

Review of Small Amount Credit Contract Laws Final Report (March 2016)

Legal Aid NSW Response to
Financial Systems and Services
Division, The Treasury

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including thirty five community legal centres and twenty eight Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW welcomes the opportunity to provide further submissions in response to the Review of Small Amount Credit Contracts Final Report (the Final Report).

We have provided submissions relating to specific proposals made by the Review Panel (the Panel) and responded to the Panel's request for further information with reference to the recommendation description used in the Final Report. In doing so we also refer to our previous submission to the review in January 2016.

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Introduction

Legal Aid NSW generally supports the recommendations made in the Final Report. In particular, Legal Aid NSW supports:

- recommendations 1, 4, 7, 8, 9 and 10 in relation to small amount credit contracts (SACCs)
- recommendations 15, 17 and 18 in relation to consumer leases, and
- all the recommendations made in relation to both SACCs and consumer leases.

Submissions relating to specific proposals

Cap on the cost of consumer leases of household goods (recommendations 11 to 14)

Recommendations 11 to 14 propose to introduce a cap on the cost of consumer leases of household goods. Legal Aid NSW believes that each of these recommendations would generate significant benefits for consumers in comparison with current regulation and we welcome the introduction of a cap. However, we are concerned that the proposed design introduces further complexity for all parties detracting from the intended benefits of a cap.

Legal Aid NSW is of the view that adopting a cap based predominantly on the forty-eight percent (48%) annual percentage rate (APR) (with additional allowable charges if required) would provide clarity and simplicity. Using forty-eight percent (48%) as a base for a consumer lease cap would allow consumers and lessors to understand and exercise their rights and obligations. We outline our specific concerns with the current proposal below.

Artificial distinction between sale by instalment and consumer lease contracts

The continued artificial distinction between sale by instalment contracts and consumer lease contracts is problematic, as acknowledged in the Final Report¹. However the report's recommendations do not sufficiently take into account the impact of this issue on consumers. Alongside affordability, this is the biggest issue that arises in our consumer lease casework. In the past two years, Legal Aid NSW has negotiated settlements of refunds in approximately one hundred cases in which the main issue concerned a lessor failing to provide adequate disclosure or actively misleading a consumer in relation to ownership of the goods.

The distinction will result in a continuation of misleading conduct in relation to terms and conditions concerning ownership in order to avoid the application of the stricter forty-eight percent (48%) cap.

¹ Final Report of the independent Review of Small Amount Credit Contracts, page 54

The impacts on consumers will continue to be confusion, overcharging and a diminution of their rights. The only way to remove the incentive for this conduct to continue is to align the products. There is no good reason to maintain a distinction between these two types of contracts. Instead, the Panel should further investigate ways to design an appropriate cap that regulates household rental contracts in the same way, irrespective of the issue of ownership.

Continued high cost of leasing

In Legal Aid NSW's view, the proposed cap would continue to allow consumer lease providers to charge excessive fees. If the current model is to be adopted, it should be limited to a maximum three year term or two and a half times the base price of the goods.

Application to motor vehicles

The application of the proposed cap is only appropriate to motor vehicle leases where the vehicle is of low value. In the case of higher value vehicles, the market operates effectively and providers are not charging forty-eight percent (48%) or otherwise excessive fees. To allow the proposed cap to apply to higher value vehicles will open the door to providers charging fees higher than current values. Further detail about this issue is outlined below at pages 7 to 8.

In view of the strange result produced by applying the proposed cap to consumer leases of vehicles, Legal Aid NSW submits this is yet another reason to adopt a cap based on the forty-eight percent (48%) annual percentage rate. Using this as a base, perhaps with additional allowance for an establishment fee or monthly fee, would create simplicity for both consumers and the consumer lease industry. Legal Aid NSW is of the view that to create separate caps for SACCs, medium amount credit contracts (MACCs), consumer leases of household goods, consumer leases of motor vehicles and other credit is to unnecessarily complicate the regulation of the credit industry. This would inevitably lead to avoidance and to consumers not clearly understanding and exercising their rights.

