment</td>
<td>32</td>
<td>7.92%</td>
<td>1.03%</td>
</tr>
<tr>
<td>Serious credit infringement</td>
<td>220</td>
<td>54.46%</td>
<td>7.06%</td>
</tr>
<tr>
<td>Default listing</td>
<td>93</td>
<td>23.02%</td>
<td>2.99%</td>
</tr>
<tr>
<td>External debt collection referral</td>
<td>39</td>
<td>9.65%</td>
<td>1.25%</td>
</tr>
<tr>
<td>Other (written off, low balance)</td>
<td>1</td>
<td>0.25%</td>
<td>0.03%</td>
</tr>
</tbody>
</table>

*The weighted figures show a single incidence per SACC weighted according to severity of event. These are ordered (from highest to lowest): Part X bankruptcy --> Part IX debt agreement --> Judgment --> Serious credit infringement --> Default listing --> External debt collection referral.

### Sub-Table 6b - Number of payments honoured to first delinquency event (overall)

<table>
<thead>
<tr>
<th>Number of payments honoured (normalised to weekly if the SACC called for fortnightly)</th>
<th>Figure</th>
<th>% (of delinquent SACCs)</th>
<th>% (of all SACCs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>54</td>
<td>13.37%</td>
<td>1.73%</td>
</tr>
<tr>
<td>One</td>
<td>11</td>
<td>2.72%</td>
<td>0.35%</td>
</tr>
<tr>
<td>Two</td>
<td>37</td>
<td>9.16%</td>
<td>1.19%</td>
</tr>
<tr>
<td>Three</td>
<td>4</td>
<td>0.99%</td>
<td>0.13%</td>
</tr>
<tr>
<td>Four</td>
<td>42</td>
<td>10.40%</td>
<td>1.35%</td>
</tr>
<tr>
<td>Five</td>
<td>3</td>
<td>0.74%</td>
<td>0.10%</td>
</tr>
<tr>
<td>Six to half</td>
<td>155</td>
<td>38.37%</td>
<td>4.98%</td>
</tr>
<tr>
<td>More than half</td>
<td>51</td>
<td>12.62%</td>
<td>1.64%</td>
</tr>
<tr>
<td>Mixed (periods of payment and non-payment)</td>
<td>47</td>
<td>11.63%</td>
<td>1.51%</td>
</tr>
</tbody>
</table>

**Groupings of above data:**

<table>
<thead>
<tr>
<th>Groupings of above data:</th>
<th>Figure</th>
<th>% (of delinquent SACCs)</th>
<th>% (of all SACCs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>None to five</td>
<td>151</td>
<td>37.38%</td>
<td>4.85%</td>
</tr>
<tr>
<td>None to half</td>
<td>306</td>
<td>75.74%</td>
<td>9.82%</td>
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<tr>
<td>More than half</td>
<td>98</td>
<td>24.26%</td>
<td>3.15%</td>
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<tr>
<td>No. of repayments</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>-------------------</td>
<td>---</td>
<td>---</td>
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<tr>
<td><strong>Figures (SACC bracket)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- $360 to $600</td>
<td>15</td>
<td>1</td>
<td>12</td>
</tr>
<tr>
<td>- $660 to $900</td>
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<td>0</td>
<td>2</td>
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<tr>
<td>- $960 to $1,200</td>
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<td>14</td>
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<tr>
<td>- $1,320 to $1,560</td>
<td>3</td>
<td>1</td>
<td>1</td>
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<tr>
<td>- $1,620 to $1,800</td>
<td>7</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>- $1,920 to $2,160</td>
<td>1</td>
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<td>1</td>
</tr>
<tr>
<td>- $2,220 to $2,400</td>
<td>6</td>
<td>6</td>
<td>3</td>
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<table>
<thead>
<tr>
<th>% (of delinquent SACCs)</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>&lt; 1/2</th>
<th>&gt; 1/2</th>
<th>Mixed</th>
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<tr>
<td>- $360 to $600</td>
<td>3.71%</td>
<td>0.25%</td>
<td>2.97%</td>
<td>0.50%</td>
<td>1.24%</td>
<td>0.00%</td>
<td>10.89%</td>
<td>2.48%</td>
<td>2.72%</td>
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<tr>
<td>- $660 to $900</td>
<td>0.50%</td>
<td>0.00%</td>
<td>0.50%</td>
<td>0.00%</td>
<td>2.23%</td>
<td>0.00%</td>
<td>4.21%</td>
<td>2.48%</td>
<td>0.99%</td>
</tr>
<tr>
<td>- $960 to $1,200</td>
<td>4.95%</td>
<td>0.74%</td>
<td>3.47%</td>
<td>0.00%</td>
<td>3.96%</td>
<td>0.00%</td>
<td>11.88%</td>
<td>2.72%</td>
<td>2.23%</td>
</tr>
<tr>
<td>- $1,320 to $1,560</td>
<td>0.74%</td>
<td>0.25%</td>
<td>0.25%</td>
<td>0.00%</td>
<td>0.25%</td>
<td>0.00%</td>
<td>1.24%</td>
<td>0.50%</td>
<td>0.99%</td>
</tr>
<tr>
<td>- $1,620 to $1,800</td>
<td>1.73%</td>
<td>0.00%</td>
<td>0.99%</td>
<td>0.25%</td>
<td>0.25%</td>
<td>0.25%</td>
<td>2.23%</td>
<td>1.24%</td>
<td>1.98%</td>
</tr>
<tr>
<td>- $1,920 to $2,160</td>
<td>0.25%</td>
<td>0.00%</td>
<td>0.25%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.50%</td>
<td>0.99%</td>
<td>0.50%</td>
</tr>
<tr>
<td>- $2,220 to $2,400</td>
<td>1.49%</td>
<td>1.49%</td>
<td>0.74%</td>
<td>0.25%</td>
<td>2.48%</td>
<td>0.50%</td>
<td>7.43%</td>
<td>2.23%</td>
<td>2.23%</td>
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</table>

