

CONSUMER LEASES AND INDIGENOUS CONSUMERS

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I INTRODUCTION

Consumer leases offer low-income consumers the option to hire household items that they do not have the money to purchase upfront. They are marketed by consumer lease providers ('Providers') as a cheap way to purchase important household items. However, recent studies illustrate that the price ultimately paid to hire goods under a consumer lease contract will generally exceed the retail value of the goods hired and that it is the most expensive form of finance available.¹ Despite this, consumers are often persuaded to enter into consumer lease contracts as a result of predatory practices engaged in by Providers. These predatory practices are most effective with low-income consumers who may be experiencing financial difficulties and who live in remote areas that make it difficult to shop for alternative goods or seek financial and legal advice.

The problems associated with consumer leases are particularly prevalent in remote and rural Indigenous communities where issues such as geographical isolation, financial hardship, and cultural practices make them vulnerable targets for Providers. This article explores in detail the ongoing problems faced by Indigenous consumers when entering consumer leases. After setting out some of the key aspects of consumer leases and the general problems associated with their use, the article explores the operation of consumer leases in Indigenous communities and enforcement actions relating to Indigenous consumers that have been undertaken by the Australian Securities and Investments Commission ('ASIC'). The article also reports the results of interviews conducted by the authors that indicate that, despite regulatory reforms and enforcement actions, Indigenous communities continue to be vulnerable consumers. This vulnerability has led many Indigenous consumers to pay exorbitant amounts for household items that could be purchased more cheaply or through less costly credit products. As a result,

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1 See below Part IIC.

Indigenous consumers entering into consumer leases often find they are unable to afford to pay for other essential items, which in turn forces them into even greater financial distress.

The article concludes with observations regarding the potential negative effects of consumer leases in Indigenous communities and reforms that may address these problems. In particular, we find that reform is of the processes for automatic payment of consumer leases is required, as current mechanisms are particularly harmful for vulnerable consumers. Further, consumer lease regulation should be brought within the broader regulatory framework for credit contracts in order to reduce the potential for harmful regulatory arbitrage, and caps on the amount that can be allocated to consumer leases need to be imposed. Current proposals for reform attempt to address some of these issues. The effectiveness of these reforms, when implemented, needs to be closely monitored, and further reforms considered if the proposals prove ineffective in protecting vulnerable consumers.

II GENERAL OVERVIEW

A Defining Consumer Leases

A consumer lease is a contract for the hire of goods under which the consumer does not have a right or obligation to purchase the goods.² Entry into a consumer lease allows the consumer to take immediate possession of goods without needing to make full payment upfront for them. This feature has encouraged Providers to market them as alternatives to mainstream credit facilities to low-income consumers who have limited savings or access to alternative credit mechanisms to purchase household items.³

The marketing strategy has proven successful with 489 businesses operating in the field in 2015–16 and revenue amounting to \$611 million for the industry.⁴ Providers can be divided into three groups based on different operating models.⁵ The first involves Providers offering consumer leases through large, multi-store retailers.⁶ These retailers usually make the arrangements for the consumer lease although the lease is between the consumer and the Provider rather than the retailer.⁷ The second group is smaller retailers who, unlike the first group, act also

2 *National Consumer Credit Protection Act 2009* (Cth) sch 1 s 169 ('Code'). For a detailed analysis of consumer leases, as well as a comparison with similar other products, see Paul Ali et al, 'Consumer Leases and Consumer Protection: Regulatory Arbitrage and Consumer Harm' (2013) 41 *Australian Business Law Review* 240.

3 ASIC, Submission to Commonwealth Department of Treasury, *Review of the Small Amount Credit Contract Laws*, October 2015, 48.

4 For a summary of these statistics, see Alen Allday, 'Home Appliance Rental in Australia' (Report No OD5467, IBISWorld, August 2016) <<http://www.ibisworld.com.au/industry/home-appliance-rental.html>>.

5 Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 260 [11.72] ('Revised EM').

6 *Ibid* 117 [9.27], 260 [11.72], 261 [11.75].

7 As these retailers are not generally also Providers, they often offer credit contracts as well as consumer leases: *ibid* 261 [11.75].

as Providers.⁸ This group of smaller retailers often have only one store, rely on local customers, and provide consumers only with the option of financing the purchase of goods through a consumer lease.⁹ Finally, and most importantly when considering remote communities that are the subject of this article, are Providers who do not have a retail shopfront.¹⁰ These Providers offer leases through door-to-door sales, often in remote and primarily Indigenous communities.¹¹

Payment terms form a key part of any consumer lease arrangement. Most consumer leases have a contract term that lasts between 12 and 48 months and require regular payments for the duration of the term.¹² These payments are generally made on a fortnightly basis and are mostly secured, for those receiving social security benefits,¹³ by authorising the Provider to receive a direct payment of Centrelink social security benefits from the Department of Human Services ('DHS') through the DHS Centrepay facility.¹⁴ After all deductions have been withdrawn from a recipient's social security benefit, the remainder of the benefit is paid to the recipient.¹⁵ According to the DHS:

The objective of Centrepay is to assist Customers in managing expenses which are consistent with the purposes of their welfare payments, and reducing financial risk, by providing a facility to have regular Deductions made from their welfare payments.¹⁶

As it relates to consumer leases, it provides low-income consumers with the opportunity to immediately access important household items while making small

8 Ibid 117 [9.27], 260 [11.72], 261 [11.76]. These providers can be distinguished from the other two groups because they generally offer 'exempt leases' which, similar to a consumer lease, do not confer a right or obligation to purchase the good but which, unlike consumer leases, do not exceed the price of the leased good: see Ali et al, above n 2, 250–1.