Add-on services and features (recommendation 13)

The cost of all add-on services, including delivery, should be subsumed within an all-inclusive cap

Legal Aid NSW reiterates that the cost of all add-on services and features, including delivery, should be subsumed within an all-inclusive cap.² Legal Aid NSW considers this to be the most appropriate arrangement because it would enable lessors to charge for delivery within the cap and protect consumers by not permitting fees outside the cap. An all-inclusive cap would protect the most vulnerable consumers, especially those in regional and remote communities.

² Legal Aid NSW response to Financial Systems and Services Division, The Treasury January 2016

Legal Aid NSW notes that the Panel recommended a cap for consumer leases of household goods that exceeds the forty-eight percent (48%) annual percentage rate (APR) on the basis that consumer leases include add-on services that other credit providers do not offer. The Panel also noted that there is uncertainty about the true nature, availability and contractual obligation to provide add-on services and that the proposed cap is a maximum. Lessors who do not provide add-on services should be able to set lease payments well below the cap.³

Legal Aid NSW is of the view that the cap on the cost of consumer leases proposed by the Panel (which allows lessors to charge consumers between twenty and thirty-four percent more than other credit providers) is set at a level that can appropriately include the cost of all add-on services and features, including delivery.

Legal Aid NSW reiterates that if delivery costs are included in a cap, strong anti-avoidance mechanisms would be required to prevent referral to other related companies which could charge consumers inflated delivery fees.⁴

Lessors should not be permitted to charge a separate fee for 'the reasonable costs of delivery of the leased goods'

The Panel's proposal is that lessors be permitted to charge a separate fee for 'the reasonable costs of delivery of the leased goods', taking into account 'any cost savings if there is a bulk delivery of goods to an area' and capped at a maximum amount. Legal Aid NSW notes that it would be very difficult for a consumer to assess whether a fee charged is reasonable or to know whether their goods were part of a bulk delivery, and to expect the fee to be lower, or to assess by how much. In addition, lessors could avoid using bulk deliveries to recover a larger delivery fee, or charge delivery fees for separate items under separate contracts despite them being part of one transaction. The proposal relies on lessors charging their customers fairly in circumstances where the consumer cannot ascertain what is reasonable.

In our January 2016 submission, Legal Aid NSW recommended that if it is determined that delivery should be charged in addition to the cap, delivery fees must be regulated to avoid any potential exploitation of an additional charge. If this option is preferred, Legal Aid NSW agrees with the Panel's proposal that delivery fees would need to be capped at a maximum amount. As stated in our January 2016 submission, available industry submissions suggest three hundred dollars (\$300) would be sufficient to cover the cost of delivery, even in regional areas. Legal Aid NSW submits that:

- a lower delivery fee cap should apply to goods delivered as part of a bulk delivery
- at the time of contract, lessors should be obliged to disclose the distance over which the goods will be delivered and the maximum delivery fee they will charge

³ Final Report of the independent Review of Small Amount Credit Contracts, page 101

⁴ Legal Aid NSW Submission, January 2016

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- at the time of delivery, lessors should be obliged to disclose whether the goods were delivered as part of a bulk delivery and the adjusted delivery fee amount
 - lessors should be permitted to charge a single delivery fee only for a bulk delivery of goods delivered to the same address, on the same occasion. To prevent avoidance, this rule should apply regardless of whether goods delivered together are the subject of separate contracts between the lessor and consumer, or between the lessor and different consumers who live at the same address
 - the delivery fee should be payable up-front or by instalments in addition to the consumer lease repayments for the first several repayments and should not be included in the finance contract
 - where there is a dispute about the reasonableness of the fee charged, the onus should be on the lessor to establish that the fee was reasonable, and
 - where a lessor is found to have charged a delivery fee that is not reasonable, the consumer should be entitled to recover the full fee from the lessor.

Submissions about matters for further consultation

Base price of goods (recommendation 12)

Legal Aid NSW welcomes the Panel's recommendation that further work be done to define the base price for second hand goods. We are of the view that a formula should be developed to enable lessors to calculate the base price of second hand goods and prevent overcharging under consumer lease contracts for older models, discontinued goods or for second hand goods.