<table>
<thead>
<tr>
<th>% (of total SACCs)</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>&lt; 1/2</th>
<th>&gt; 1/2</th>
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</thead>
<tbody>
<tr>
<td>- $360 to $600</td>
<td>0.482%</td>
<td>0.032%</td>
<td>0.385%</td>
<td>0.064%</td>
<td>0.161%</td>
<td>0.000%</td>
<td>1.413%</td>
<td>0.321%</td>
<td>0.353%</td>
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<tr>
<td>- $660 to $900</td>
<td>0.064%</td>
<td>0.000%</td>
<td>0.064%</td>
<td>0.000%</td>
<td>0.289%</td>
<td>0.000%</td>
<td>0.546%</td>
<td>0.321%</td>
<td>0.128%</td>
</tr>
<tr>
<td>- $960 to $1,200</td>
<td>0.642%</td>
<td>0.096%</td>
<td>0.449%</td>
<td>0.000%</td>
<td>0.514%</td>
<td>0.000%</td>
<td>1.541%</td>
<td>0.353%</td>
<td>0.289%</td>
</tr>
<tr>
<td>- $1,320 to $1,560</td>
<td>0.096%</td>
<td>0.032%</td>
<td>0.032%</td>
<td>0.000%</td>
<td>0.032%</td>
<td>0.000%</td>
<td>0.161%</td>
<td>0.064%</td>
<td>0.128%</td>
</tr>
<tr>
<td>- $1,620 to $1,800</td>
<td>0.225%</td>
<td>0.000%</td>
<td>0.128%</td>
<td>0.032%</td>
<td>0.032%</td>
<td>0.032%</td>
<td>0.289%</td>
<td>0.161%</td>
<td>0.257%</td>
</tr>
<tr>
<td>- $1,920 to $2,160</td>
<td>0.032%</td>
<td>0.000%</td>
<td>0.032%</td>
<td>0.000%</td>
<td>0.000%</td>
<td>0.000%</td>
<td>0.064%</td>
<td>0.128%</td>
<td>0.064%</td>
</tr>
<tr>
<td>- $2,220 to $2,400</td>
<td>0.193%</td>
<td>0.193%</td>
<td>0.096%</td>
<td>0.032%</td>
<td>0.321%</td>
<td>0.064%</td>
<td>0.963%</td>
<td>0.289%</td>
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### Table 7 - Legal proceedings steps and time frames for uncontested matters (QCAT)

<table>
<thead>
<tr>
<th>Step</th>
<th>Time Frame</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engrossing legal process</td>
<td>Undeterminable</td>
</tr>
<tr>
<td>Service of process</td>
<td>Up to 28 days allowed before an order for extension is required</td>
</tr>
<tr>
<td>Period for respondent to file a response</td>
<td>28 days from date of service</td>
</tr>
<tr>
<td>Engrossing application for default decision</td>
<td>Undeterminable</td>
</tr>
<tr>
<td>Demand for payment of decision</td>
<td>Minimum 14 days recommended</td>
</tr>
<tr>
<td>Engrossing application for default judgment for filing with Magistrates Court</td>
<td>Undeterminable</td>
</tr>
<tr>
<td>Judgment obtained</td>
<td></td>
</tr>
</tbody>
</table>
ANNEXURE 2: CASE STUDIES

Case Study 1

$600 SACC to 41 year old male, single, no dependents, fully employed (over three years).

Loan taken out on 22/7/13. In January, 2014 stated that his work was seasonal and he was awaiting Centrelink payments. Consumer became difficult to contact; when successful, he made promises to pay. Changes to repayment particulars were made in line with his requests, but regular payment dishonours ensued.

In August, 2014 the consumer answered his phone and then hung up on our representative. In September, 2014 contact was made and repayments were deferred for him as he claimed he’d been in hospital. Payments ceased altogether in October, 2014. In November, 2014 contact was made and he requested a call back as he was driving. Our representative called at the agreed time, only to be hung up on.