9 Revised EM 260 [11.72].

10 Ibid 260 [11.72].

11 Ibid 117 [9.30], 260 [11.72].

12 ASIC, 'The Cost of Consumer Leases for Household Goods' (Report No 447, September 2015) 4. The Code does not apply to leases for a fixed period of four months or less, or those for an indefinite period: see *Code* s 171(1). Where a consumer lease is for an indefinite period, not only is it excluded from regulation under the *Code*, but it raises problems regarding who bears the economic risk. The indefinite period of such leases means that unlike most true leases, the lessee bears all of the economic risk: see, eg, Ali et al, above n 2, 244–6.

13 ASIC, 'The Cost of Consumer Leases for Household Goods', above n 12.

14 See Anna Buduls, 'Report of the Independent Review of Centrepay' (Report to the Secretary of the Department of Human Services (Cth), June 2013) 8–24. Centrepay is a free service for Centrelink customers. The critical element of Centrepay is that the recipient authorises a direct deduction of their social security to an external third party: at 8. In the period up to March 2013, 118 700 individual deductions were made to Providers through the Centrepay system and it was estimated that a total of \$200 million would be paid to Providers through the Centrepay system in the year up to 30 June 2013: at 74. More recent figures provided in 2015 indicate an increase in use of the system, with 123 000 Centrelink customers using Centrepay to pay Providers at a total value of \$350 million: Senator Doug Cameron, '198 Consumer Leasing Companies Receive \$350 Million a Year from 123,000 Centrelink Clients' (Media Release, 23 October 2015).

15 Department of Human Services (Cth), *Centrepay Policy* (12 April 2017) cl 1.2 <<https://www.human.services.gov.au/customer/services/centrelink/centrepay>>.

16 Ibid cl 2.1; see also Financial Counselling Australia, 'Centrepay: A Good Idea That Has Lost Its Way' (Report, February 2013) 5.

regular payments.¹⁷ It also allows Providers to minimise the risk of default by the consumer.¹⁸

B Regulation of Consumer Leases

Consumer leases are regulated under the *National Credit Code* ('Code'), which is Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth) ('NCCPA').¹⁹ The legislative regime distinguishes between consumer leases as defined under the *Code* and credit contracts.²⁰ In order to be considered a consumer lease, a lease of goods must (i) be entered into by a natural person;²¹ (ii) be for 'personal, domestic or household purposes';²² (iii) result in the amount being paid under the lease exceeding the cash price of the goods;²³ and (iv) not provide the consumer with a right or an obligation to purchase the goods.²⁴ This definition is important as it provides the main distinction between consumer leases and credit contracts; under a credit contract, there is a right or obligation to purchase the goods that are the subject of the contract.²⁵ Importantly, the *Code* provides that consumer leases must be in writing and must disclose at a minimum:

- a description of the goods;
- amounts payable by the lessee prior to delivery;
- stamp duty and other government charges payable by the lessee;
- any charges additional to rental;
- the amounts and timing of rental payments;
- the number of rental payments and the total amount payable;
- the circumstances in which the lessee may terminate the lease; and
- the liabilities of the lessee on termination of the lease.²⁶

17 Centrepay originated in the Indigenous housing sector. It was developed in 1998 to ensure that Indigenous housing residents paid their rent on time. The intention was to develop a system that directly debited Centrelink benefits for the payment of public housing rent. Although originally limited to public or private housing rental and for household utility payments, it is now used more broadly to pay bills and act as a budgeting facility offered by DHS to allow Centrelink recipients to authorise direct deductions: Buduls, above n 14, 8–10.

18 Financial Counselling Australia, above n 16, 7.

19 *National Consumer Credit Protection Regulations 2010* (Cth) ('Regulations') provide a third legislative instrument under which consumer leases are regulated.

20 Somewhat confusingly, the term 'consumer lease' is often used in the market to refer to both consumer leases as defined under the *Code* as well as to credit contracts: Ali et al, above n 2, 242.

21 *Code* s 169.

22 *Code* s 170(1)(a).

23 *Code* s 170(1)(b).

24 *Code* s 169.

25 A contract for the hire of goods that provides a right or obligation to purchase the goods is considered a sale of goods by instalment if the charges for hiring the goods and any payments under the contract exceed the cash price of the goods: *Code* s 9.

26 *Code* s 174. The consumer must, within 14 days of entering into a consumer lease, receive a copy of the lease, with an explanatory statement in the statutory form setting out a lessee's rights: *Code* s 175; *Regulations* form 17.

