

Corporations Amendment (Design and  
Distribution Obligations) Regulations  
2019

Legal Aid NSW submission to the  
Treasury

*14 October 2019*

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**Legal Aid**   
NEW SOUTH WALES

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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). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact

most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services. This submission draws on the casework experience of our civil lawyers in providing these services.

Legal Aid NSW welcomes the opportunity to make a submission to the Treasury's consultation about the Corporations Amendment (Design and Distribution Obligations) Regulations 2019. Should you require any further information, please contact:

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## Introduction

Legal Aid NSW welcomes the opportunity to comment on the Exposure Draft Corporations Amendment (Design and Distribution Obligations) Regulations 2019 (Cth) (the **Draft Regulations**).

The Design and Distribution Obligations (**DDO**) regime aims to assist consumers to obtain appropriate financial products by requiring issuers and distributors to have a customer-centric approach to designing, marketing and distributing financial products. Legal Aid NSW broadly supports the Draft Regulations, which complement the operation of the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth), and extend the DDO regime to additional products and persons. In particular, we support the inclusion of basic banking products in the DDO regime.

However, we are concerned that the exclusion from the DDO regime of credit provided for business purposes may be exploited by lenders who ostensibly lend to a small business, but who in fact lend to consumers. We are also concerned about the exclusion of pawnbroking from the DDO regime and strongly recommend that it is included. We make the following recommendations:

1. Treasury should provide clear guidance that credit providers must comply with Design and Distribution Obligations when credit is provided for consumer purposes, regardless of how the credit contract is structured. This should include contracts that purport to be small business loans, but which are in fact consumer credit contracts.
2. The regulations should not exclude pawnbroking from the scope of the Design and Distribution Obligations. The Design and Distribution Obligations should apply to pawnbroking credit facilities in conjunction with existing state-based regulation.

## Proposed exclusions from the Design and Distribution Obligations

Credit provided for business purposes (Schedule 1, item 1, item 8 in the table in regulation 7.8A.04)

Some finance providers purport to be lenders to small businesses, but are in fact offering credit to consumers. We are concerned that the proposed exclusion of credit provided for business purposes might allow these finance providers to avoid the DDO regime.

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Legal Aid NSW has advised and represented a number of clients who thought, as a result of representations made by lenders, that they were entering into a consumer contract for finance, but who were in fact entering into a small business arrangement. In one case, a broker had also taken steps to obtain an ABN for the clients, without their knowledge. All of our clients were consumers and were not operating small businesses. In our view, the DDO should apply in circumstances where the finance provider induces a customer to enter into a business loan on the premise that it is a consumer contract, or where it is clear that the consumer is not operating a small business.

We recommend that Treasury provide clear guidance to credit providers that they must comply with the DDO regime when credit is provided for consumer purposes, regardless of how the credit contract is structured. This should include contracts that purport to be small business loans, but which are in fact consumer credit contracts.

***Case Study: consumer credit construed as commercial lease***

A number of clients experiencing vulnerability in a remote community in NSW wanted to purchase cars. Many of these clients were experiencing financial hardship and were not eligible to obtain a loan through mainstream providers. Some members of the community received information that if you contacted a certain car dealer you could purchase a car with finance. However, the clients were in fact signing up to a commercial lease to rent a car, rather than to purchase a car as a consumer.

When the clients came to Legal Aid NSW for help, many of them had already had their car repossessed or were experiencing significant financial hardship as a result of making payments under the contract. Several clients had problems with the quality of the cars, and found the cars to be unreliable to drive in regional areas.

One client told Legal Aid NSW that she was prioritising making payments as she thought that it was worth it as the owner of the car. She was shocked and upset when Legal Aid NSW told her that she was leasing the car from a commercial lease provider, and would never be the owner according to the contract.

Another client told Legal Aid NSW that the first time he understood that he was not the owner of the car was when the car was repossessed by the commercial lease company.

We note that a commercial lease is considered a form of commercial credit under the *Corporations Act 2001 (Cth)*.

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Credit provided by pawnbrokers (Schedule 1, item 1, item 9 in the table in regulation 7.8A.04)

Legal Aid NSW does not support the exclusion of pawnbroking from the scope of the DDO regime.

Our casework experience shows that vulnerable and financially excluded consumers often turn to pawnbroking services as a means of obtaining credit, and as an option of last resort where consumers cannot access mainstream credit or access finance from friends or family.

Vulnerable consumers are often adversely impacted by the high interest rates, fees and other charges applied by pawnbroking operators. The industry remains under-regulated, and difficult to navigate for consumers and legal advocates. This is particularly the case given there is no requirement for pawnbrokers to be members of the Australian Financial Complaints Authority.

Though pawnbroking is regulated under state legislation,<sup>1</sup> state legislation does not go far enough in ensuring that consumers are protected from harmful products.

The regulations should not exclude pawnbroking from the scope of the DDO regime. Rather, the DDO regime should apply in conjunction with existing state legislation.

## Proposed inclusions to the Design and Distribution Obligations

Basic banking products (Schedule 1, item 1, item 3 in the table in sub-regulation 7.8A.03(2))

Legal Aid NSW supports the proposed inclusion of basic banking products in the DDO regime. Placing an obligation on issuers of basic banking products to make a target market determination about these products will ensure that the product is appropriate for the consumer. For example, issuers would be obligated to ensure that bank accounts with high fees are not provided to consumers who may be entitled to a low fee or fee free bank account. Further, issuers would also need to ensure that consumers entering into a home loan are not sold extra products, such as an offset account, where these products are inappropriate for the consumer's needs.

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<sup>1</sup> For example, in NSW it is regulated under the *Pawnbrokers and Second-hand Sealers Act 1996* (NSW).