In January, 2015 the borrower stated he hadn’t worked or received Centrelink for three months. He refused to offer any repayments. When told he could give notice of hardship he said he “couldn’t be bothered”. He questioned the loan fees and when told that they were in his documents he said “he didn’t read them”. No repayments have been received since 3 October, 2014.

Case Study 2

$1,800 SACC to 20 year old male, single, no dependents, fully employed (over 12 months).

Loan taken out on 17/9/13. Consumer made first two repayments only, then dishonoured all following to date. Contact made in November, 2013 at which time the consumer asked for bank details to make direct payments (given). In December, 2013 the consumer represented he would attend lender’s representative’s office to make payment arrangements ‘once he sorted out his Centrelink payments’.

Further contact was unable to be made. A phone call to his stated place of employment in January, 2014 revealed he no longer worked there. In February, 2014 a commercial agent was sent to the consumer’s residence. The occupant, who stated he was the consumer’s uncle, claimed to have no idea of the consumer’s location stating he has “nothing to do with him”. Consumer’s given telephone number was answered by a woman claiming to have never heard of him.

A new address was discovered in March, 2014 as a result of a serious credit infringement listing with a credit reporting body. Contact was made. Consumer promised to recommence repayments by direct debit, but it was discovered he had placed a stop payment on his bank account. Subsequent attempts to make contact unsuccessful.

In August, 2014 the consumer made contact to state he had been in prison. He made promises to recommence repayments by direct debit, but a stop payment was still in place on his bank account.

The consumer continues to be in irregular contact, is adamant that the stop payment is lifted and requested bank account details to make a direct deposit, but has yet to make any repayments.
Case Study 3

$1,800 SACC and $960 SACC to 40 year old female, single, one dependent, part time employed.

First SACC obtained on 15 July, 2013, and the second SACC on 5 November, 2013. Consumer put a stop payment notification on her account on 31 December, 2013. She made contact on 6 January, 2014 stating she had been unwell and lost her job but advising that payments could resume from 24 January, 2014. Payment stop on account was not lifted. Consumer advised new bank account for drawing of repayments, but this dishonoured as well.

Daughter advised of serious hospitalisation in April, 2014. Monthly fees were turned off and repayments were reduced. These started to dishonour, and no repayments have been made from end of May 2014 (to date).

Contact unable to be made and consumer did not respond to messages and letters.

In August, 2014 a commercial field agent was sent to the consumer’s address to attempt to make contact. When agent asked male occupant if they could speak to the consumer, the occupant slammed the door in the agent’s face. No subsequent contact or repayments have been made.

Case Study 4

$800 SACC to a 39 year old male, single, no dependents, employed as a debt collector.

SACC obtained on 12 January, 2015. On application, when queried for outstanding bills and loans, entered “nil”. When subsequently completing a full budget with representative stated that he had had one SACC but it was finalised. This information was verified against bank statements for two accounts.

Notification of Part X bankruptcy (debtor’s petition) received on 12 February, 2015 without warning. Notification cites 22 creditors (other than us) with total debts of $29,598.

Consumer’s Statement of Affairs ("SoA") was obtained from AFSA. SoA lists only 18 of the creditors, all of whom were incurred prior to applying for the loan with us – most of them in 2014. SoA also bears two dates – one of which is 26 December, 2014; 13 days before the borrower made application for finance.

Consumer was clearly bankrupt and intended to file for Part X before making application for credit with us. He failed to disclose pertinent information about his debts despite being repeatedly requested to do so.

Case Study 5

$1,800 SACC to a 52 year old female, single, no dependents, full time employment.

SACC obtained on 31 October, 2013. At time of application, provided a comprehensive budget and disclosed four debts (one of which was to us for an existing loan facility) totalling $5,059.41. The budget provided for a surplus of funds above the intended repayment amount, covering payments on all debts.

Consumer immediately began dishonouring repayments, and made no repayments on the loan. Telephone messages and written notices were not responded to. On 6 December, 2013 we were notified the consumer had put a stop payment on her account. Contact was finally made on 6 January, 2014, whereupon the consumer declared that she was bankrupt (debtor’s petition).

In the consumer’s statement of affairs, she lists the same debts as given at the time of her application for the loan, with only a mild increase in the balances. She also stated that she was currently employed in the same occupation. We consider that the consumer obtained the loan with no intention of repaying it.
Case Study 6

$2,400 SACC to 26 year old male, single, no dependents, part time employment.

SACC obtained on 3 November, 2014. Consumer commenced dishonouring repayments immediately, and has only honoured one repayment to date (in December, 2014).

Contact made with consumer following first dishonour in November, 2014. He was adamant there was no issue and would go to the bank that day and make enquiries, then contact representative. No contact was made.