Recent reforms to the regime have sought to decrease the differences between the regulation of consumer leases and credit contracts. Prior to the reforms enacted through the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) (*Enhancements Act*), consumer leases were subjected to less stringent regulatory oversight than credit contracts.²⁷ This led to concerns regarding regulatory arbitrage, a situation where Providers attempted to classify their leasing arrangements as consumer leases rather than credit contracts to avoid the more stringent regulatory regime for credit contracts.²⁸

The *Enhancements Act* introduced several reforms that imposed similar obligations on Providers of consumer leases as those offering credit contracts.²⁹ Some of the more significant regulatory reforms include:

- Part 3-4 of the *NCCPA* requires that Providers comply with provisions that are largely equivalent to the responsible lending provisions imposed upon credit providers.³⁰ This means that Providers must now carry out an assessment of the suitability of the lease taking into account the objectives of the consumers. Providers are prohibited from unconditionally representing to a consumer that they are eligible to enter a consumer lease where the lease is presumed to be unsuitable for the consumer.³¹
- Consumers can apply for a hardship variation by notifying the Provider of their inability to meet their obligations under the consumer lease.³² A Provider must respond to a request for a variation before they enforce the lease against the consumer.³³
- Providers must give consumers periodic statements of account during the term of the lease³⁴ and must inform consumers that they will not own the

27 See Revised EM 116 [9.25]; Ali et al, above n 2, 250.

28 Ali et al, above n 2, 250.

29 Despite these reforms, there continue to be issues regarding regulatory arbitrage that require attention. For a discussion regarding the different treatment between consumer leases and credit contracts as well as the difficulties this raises, see Ali et al, above n 2.

30 Obligations are conveyed on licensees or credit providers to only offer credit to consumers if this is responsible and would not cause financial harm to the consumer: *NCCPA* div 4, ch 3. Providers have an obligation to make certain inquiries and take steps that require the conduct of a preliminary assessment of a consumer before providing credit assistance. The inquiries need to be taken before the preliminary assessment is made: *NCCPA* s 130(1). Further, providers of consumer credit must find that a contract is unsuitable if, when the assessment is made: '(a) the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship; or (b) the contract will not meet the consumer's requirements or objectives': *NCCPA* s 131; see ASIC, *Credit Licensing: Responsible Lending Conduct*, Regulatory Guide 209, November 2014 for further guidance on when a credit contract is not suitable.

31 *Enhancements Act* sch 1 items 15, 19.

32 *Code* s 177B(1). The Provider may require the consumer to provide, within 21 days of receiving the consumer's application, information to enable the Provider to decide whether the consumer is able to meet their obligations under the consumer lease and how, if the consumer is not able to meet these obligations, the consumer lease should be varied: see *Code* s 177B(2).

33 *Code* s 179F.

34 *Code* ss 175C(1), 175D.

goods at the end of the contract and they do not have a right or obligation to purchase the leased goods.³⁵

- Providers must give consumers a statement at least 90 days before the end of the lease,³⁶ that includes the following information: (i) that the leased goods must be returned at the end of the lease period and if they are not returned the consumer must pay a specified monthly fee for each month the goods are not returned; and (ii) whether the Provider is prepared to negotiate the sale of the goods, and if so, an estimate of the sale price.³⁷

Consumers may terminate a consumer lease contract before the end of its term if they return the leased goods to the Provider and may also terminate the contract at any time before the delivery of the goods to the Consumer.³⁸

Compliance with these regulations is overseen by ASIC, which has responsibility for the oversight of all consumer credit arrangements, including consumer leases.³⁹ Part of this function includes the ability to undertake investigations and to bring enforcement actions against Providers that ASIC believe have not complied with their obligations under the regime.⁴⁰

C Overview of Problems Relating to Consumer Leases

Despite the attempts to reform consumer leases to protect vulnerable consumers, several key problems remain with the regime, particularly as it operates in relation to low-income consumers. We explore two of these problems in detail and this provides the context for the discussion in Part III regarding the operation of consumer leases in Indigenous communities: (i) the oppressive manner in which payment and cost operate under the system; and (ii) the predatory practices engaged in by some Providers who target low-income consumers.

Although consumer leases are marketed as a relatively cheap way for low-income consumers to access household items, this hides the fact that due to the length of consumer contracts, the amount ultimately paid by consumers will generally exceed the retail value of the goods leased.⁴¹ Further, numerous recent studies have shown that the cost of the average consumer lease contract is higher even than the cost of obtaining goods using the most expensive alternative form of credit in Australia: high-cost, short-term payday loans.⁴² The exorbitant cost of goods under consumer leases is made worse by the fact that depending on the length of the lease, the consumer may bear all of the economic risk under the

35 *Regulations* reg 105A.

36 *Code* s 175H(1); *Regulations* reg 105C.

37 *Regulations* regs 105C(b), 105C(f)–(h).

38 For the right to terminate the contract by return of goods see *Code* s 179(1). For the right to terminate the goods before delivery of the goods has been made see *Code* s 178A.

39 *NCCPA* s 239.

40 Some of these enforcement actions, as they relate to Indigenous consumers, are discussed above in Part IIB.

41 ASIC, 'The Cost of Consumer Leases for Household Goods', above n 12, 4. The typical price paid under a consumer lease was three times the cash price of the item: Daniel, 'The Hidden Cost of "Rent to Own"' on *Consumer Action Law Centre* (13 September 2013) <<http://consumeraction.org.au/report-the-hidden-cost-of-rent-to-own/>>.