This reflects the January 2016 proposal of Legal Aid NSW and incorporates the Panel's recommendation regarding how the cash price of goods be determined as follows:

- (a) recommended retail price or price agreed in store (if lower)
- (b) for older model or discontinued goods, reduced by the depreciation in value of the goods as assessed in accordance with ATO depreciation rates, and
- (c) for second hand goods, reduced by a further ten per cent (10%) of the amount determined after (a) and (b) are applied.

Consumer leases to which the cap applies (recommendation 14)

Legal Aid NSW welcomes the Panel's recommendation that there should be further consultation to consider whether the proposed cap on the cost of consumer leases of household goods should apply to consumer leases of motor vehicles. In our January 2016 submission, Legal Aid NSW recommended that to prevent regulatory arbitrage, a cap on the cost of consumer leases should apply to all consumer leases.

As demonstrated by indefinite leases and leases less than four months in term (which are exempted from the application of the National Credit Code), exemption encourages avoidance and introduces unnecessary complexity into the law.

The following comments apply to leases of motor vehicles, other than novated leases.

Legal Aid NSW's casework experience demonstrates the need for a cap on the cost of leases of lower value second hand motor vehicles. Legal Aid NSW is of the view that the cost of all consumer leases of motor vehicles should be capped at forty-eight percent (48%) per annum. If additional fees or charges are adopted, to ensure clarity and simplicity, these should correspond with the SACC and MACC loan value thresholds.

If the proposed cost cap for consumer leases of household goods is to be adopted for consumer leases of motor vehicles, the cost cap should be limited to a maximum three year term or a maximum cost of two and a half times the base price of the goods.

Legal Aid NSW has assisted clients who obtained a car under a lease and were charged rates comparable to the rates charged by lessors of household goods. Examples of this include:

- Maggie, an Aboriginal woman living in regional New South Wales was provided with a consumer lease for a ten year old Ford Falcon valued at \$3,300. Under the lease, Maggie was required to pay \$25,700 over forty two months. This equates to 222.33% per annum.
- Krysta, a thirty two year old woman was provided with a consumer lease for an eleven year old Holden Commodore worth approximately at \$8,000. Under the lease, Krysta was required to pay \$25,950 over forty two months. This equates to 87.92% per annum.

Legal Aid NSW's casework experience suggests that the market price of higher value motor vehicle leases expressed as an APR can be significantly lower than the market price of leases of household goods. This may be because greater competition exists in the higher value motor vehicle leasing industry and/or because leases of higher value motor vehicles would be prohibitively expensive if they were charged at rates comparable with consumer leases of household goods. An example of this is outlined below:

- John, an Aboriginal man living in regional New South Wales, was provided with a consumer lease for a three year old Holden Commodore valued at \$20,000. Under the lease, John was required to pay \$54,495 over forty eight months. This equates to 62.06% per annum.

The table below compares the maximum cost under the three cost capping options discussed in this submission.

Maximum cost:	Maggie (\$3,300 car, 42 month term)	Krysta (\$8,000 car, 42 month term)	John (\$20,000 car, 48 month term)
Actual lease (no cost cap)	\$25,700	\$25,950	\$54,495
Lease subject to the Panel's proposed cost cap	\$8,844	\$21,440	\$58,400
Lease subject to the proposed cost cap limited to maximum three year term or two and a half times base price of goods	\$8,250	\$20,000	\$50,000
Lease subject to forty eight percent (48%) cost cap (Legal Aid NSW's preferred option for regulation)	\$6,866.27	\$16,645.61	\$45,293.42

Legal Aid NSW considers that it would be inappropriate to apply the proposed cap on the cost of consumer leases of household goods to higher value motor vehicle leases without further limitations relating to the term or cost as a multiple of the base price. To allow the proposed cap to apply to higher value vehicles may provide a signal to lessors to charge more than they are currently charging and/or it may make leases of these vehicles prohibitively expensive.

Legal Aid NSW is of the view that the anomalous result produced by applying the Panel's proposed cap to consumer leases of higher value cars is a further reason to adopt a cap on the cost of all consumer leases, including leases of motor vehicles, based on the forty-eight percent (48%) annual percentage rate that applies for credit. Applying the same cap on costs, perhaps subject to additional fees/charges for consumer leases of motor vehicles with a base price equivalent to SACC and MACC loan values would create simplicity for consumers and the consumer lease industry and prevent regulatory arbitrage.