Contact made on 20 November, 2014. Consumer stated he had been trying to get in to see the representative, but had been “too busy”. He was requested to do so urgently, to which the representative noted his response was “short and rude”.

On 26 November, 2014 the consumer telephoned the representative to state he will attend their office to “sort it out”. Consumer was informed that was not necessary unless he wanted to make cash repayments; otherwise, amounts to cover repayments could be left in his bank account for drawing. Consumer stated he would go to his bank that day (as he had the day off).

A payment stop notification on the account was received on 17 December, 2014.

When the female representative made telephone contact with the consumer on 5 January, 2015 and identified themselves, he responded by saying, “F--- off you c---- and leave me alone.”

Subsequent attempts to contact the consumer by telephone and mail have been unsuccessful.

Case Study 7

$1,800 SACC to a 21 year old female, single, two dependents, unemployed.

SACC obtained on 25 March, 2014. Consumer dishonoured all repayment attempts on the loan, and has made no repayments at all to date.

Contact was made with consumer in early April, 2014. She stated that she had had some issues with other payments, and would attend representative’s office on 18 April to make a catch up payment. Consumer did not attend nor make the payment. Further letters and telephone contact attempts were unsuccessful in obtaining a response.

Contact made on 5 May, 2014. Consumer stated she had some family dramas and her ex partner had access to her bank account. Made arrangements to recommence direct debit draws for repayments, which was unsuccessful.

Attempted telephone contact on 12 May, 2014 was answered by a male who stated that the consumer would be “back later”. When the representative asked when that might be, the person said, “whenever”. Attempted telephone contact on 19 May, 2014 was answered by a male who repeatedly said “hello” and acted as if he could not hear the representative.

Legal action was commenced on the file. On attempting to serve the claim documents, the commercial agent was unable to locate the consumer at her given residential address. The occupant of the address stated that
the consumer was the previous tenant and had left prior to 29 August, 2014. Attempts to make contact by telephone by the agent and representative to date have been unsuccessful.

<table>
<thead>
<tr>
<th>Case Study 8</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1,200 SACC to a 36 year old female, de-facto, no dependents, unemployed.</td>
</tr>
<tr>
<td>$1,800 SACC to a 36 year old male, de-facto, no dependents, unemployed.</td>
</tr>
<tr>
<td>SACCs are unrelated. Consumers are de-facto partners.</td>
</tr>
</tbody>
</table>

Female consumer honoured the first three repayments on her SACC, and then dishonoured all following repayment attempts on the loan save one in November, 2014. She sought further SACCs for $1,000 in August, 2014, and $500 in September, 2014, but these were declined.

Consumer did not respond to telephone messages, text message or written notices. On 7 October, 2014, the consumer stated she would attend the lender’s representative’s office on 9 October, 2014 with new bank account details and a cash payment. She did not so attend.

On 14 November, 2014 it was discovered that the consumer had put a stop payment on her bank account and her telephone number was disconnected.

A licensed commercial agent was dispatched to the consumer’s residence to make contact on 18 November, 2014. Contact was unsuccessful, but the agent left a calling card and subsequently received a telephone call from the consumer. According to the agent’s report, she “was quite belligerent and demanded to know what right [the agent] felt he had to hassle her like that”. When the agent told her the reason for the contact she “seemed to become even more angry and threatened the agent with legal action from her ‘solicitor’ and a beating if he dared to show up at her door again”, “continued to rant and rave... without listening” and hung up “with the threat that she would have her boyfriend and his mates sort [the agent] out if he showed up again.”

Legal action was commenced against the consumer in the Queensland Civil and Administrative Tribunal. Following service, decision and demand for payment, judgment has been given in the Magistrates Court of Queensland. No payment on the judgment debt has been received.

Male consumer did not honour any repayments on his SACC.

Contact was made on 26 August, 2014. Consumer stated he thought the payment was made as money had been deducted from his account. Stated he would attend the lender’s representative’s office on 29 August with a cash repayment. He did not attend.

The consumer did not respond to subsequent telephone messages or written notices. On 14 November, 2014 it was discovered that a stop payment on his bank account.

Legal action was commenced against the consumer in the Queensland Civil and Administrative Tribunal. When the process server attended the consumer’s residence to serve court documents, the consumer reportedly identified himself but refused to take the documents (which the server then placed at his feet). Following service, decision and demand for payment, judgment has been given in the Magistrates Court of Queensland. The consumer has made no payments on the judgment debt at all.
Case Study 9

$960 SACC to a 23 year old male, single, no dependents, employed full time.

SACC obtained on 14 April, 2014. Consumer dishonoured all repayment attempts on the loan, and has made no repayments at all.

All attempts to make contact with the consumer in April, May and June 2014 were unsuccessful. He did not respond to written notices, telephone messages, SMS, contact attempts through references or with his employer.