42 ASIC, 'The Cost of Consumer Leases for Household Goods', above n 12, 4.

contract, including the depreciation in value of the goods over the life of the contract.⁴³

These problems are exacerbated when one considers that many consumers using consumer leases are recipients of social security benefits and have their fortnightly payments deducted directly from their Centrelink payment.⁴⁴ The use of Centrepay is particularly problematic in this regard. Although the Centrepay system was originally designed as a scheme to increase financial resilience and assist Centrelink recipients with budgeting, it has proven problematic when used as a payment mechanism for consumer leases, particularly for Indigenous consumers. The main problem relates to the automatic nature of the payment. DHS states that a benefit of Centrepay to business is that '[c]ustomers tend to "set and forget" their Deduction Payments resulting in a consistent regular cash flow for Participants and less expense associated with pursuing overdue payments or bad debts'.⁴⁵ Despite the potential benefit for businesses, this feature of Centrepay is often problematic when considering consumer leases, particularly those of an indefinite period, as low-income consumers face difficulties in stopping payments.⁴⁶ Further, as there is no cap on the amount of social security that can be allocated to a Provider under the Centrepay arrangement, in practice vulnerable consumers may allocate large portions of their benefit to consumer leases that make it difficult for them to meet other vital expenses.⁴⁷ When combined with breaches of responsible lending obligations by Providers discussed later in this section, these factors suggest significant potential for hardship and harm to the consumer.

These cost and payment problems are made worse by the predatory practices engaged in by some Providers. ASIC has noted several of these problems when setting out its concerns with consumer leases.⁴⁸ These include companies charging different amounts to different consumers for similar products,⁴⁹ increased costs resulting from the length of the term of the contract,⁵⁰ and higher charges associated with consumers who are on Centrelink than would be the case if they had obtained a high cost credit loan (i.e. a payday loan) to purchase the goods in

43 Ali et al, above n 2, 244–6. This is made worse by the fact that leases of an indefinite period are exempt from the regulations applying to consumers.

44 See Buduls, above n 14.

45 Financial Counselling Australia, above n 16, 8, citing a Centrepay Principles document of 2009 obtained by Financial Counselling Australia under the *Freedom of Information Act 1982* (Cth).

46 Ibid 20. Although in theory consumers can stop payments, they are often precluded from doing so because they would be in breach of their contract with the Provider and if alternative payment arrangements are not made, the Provider could take action to enforce the debt and recover the goods.

47 Buduls, above n 14, 31. The Centrepay system originally placed a 60 per cent cap on the fortnightly amount that could go to service provider deductions. The cap was removed in response to the demands of customers and community and welfare organisations and was replaced with a single requirement that customers have a positive balance after deductions. The result for some Centrelink recipients has been that large portions of income are assigned to deductions, and insufficient funds remain for food and other basic living expenses.

48 ASIC, 'The Cost of Consumer Leases for Household Goods', above n 12.

49 Ibid 17.

50 Ibid.

question.⁵¹ In support of this last claim, ASIC found that 20 out of the 39 leases that it examined which involved a consumer on Centrelink benefits resulted in the consumer being charged more than five times the retail cost of the goods.⁵²

The practices engaged in by these Providers are particularly concerning as they appear to expressly target vulnerable members of the community, including those on low incomes and those who have limited financial literacy or English skills.⁵³ Providers undertake marketing that targets financially vulnerable consumers.⁵⁴ In targeting these vulnerable members of the community, Providers obscure the significant costs associated with consumer leases or the cheaper alternatives to consumer leases.⁵⁵ Instead, the main point promoted by Providers is the relatively small fortnightly repayment required under the consumer lease arrangement in an attempt to mislead consumers as to the total amount that will be repaid under the consumer lease.⁵⁶

III INDIGENOUS CONSUMERS AND CONSUMER LEASES

A The Harm Caused to Indigenous Consumers by Consumer Leases

The problems set out in Part IIC are particularly prominent among Indigenous consumers in rural and regional communities. The 2012 National Australia Bank Financial Exclusion Report found that 43.1 per cent of Indigenous people are financially excluded (compared with the national average in 2012 of 17.2 per cent).⁵⁷ This suggests that Indigenous consumers in these communities are more likely to be vulnerable to the targeting practices engaged in by Providers and are also more likely to experience the negative harm caused as a result of entering into consumer leases.

Concerns regarding the operation of consumer leases in Indigenous rural and regional communities have been raised in several forums. For instance, the 2011 Treasury Regulatory Impact Statement ('Treasury RIS') on the regulation of consumer leases supported claims that Indigenous consumers are particularly vulnerable to predatory practices. Therefore, they are at a greater risk of entering into consumer lease contracts that are not beneficial or wanted and that can be

51 Ibid 27. For example, a washing machine with a retail price of \$700 would cost \$1 176 if purchased using a payday loan, but would cost \$2 175.94 under a consumer lease contract, a price difference of \$999.94: at 27.

52 This equates to an interest rate of 248 per cent: *ibid* 7.

53 See, eg, Financial Counselling Australia, above n 16, 13.

54 ASIC, 'The Cost of Consumer Leases for Household Goods', above n 12, 7.

55 See, eg, Amy Bainbridge, 'Big Retailers Accused of Pushing Customers into "Outrageously Expensive" Consumer Leases' *ABC News* (online) 16 August 2016 <<http://www.abc.net.au/news/2016-08-16/big-retailers-accused-of-pushing-customers-into-leased-goods/7747908>>.