On 4 July, 2014 when calling one of the consumer’s references who lived with him, the lender’s representative managed to speak to the consumer who stated he had “forgotten” about the loan. He was urged to attend the representative’s office the following week to discuss the loan. The consumer did not attend, and subsequent contact has proved unsuccessful.

On attempting to make contact via the same reference on 6 November, 2014, the reference stated that the consumer no longer resided at the address and he had no information as to his whereabouts.

Case Study 10

$1,440 SACC to a 40 year old female, de-facto, three dependents, Centrelink recipient.

SACC obtained on 23 October, 2014. Consumer dishonoured all repayment attempts on loan, and has made no repayments at all.

Consumer failed to respond to voice messages and written correspondence from 5 November, 2014. Contact made 21 November, 2014 – consumer claimed she had been in hospital, was unaware of payments dishonouring and agreed to have payment plus direct debiting fees available for drawing on 1 December, 2014. Payment draw was dishonoured.

Contact made on 3 December, 2014. Consumer claimed funds had been in account, but had forgotten about direct debit fees. Stated she would ensure funds available for draw on 4 December, 2014. Payment draw was dishonoured.

Consumer failed to respond to voice messages and written correspondence between 8 December, 2014 and 5 January, 2015.

Contact made on 2 February, 2015, at which time the consumer claimed not to have received any calls, SMSs or emails. Arrangements made for payment on 9 February, 2015. Payment draw was dishonoured.

Contact made on 11 February, 2015. Consumer stated “life is really hard”, said she should call back and hung up. Contact subsequently made on 25 February, 2015, with arrangements made to draw a repayment of $30.00 on 9 March, 2015. Payment draw was dishonoured.

Last contact made on 12 March, 2015. The consumer’s phone was answered, but the recipient would not speak or respond in any way. Representative called back and left a message requesting contact, which has not been forthcoming to date.
## ANNEXURE 3: ATTACHED DOCUMENTS

<table>
<thead>
<tr>
<th>Document</th>
<th>Title</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Email from ACCC dated 9 September 2015</td>
<td>84</td>
</tr>
<tr>
<td>2</td>
<td>Letter from ASIC dated 15 September 2015</td>
<td>85 – 86</td>
</tr>
<tr>
<td>3</td>
<td>Letter from ASIC dated 30 January, 2015</td>
<td>87 – 88</td>
</tr>
<tr>
<td>4</td>
<td>Letter from ASIC dated 5 May, 2015</td>
<td>89 – 91</td>
</tr>
<tr>
<td>5</td>
<td>Email from ASIC dated 13 October, 2015</td>
<td>92</td>
</tr>
<tr>
<td>6</td>
<td>Email from DOCEP (WA) to Treasury dated 2 May, 2010</td>
<td>93 – 94</td>
</tr>
<tr>
<td>7</td>
<td>Treasury file note dated 23 December, 2009</td>
<td>95</td>
</tr>
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<td>8</td>
<td>Summary of Main Changes to Reforms in Relation to Small Amount Credit Contracts, dated 5 June 2012</td>
<td>96</td>
</tr>
<tr>
<td>9</td>
<td>Executive Minute, Treasury to Shorten, 26 June 2012</td>
<td>97</td>
</tr>
</tbody>
</table>
Dear Mr Legat,

Thank you for your email of 10 August 2015 to the Australian Competition and Consumer Commission (ACCC) about the Consumer Action Law Centre. Your reference number for this matter is REF 1753346. I apologise for the delay in responding to your complaint.

The Australian Securities and Investments Commission (ASIC) is best placed to help. You can contact ASIC on 1300 300 630. I have referred you to the ASIC because they have the powers to protect consumers against providers of financial products and services.

Please see our website for more information about the ACCC.

I hope the above information is helpful.

Yours sincerely,

PUBLIC INFORMATION OFFICER | INFOCENTRE
AUSTRAlian competition and Consumer Commission
23 Marcus Clarke Street Canberra 2601 | www.accc.gov.au
T: 1300 302502

Have you purchased a new home, had your home renovated, or installed new appliances between 2010 and 2013? If so, our website has information about the recall of infinity cables.

IMPORTANT: This email from the Australian Competition and Consumer Commission (ACCC), and any attachments to it, contains information that is confidential and may also be the subject of legal, professional or other privilege. If you are not the intended recipient, you must not review, copy, disseminate, disclose to others or take action in reliance on, any material contained within this email. If you have received this email in error, please let the ACCC know by reply email to the sender informing them of the mistake and delete all copies from your computer system. For the purposes of the Spam Act 2003, this email is authorised by the ACCC www.accc.gov.au
Our Reference: 29881/15

15 September 2015

Mr Robert Legat
P.O. Box 1443
Nerang QLD 4211

By email: ceo@moneyboxloans.com.au

Dear Mr Legat

GOOD SHEPHERD MICROFINANCE ACN 151 124 408 and [redacted]

I refer to the report of misconduct that you lodged with ASIC on 14 August 2015. I have attempted to contact you on 9 September 2015 but was unsuccessful.