56 *Ibid*.

57 Chris Connolly, Centre for Social Impact and National Australia Bank, *Measuring Financial Exclusion in Australia* (2012) 8, 11. Financial exclusion 'exists where people lack access to appropriate and affordable financial services and products': at 11.

seriously deleterious to their financial wellbeing.⁵⁸ Numerous other studies support the findings presented in the Treasury RIS.⁵⁹ Particular concerns have been raised with the use of Centrepay by Indigenous consumers as a payment mechanism for household items leased through consumer leases. For instance, Financial Counselling Australia set out evidence provided by financial counsellors across Australia regarding the harm they were witnessing in relation to the operation of Centrepay in Indigenous communities.⁶⁰ The sheer number of reports identifying problems with the operation of consumer leases in Indigenous communities casts doubt on the effectiveness of the current regulatory framework to protect excluded consumers, such as Indigenous consumers, in rural and remote areas from the negative effects of consumer leases and the practices of Providers.

In its report on claims that traders were unfairly targeting Indigenous consumers in rural and remote regions of northern Queensland, the Indigenous Consumer Assistance Network ('ICAN') set out a number of matters that impacted on the bargaining position of Indigenous consumers and traders as well as the advantages that traders had over Indigenous consumers.⁶¹ Although these were not discussed specifically in relation to consumer leases, they provide general discussion regarding disadvantages that Indigenous consumers face that may be applicable to consumer leases.⁶²

The first issue relates to the geographic isolation of Indigenous consumers who live in remote areas of Australia.⁶³ Geographic isolation limits the opportunities available to seek legal or financial help that may assist Indigenous consumers when considering their options to purchase household items.⁶⁴ Limited financial literacy combined with a lack of access to legal and financial assistance can increase the vulnerability of consumers contemplating the use of a consumer lease to hire household items.⁶⁵ In addition, geographic isolation also means that Indigenous consumers living in rural and remote regions generally have fewer options available to them from which to choose household items that best suit their

58 Department of the Treasury, 'Phase Two of the National Consumer Credit Reforms: Consumer Leases and Enhancements to the National Credit Code' (Regulation Impact Statement, June 2011) 69.

59 See, eg, Heron Loban, 'Unconscionable Conduct and Aboriginal and Torres Strait Islander Consumers' (Research Report, Indigenous Consumer Assistance Network, 2010) ('ICAN Report'); Financial Counselling Australia, above n 16; Buduls, above n 14, 70–4; See also The Australian Government the Treasury, 'Review of the Small Amount Credit Contract Laws' (Report, March 2016) <https://static.treasury.gov.au/uploads/sites/1/2017/06/C2016-016_SACC-Final-Report.pdf>.

60 See generally, Financial Counselling Australia, above n 16.

61 Loban, above n 59. The problems that we set out in this section closely follow those set out in the ICAN Report: at 7. We have however, amended them to take into account more recent information and information from other sources. In addition to the points discussed in this paper, the ICAN Report notes that all of these problems can be traced back to historical problems faced by Indigenous Australians living in remote areas of Australia: at 8. The ICAN Report's classification of problems experienced by Indigenous consumers relies heavily on a report published by the then Trade Practice Commission: Trade Practices Commission, *Taking Advantage: Sale of Life Insurance to Aboriginal People in Remote Communities* (1994).

62 Several of these issues have been raised as they relate specifically to Indigenous consumers in the context of consumer leases: Department of the Treasury, above n 58.

63 Loban, above n 59, 8; Department of the Treasury, above n 58, 20–1.

64 Loban, above n 59, 8.

65 Ibid 63.

needs.⁶⁶ Providers aware of these limitations often arrive in small, isolated towns with vans or trucks loaded with household items that appear to offer a low-cost, convenient service in the absence of readily available alternatives.⁶⁷

Second, social and cultural practices of certain consumers may make them vulnerable to unconscionable conduct.⁶⁸ In Indigenous communities for instance, gratuitous concurrence, a factor well-recognised in the criminal law context, means that Indigenous consumers are likely to place a high value on agreement and silent respect in response to offers or statements.⁶⁹ This cultural practice would appear to make it easier for sales representatives, particularly when they are in a consumer's home, to obtain agreement from potential consumers to enter into consumer leases.⁷⁰ The problem with this is fairly clear; gratuitous concurrence is not true agreement to an offer, but rather a cultural norm that discourages disagreement. This means that Providers are taking advantage of this cultural norm to sign up Indigenous consumers to consumer leases that they may not want or be able to afford. Further, the fact that English is a second language for many Indigenous consumers and that they often have few financial literacy skills means that they may be entering into contracts that they do not understand or that they have not read.⁷¹ These limitations suggest that many Indigenous consumers may be entering into consumer leases without knowledge of important matters such as the nature of the contract signed, what products they had agreed to purchase or lease, or their obligations and rights under a contract. When combined with geographical isolation that limits the availability of professional services as discussed above, this problem becomes pronounced.