Your concerns

You have raised concerns that [redacted], CEO of Good Shepherd Microfinance, has made false and misleading statements about small amount credit contracts in an ABC Radio interview. In particular, you have reported that [redacted] has stated that small amount credit contracts may charge up to 350 per cent per annum which you believe is misleading.

ASIC’s consideration of your concerns

ASIC conducts an assessment of every report of misconduct that we receive. In determining which matters we will select for further action, consideration is given to a range of factors, including the likely regulatory effect of any available action and alternative remedies available to address the concern raised.

ASIC has considered the information you have provided and undertaken our own inquiries into the concerns that you have raised. Based on our assessment of the issues, we have decided that we will not take action in this case. ASIC will only take action to resolve concerns such as those outlined in your report where there is a broader public benefit. ASIC determines public benefit based on our published priorities which are available on our website, in the About ASIC section. In this case, we have made a determination not to take any action based on the application of those priorities.
17 September 2015

Although ASIC has decided not to take further action in regarding your concerns, this does not prevent you from pursuing any civil remedies otherwise available to you. You may also wish to lodge a complaint with ABC on their website, http://www.abc.net.au/contact/complain.htm.

If you have any questions about this letter please contact me on [redacted].

Yours sincerely

[Redacted]

Misconduct & Breach Reporting
Assessment & Intelligence
30 January 2015

Mr Robert Legat
P.O. Box 1443
Nerang Qld 4211

By email only: sfalral@tpg.com.au

Dear Mr Legat

FAIR LOANS FOUNDATION PTY LTD ACN 123 592 487

We refer to your report of misconduct lodged with ASIC on 13 November 2014, in which you raised concerns about the website operated by Fair Loans Foundation Pty Ltd, and in particular whether it complies with the requirements of the National Consumer Credit Protection Act 2009 (Cth) ("NCCC Act").

Thank you for bringing this matter to ASIC's attention. ASIC considered all of the information and documents you provided, conducted our own preliminary and confidential enquiries, and consulted with specialist teams within ASIC.

Following consideration of the issues you have raised at a senior level, ASIC has determined not to take any further action in relation to your concerns at this time.

ASIC's Processes

ASIC assesses every report of misconduct we receive, in order to ascertain whether there has been conduct in contravention of the legislation that we administer. ASIC does not act on behalf of individuals, but we must consider whether the available evidence is sufficient as the basis for civil or criminal proceedings.

We also consider whether any further action would have any regulatory impact by deterring similar conduct or provide a suitable remedy for the conduct in question.

Further information regarding ASIC's policy in this regard is available in "Information Sheet 151: ASIC's approach to enforcement". This document is available from ASIC's website at www.asic.gov.au.

Your Report of Misconduct

In response to the concerns you have raised, ASIC's enquiries have determined that the regulations to the NCCC Act do not require websites to have a licensee's ACL cited.
Further, the requirement to state an annual percentage rate is limited to situations where an advertisement states the amount of repayments. In this case there does not appear to be repayment amounts quoted, but rather, the fees which would be applicable to any particular contract.

The concerns you have raised, about fees being passed on at cost and the statement that revenue was not earned from those fees, have also been considered. Closer review of the website seems to indicate that the comment about the "at cost" fees relates to the direct debt fees, and not the loan establishment or monthly fees. If you have ongoing concerns about this, you may wish to contact the Internal Dispute Resolution team for Fair Loans Foundation Pty Ltd on 1300 727 006 or team@fairloans.org.au.

We have recorded the information you have provided in our confidential internal database.

If you have any questions about this letter please contact me on 07 3867 4728.

Yours sincerely

[Name redacted]

Misconduct & Breach Reporting
Assessment & Intelligence
5 May 2015

Mr Robert Legat
By email: fafral@tpg.com.au

Dear Mr Legat

Fair Loans Foundation Pty Ltd (ACN 123 592 487).

Thank you for your correspondence dated 2 February 2015 concerning Fair Loans Foundation Pty Ltd (Fair Loans). After we received your correspondence, we escalated this matter for review.

We apologise for the delay in providing you an outcome, which was due to our inquiries taking longer than anticipated.

We understand you have raised the following concerns in your request for review:

- You state that ASIC’s position, that Australian credit licence (ACL) numbers are not required to be cited on websites appears to be at odds with ASIC’s published regulatory documents, notably RG 234 – Advertising financial products and services (including credit): Good practice guidance.

- You note that fees and charges on Fair Loans’ website may be misleading.

ASIC’s role

As you may know, ASIC regulates credit providers in accordance with the consumer credit regulatory framework in the National Consumer Credit Protection Act 2009, the Australian Securities and Investments Commission Act 2001, and related laws.

Under these laws, we enforce a range of obligations on credit providers to disclose fees and charges and to make inquiries about whether proposed credit would be suitable for consumers.

To help us perform our regulatory role and ensure compliance with these obligations, we appreciate receiving reports of alleged misconduct from members of the public about their experiences with credit providers. These reports provide ASIC with valuable intelligence and information and help us to understand consumer concerns.

As you may appreciate however, not all legitimate, private disputes between credit providers and their customers will suggest that the provider has breached a regulatory
05 May 2015

obligation. In addition, the focus of ASIC’s regulatory action must be the public interest.

We note your comments with respect to RG 234: Advertising financial products and services. Following consideration of the issues you have raised at a senior level including by ASIC’s credit specialists, we confirm ASIC’s previous conclusion that we are unable to take further action.

We have provided the reasons to you in ASIC’s letter dated 30 January 2015 and our reasoning for deciding to take no further action still stands at this point in time. They are:

- that ASIC’s inquiries have determined that there is no requirement to cite the ACL on a provider’s website.
- that the information before ASIC about Fair Loans’ statements about its fees does not provide sufficient grounds for us to take further action in response to claims that these statements are misleading or deceptive.

Next steps

ASIC’s decision not to take further action does not prevent you from considering any private civil remedies available to you. Your legal adviser will be able to assist you in this regard.

As you may be aware, ASIC has accepted an enforceable undertaking from Fair Loans in relation to concerns about overcharging interest. For this reason, the information that you have provided will assist ASIC to understand its operations and inform our monitoring of consumer credit issues.

Commonwealth Ombudsman

If you have concerns about ASIC’s management of your matter you can lodge a complaint with the Commonwealth Ombudsman. The Commonwealth Ombudsman cannot review or re-determine ASIC’s decision, but does have the power to investigate misconduct, or review the manner in which a decision has been made to ensure that it was done fairly and in accordance with the law.

The contact details for the Commonwealth Ombudsman are as follows:

Commonwealth Ombudsman
GPO Box 442
Canberra ACT 2601
Telephone: 1300 362 072
Website: www.ombudsman.gov.au
05 May 2015

We trust this information is of assistance. If you have any questions about this letter please contact me on 03 9280 3384 or by email at phia.kang@asic.gov.au.

Yours sincerely

[Signature]

Misconduct & Breach Reporting
Assessment & Intelligence
Robert Legat

From: [Redacted]@asic.gov.au

To: [Redacted]

Sent: Tuesday, 13 October 2015 10:16 AM

Subject: Consumer Action Law Centre ACN 120 056 484 and [Redacted] - Report of Misconduct (Treat as in Confidence) [DLM-Sensitive]

Attachments: INFO 153 - How ASIC deals with Reports of Misconduct.pdf

For the attention of Mr Robert Legat:

Dear Mr Legat,

Further to our conversation of 24 September 2015, I confirm ASIC will be taking no further action in relation to the concerns you raised in your report of misconduct due to a lack of jurisdiction to pursue the matter further.

CALC does not have an oversight body per se, as CALC is a campaign-focused consumer advocacy organisation. Based in Melbourne, Australia, CALC was formed in 2000 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service. However, as CALC is primarily funded by the Victorian Government through Victoria Legal Aid and Consumer Affairs Victoria, and the Commonwealth of Australia, through the Department of Social Services and the Attorney-General’s Department, you could potentially refer your concerns to those funding bodies.

We hope this is of assistance to you.

Kind regards,

[Redacted]

--- Forwarded by [Redacted] ASIC on 13/10/2015 11:11 AM ---

Dear Mr Legat,

Thank you again for lodging a report of misconduct with ASIC, in relation to the above organisation. As discussed with you over the telephone, I will be making enquiries into the concerns you have raised in your report of misconduct, but ultimately the matter appears to be largely beyond the jurisdiction of ASIC.

I would like to confirm for you my details and provide you with some general information regarding how ASIC deals with reports of misconduct. Please see attached in this regard.

Should you have any further information in respect of this matter that you would like me to consider, please forward that information to me at the email address below.

Kind regards,

[Redacted]

--- Forwarded by [Redacted] ASIC on 13/10/2015 11:11 AM ---

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From: @commerce.wa.gov.au
Sent: Sunday, 2 May 2010 4:36 PM
To:
Cc:
Subject: RE: Information regarding WA Government-commissioned research on interest rate caps [SEC=UNCLASSIFIED]

Hello

My apologies for not getting back to you earlier, however last week was a bit frantic with us hosting and participating in a series of national Senior Officers and Ministerial Council meetings.

The PWC report to which you have referred has not been made public and there is no current intention to publish the report.

There were a number of concerns with regard to the way in which the report was prepared which have given rise to this position.

As a result, I’m unable to provide you with a copy.