Third, economic factors contribute towards problems associated with consumer leases in Indigenous communities.⁷² When Indigenous (and non-Indigenous) consumers receive income support, the monetary amount is typically low, placing them at greater risk of financial harm with repayments often taking up a significant proportion of their fortnightly income.⁷³ Automatic payment arrangements may contribute to individuals and families having insufficient funds available to pay for basic necessities such as food and educational expenses.⁷⁴ Further, in a number of cases, Providers have been found to lease household items to consumers who cannot afford the required payments and in many cases Providers have not been making assessments as to whether particular consumers have capacity to meet the payment obligations under a consumer lease.⁷⁵

The fourth factor follows on from the first three – the tactics engaged in by some Providers in order to sign up Indigenous consumers to consumer leases.

66 Ibid 8.

67 See below Part III.

68 Loban, above n 59, 9.

69 Ibid.

70 Department of the Treasury, above n 58, 69.

71 Loban, above n 59, 8; Department of the Treasury, above n 58, 70.

72 Loban, above n 59, 8, discusses economic factors generally as relating to matters of financial literacy.

73 See above n 47 and accompanying text.

74 Ibid.

75 Consumer Action Law Centre, 'Comment on the Financial System Inquiry Final Report' (31 March 2015) 32. This is a requirement of the *Code*: see above n 30–1 and accompanying text.

Providers appear to take advantage of the geographical isolation, social and cultural norms, and economic disadvantage prevalent in many Indigenous rural and regional communities to promote harmful consumer lease arrangements. The practice of door-to-door selling in remote Indigenous communities has proven particularly harmful.⁷⁶ Several important factors relating to door-to-door sales have the potential to raise problems for Indigenous consumers in the context of consumer leases, including:

- Door-to-door salespeople must convince consumers that they need the goods, as the communication and interaction is not, as is the case with retail purchases, initiated by the consumer.
- Sales tactics such as applying pressure to purchase goods are more effective in a home environment. Salespeople emphasise time constraints and tend to take advantage of the less formal interactions in a home setting than is common in a retail environment.
- Consumers are unable to compare prices and products when a salesperson is in their home. Many consumers find it difficult to request that the salesperson return at a later time after the consumer has had the opportunity to assess the offer after making their own comparisons and potentially receiving financial advice.
- Many consumers lack the assertiveness required to ask the salesperson to leave their house, a factor that does not arise in a retail environment as the consumer can simply leave the store.⁷⁷

All of the factors discussed in this section may induce Indigenous consumers to enter into consumer leases for reasons other than an informed choice based on a need or actual want of a particular household item. As discussed further in Part IIIB, certain Providers have exploited the vulnerabilities of Indigenous consumers. Not surprisingly, such abuses have received considerable attention and led ASIC to initiate several enforcement actions against Providers that it believes have breached their regulatory obligations.

B ASIC Enforcement Actions

ASIC has taken enforcement action against those who breach responsible lending obligations.⁷⁸ Several of these enforcement actions have dealt specifically with Providers that have deliberately targeted Indigenous consumers living

76 The Department of the Treasury found that consumer leases were used by a number of door-to-door operators marketing household goods to Indigenous communities in rural NSW and NT: The Department of the Treasury, above n 58, 14, 20–1; see also Loban, above n 59, 15, 19.

77 Department of the Treasury, above n 58, 62–3; see also Paul Harrison, Marta Massi and Katheryn Chalmers, 'Shutting the Gates: An Analysis of the Psychology of In-Home Sales of Educational Software' (Research Paper, Deakin University and Consumer Action Law Centre, March 2010). The Federal Court of Australia has also discussed the potential problems of door-to-door selling in the context of its review of common practices in the industry and their potential to breach the unconscionable conduct provisions of Australia's consumer laws: see *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90.

78 ASIC has provided guidance on how it will regulate responsible lending obligations: ASIC, 'Credit Licensing: Responsible Lending Conduct' (Regulatory Guide 209, November 2014).

in rural and remote communities.⁷⁹ ASIC's enforcement action against Zaam Rentals and its directors provides a useful example of the approach adopted by ASIC in enforcing regulations regarding consumer leases.⁸⁰ Zaam Rentals was a Provider based in Victoria that targeted poor areas in Mildura and surrounding areas in NSW, including Indigenous communities. ASIC found that between 4 December 2010 and 14 September 2011, Zaam Rentals did not comply with responsible lending obligations set out in the *NCCPA* and in particular:

- did not make reasonable inquiries about the requirements and objectives of those entering into the contracts;
- did not make reasonable inquiries about their financial situation;
- did not take reasonable steps to verify their financial situation;
- did not give consumers a credit guide; and
- did not make the necessary disclosures in the consumer lease contract.⁸¹

ASIC found further that Zaam Rentals had acted unconscionably by targeting vulnerable people who had limited understanding of the contracts that they were signing and who had limited capacity to meet their repayments under the contract.⁸² As a result of the misconduct, ASIC cancelled the credit license of Zaam Rentals and banned its directors from engaging in credit activity for up to six years.⁸³

In addition to imposing fines and banning Providers and directors from engaging in credit activities, ASIC relies on several other mechanisms to assist vulnerable consumers. This includes obtaining undertakings for the release of consumers from their contractual obligations where appropriate.⁸⁴ For instance, ASIC obtained releases for several Indigenous consumers from their contracts with Mr Rental, a national household goods rental company, after surveillance indicated that Mr Rental had been engaging in unconscionable conduct in relation to these contracts.⁸⁵ Mr Rental was found to be targeting Indigenous consumers in remote

79 The cases explored in this Part provide only an indicative account of the enforcement actions that ASIC has initiated in relation to abuses carried out by Providers in their conduct with Indigenous consumers.

80 ASIC, 'ASIC Takes Action Against Zaam Rentals, Cancelling its Licence and Banning its Directors' (Media Release, ASIC 13-021MR, 11 February 2013) ('Zaam Rentals'). ASIC also took action against a number of Zaam's franchisees. These companies were operating in Berri, South Australia, Broken Hill, NSW, Geelong, Victoria and Kelso, NSW. The franchisees were all found to be targeting Indigenous regional communities in these towns, or those that are located close to these towns: ASIC, 'ASIC Takes Action against Rental Companies [sic] Franchisees' (Media Release, 13-235MR, 28 August 2013).

81 ASIC, 'ASIC Takes Action Against Zaam Rentals', above n 80. ASIC was alerted to these potential abuses by The Murray Mallee Community Legal Service and the Mallee Family Care Financial Counselling Program: Murray Mallee Community Legal Services, *News* (2013) <http://www.communitylaw.org.au/murraymallee/cb_pages/news_2013.php>. ASIC initiated its investigations after media attention, including Fairfax newspapers and the ABC's 7.30 Victoria Report: ABC, 'ASIC Cancels Rental Company's Credit Licence' *ABC News* (online) 11 February 2013 <<http://www.abc.net.au/news/2013-02-11/asic-cancels-rental-company27s-credit-licence/4512342>>; Lucy Battersby, 'Zaam Bosses Banned for Irresponsible Lending', *Sydney Morning Herald* (online) 11 February 2013 <<http://www.smh.com.au/business/zaam-bosses-banned-for-irresponsible-lending-20130211-2e7t1.html>>.

82 ASIC, 'ASIC Takes Action Against Zaam Rentals', above n 80; see also Battersby, above n 81.

83 ASIC, 'ASIC Takes Action Against Zaam Rentals', above n 80.

84 ASIC has the authority to accept written undertakings: *NCCPA* s 322(1).

85 ASIC, 'ASIC Action Sees Indigenous Consumers Released from Contracts' (Media Release, 13-288MR, 24 October 2013).

communities in the Anangu Pitjantjatjara Yankunytjatjara lands in South Australia.⁸⁶ ASIC found that Mr Rental had engaged in serious, unconscionable conduct, when it had asked more than 40 consumers ‘to sign several documents together with a lease agreement, none of which were explained to them and included a “customer declaration” indicating they understood all the paperwork and that they were not intoxicated’.⁸⁷ The breaches were found to be particularly egregious as the majority of the Indigenous consumers targeted lived on very low incomes, had English as a second language, and were not familiar with the indefinite lease agreements that they were offered.⁸⁸ Further, Mr Rental entered into an undertaking to notify ASIC before it re-entered a remote or very remote Indigenous community to sign up consumers to agreements.⁸⁹

ASIC has also accepted an enforceable undertaking from several Providers: Home Essentials, I Love My Water, Triple Bay Group and Triple Bay, as well as company principals after an investigation found that they had engaged in unlicensed credit activities.⁹⁰ ASIC found that these Providers had engaged in unsolicited door-knocking and had targeted vulnerable consumers, including Indigenous consumers living in remote parts of the Pilbara region in Western Australia.⁹¹ These targeting practices had resulted in the entry of approximately 16 000 consumer lease contract for water coolers and first aid kits by consumers in the region.⁹² The cost of these contracts was far in excess of the fair market value of the goods and the Providers acted without a credit license.⁹³ Their conduct was found to be unconscionable as the contracts contained unfair terms, including an automatic renewal of the contract unless the consumer contacted the company to cancel the contract.⁹⁴

The enforceable undertaking included a \$250 000 payment to the Pilbara Community Legal Service and the Indigenous Consumer Assistance Network, for the purposes of educating community members about financial products and increasing financial literacy levels within the community.⁹⁵ In addition, the enforceable undertaking required that the Providers stop collecting payments from existing customers, allow customers to keep the goods leased with no further payment, not exercise any rights under the contracts except to honour contractual or statutory warranties and to provide refunds to customers who had made payments under a consumer lease but had not yet received their goods.⁹⁶ Finally, ASIC imposed penalties on each of the Providers and the principals including a prohibition on any of them engaging in credit activities or applying for a credit

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*

90 ASIC, ‘Unlicensed Rental Companies Enter into Enforceable Undertaking with ASIC’ (Media Release, 14-021MR, 4 February 2014).

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*

94 *Ibid.*

95 *Ibid.*

96 *Ibid.*

licence for five years or placing advertisements in Australian various newspapers around Australia and on specified websites.⁹⁷

A final example of an undertaking obtained by ASIC is the recent case of Amazing Rentals.⁹⁸ Amazing Rentals had stores in Darwin, Toowoomba and Caboolture. An examination of the records of consumers in the Darwin store by ASIC found that most derived their income from Centrelink benefits and many were Indigenous members of remote communities who had little access to retail stores or other credit services.⁹⁹ In addition, many consumers did not have English as a first language and were misled about the nature of the contracts, which they thought was a contract for payment in instalments.¹⁰⁰ As part of an enforceable undertaking, Amazing Rentals agreed to pay \$5000 to each of the Top End Women's Legal Service and the North Australian Aboriginal Justice Agency for funding legal services for Indigenous consumers in the Northern Territory.¹⁰¹