Regards

Director
Strategic Policy and Development
Consumer Protection, Department of Commerce, Western Australia
A Level 7, 216 St George’s Tce, PERTH 6000
Locked Bag 14 Cloisters Square PO, PERTH 6850
T (08) 9222 4444 M (08) 9222 6666
E commerce.wa.gov.au
W www.commerce.wa.gov.au

Subscribe for free to Better Trading Consumer Protection’s online newsletter

From: @TREASURY.GOV.AU
Sent: Tuesday, 27 April 2010 10:18 AM
To:
Cc:
Subject: Information regarding WA Government-commissioned research on interest rate caps [SEC=UNCLASSIFIED]

Good afternoon

As you are aware, Treasury is looking at the issue of interest rate caps as a part of Phase 2 of the National Consumer Credit Protection Reforms and I am hoping that you may be able to help us to track down some information.

The report of the Small Amount Lending Inquiry published by Consumer Affairs Victoria (CAV) in 2008 noted that the Western Australian Department of Consumer and Employment Protection had commissioned PWC to look at various issues relating to small amount lending and the impact of an interest rate cap (including the costs of small amount lending and the level at which a cap may make small amount lending unviable) and to identify other options to address problems associated with small amount credit.

At the time of publication by CAV the WA-commissioned research findings were not available, but in the context of our current work for Phase 2 we would be very interested in the outcomes of that research. Are you able to advise...
whether the outcomes of the research were made public (and how we might obtain a copy) or, in the alternative, are you able to advise me of a contact could talk to us about the outcomes of the research?

I can be contacted on 02 6263 or at this email address: df@treasury.gov.au

Thanks in advance

Kind regards

Corporations and Financial Services Division
02 6263

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NOTE FOR FILE

DISCUSSION WITH FSCRIT - INTEREST RATE CAPS

FSCRIT Participants:

(Old)
(Victoria),

(ACT)
(NSW)

Objective:

• Discussion of the request for information on interest rate caps, sent by Treasury to representatives of states with interest rate caps.

• Treasury outlined the proposed approach to the issue of interest rate caps in Phase 2, explaining that we are in the information gathering phase and that the purpose of the initial phone conversation is to get an idea of what sort of information may be available from other jurisdictions, before setting up a working group and preparing a draft paper for circulation.

Outcomes:

• A number of participants said that they would not be able to provide information requested in the letter.

• Treasury stressed our interest in any information that would help us to understand the policy reasons for imposing a cap on interest rates for short term, small amount loans.

• NSW advised that the government made its decisions about regulatory options for small amount lending before the Code was in place, and therefore does not have a RIS or equivalent document containing details of the other regulatory options pursued.
  
  – NSW mentioned NILS, bank assistance through (for example) Step Up Loans and financial counselling as parts of a global approach to the demand for short term and small amount loans.
  
  – NSW is currently considering solutions to loopholes in the law that are being used by unscrupulous lenders.

• [Vic – Small amount lending survey information to be provided?]

• ACT advised that the ACT provisions were put in place following the experience of NSW with its regime - to prevent the problems that had been experienced in NSW (including avoidance of ST lending regulatory provisions).

• States noted the trend for lenders to migrate between states to avoid regulation.

• Victoria advised that they would send Treasury information on regulation of unfair contract terms.

DRAFT
### SUMMARY OF MAIN CHANGES TO REFORMS IN RELATION TO SMALL AMOUNT CREDIT CONTRACTS

Small amount credit contracts are referred to as "SACCs" below.

<table>
<thead>
<tr>
<th>ISSUE</th>
<th>COMMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Setting cap for SACCs at 20/4 level</td>
<td>20/4 cap to apply – increase from 10/2 cap originally announced by the Government as it allows for a viable industry.</td>
</tr>
<tr>
<td>2. Shortening term for SACCs from 24 months to 12 months</td>
<td>Shorten term for SACCs from 24 months to 12 months, as the 4% monthly fee allows for too high a return after 12 months. No change to definition in relation to amount (cap applies to loans of $2000 or less). Secured contracts to be included in definition of SACC</td>
</tr>
</tbody>
</table>
Section 22

The Enhancements Bill was introduced into the House of Representatives on 21 September 2011, and gives effect to Part One of Phase Two of the National Credit Reforms, in accordance with the decision of the Council of Australian Governments (COAG).

The Senate Economics Committee and the Joint Committee on Corporations and Financial Services made recommendations in their reports on the Enhancements Bill in December 2011.

Section 22

The majority of these changes are to the regulation of small amount credit contracts (SACCs), also known as 'payday loans'. I have conducted consultations directly with both consumer groups and these lenders, and their industry bodies. My office and Treasury have also consulted extensively with them.

Therefore, I propose to make the following key changes to the regulation of SACCs:

- The cap for SACCs is to be retained at the 2014 level — that is, it is unchanged from the cap in the draft Parliamentary Amendment. This has been accepted as a level that will allow for the continued viability of some small amount lenders (although others will be required to exit the industry).
- The definition of a SACC is to be changed so that it is a contract with a minimum term of 12 months, rather than 24 months. This has been done so the 4% monthly fee allows for too high a return after 12 months. Both consumer groups and lenders agree with this change.

Section 22