ASIC may also initiate legal proceedings in court where it feels the severity of a case warrants such action.¹⁰² For instance, ASIC was recently successful in its claim in the Federal Court of Australia that a Cairns-based lender, Channic Pty Ltd ('Channic'), a broker, Cash Brokers Pty Ltd ('Cash Brokers') and the sole director of both companies, Mr Colin William Hulbert (together, the 'Suppliers') had acted unconscionably and caused consumers to enter into unjust contracts when they made loans to vulnerable Indigenous consumers for the purchase of second hand cars from a car dealer owned by Mr Hulbert.¹⁰³ ASIC claimed that the Suppliers had been targeting Indigenous consumers in the Yarrabah community, which had been identified in the 2011 Census as the most disadvantaged Local Government Area in Australia.¹⁰⁴ ASIC provided evidence that Cash Brokers had assisted consumers to obtain loans from Channic at 48 per cent interest per annum for the purchase of second hand cars at a price well above the market rate.¹⁰⁵ ASIC also complained of the advertising techniques engaged in by the Suppliers, with one flyer advertising along the following lines: 'Bad credit okay, Ex-Bankrupt okay, Pensioners okay, Defaults okay'.¹⁰⁶ The flyer also advertised '20 minute approvals' and 'Centrelink OK'.¹⁰⁷ Finally, the Suppliers did not explain the contract terms to

97 Ibid.

98 ASIC, 'ASIC Accepts EU from Amazing Rentals' (Media Release, 15-141MR, 5 June 2015).

99 Ibid.

100 Ibid.

101 Ibid.

102 ASIC has the power to prosecute and bring civil proceedings: *NCCPA* ss 274–5.

103 *Australian Securities and Investments Commission v Channic Pty Ltd (No 4)* [2016] FCA 1174 (*ASIC v Channic*). This case dealt with a credit contract as opposed to a consumer lease but many of the issues covered are relevant to an analysis of consumer leases and Indigenous consumers. The case provides a useful example of the methods adopted by credit lenders when dealing with Indigenous consumers in remote or rural communities as well as illustrating the mechanisms that ASIC may adopt when responsible lending provisions, which apply to consumer leases, are breached.

104 ASIC, 'ASIC Commences Legal Action Against Cairns-Based Lender and Broker' (Media Release, 13-228MR, 26 August 2013).

105 The Suppliers accepted, for example, that a loan to one consumer, Ms Kingsburra, was provided by Channic in an amount of \$8301.50 for a period of 110 weeks at an interest rate of 48 per cent: *ASIC v Channic* [2016] FCA 1174, [127]; see also *ibid.*

106 *ASIC v Channic* [2016] FCA 1174, [939].

107 Ibid.

potential consumers and that because of their disadvantaged background, consumers were often unaware of what they were signing up to.¹⁰⁸ According to ASIC, these practices, when combined with the remoteness of Yarrabah, meant that Indigenous consumers, who needed vehicles to access vital services such as hospitals and supermarkets, were vulnerable and the Suppliers took advantage of this vulnerability.¹⁰⁹

The Federal Court largely agreed with ASIC that the Suppliers had acted unconscionably and that the contracts were unjust transactions.¹¹⁰ When discussing its findings on unconscionable conduct, the Federal Court held that the consumers generally had an unsophisticated knowledge of financial transactions and were as a result often unaware of what they were signing up to, that the Suppliers knew of the disadvantages experienced and the vulnerability of the consumers that they were dealing with and that the Suppliers had not made adequate disclosures to consumers.¹¹¹ Importantly, the Federal Court appeared to share ASIC's concerns regarding the limited opportunities available to consumers in this case, noting that the consumers were on Centrelink and their financial circumstances meant that the offer made by the Suppliers was the only option open to the consumers.¹¹² The penalties in this case could be significant and may include fines of up to \$1.1 million for each of the Suppliers in question and fines of up to \$220 000 for each contravention of the responsible lending obligations engaged in by an individual.¹¹³

This brief exploration of enforcement actions undertaken by ASIC in relation to Indigenous consumers illustrates the ongoing difficulties faced by Indigenous consumers when entering into consumer contracts. The cases confirm the general problems with consumer contracts discussed in Part IIC as well as the specific problems associated with consumer leases in Indigenous communities as discussed in Part IIIB. However, the enforcement actions also illustrate that ASIC has been active in bringing enforcement actions, imposing penalties, cancelling credit licenses and even bringing legal actions in court when Providers have breached their regulatory obligations. Further, ASIC's enforcement actions seem to have both a preventative purpose, with high penalties imposed and cancellation of credit licenses and an educational purpose, with some penalties aimed at providing assistance to community groups that offer community services to consumers affected. As Part IIIC illustrates however, despite these efforts by ASIC, those working in the field of consumer leases continue to report significant problems with the regime that have not been addressed by legislative reforms and enforcement actions.

108 Ibid, [1828].

109 ASIC, above n 104; *ASIC v Channic* [2016] FCA 1174, [1828]. Greenwood J agreed that the consumers in *ASIC v Channic* were generally from disadvantaged backgrounds.

110 *ASIC v Channic* [2016] FCA 1174, [1826]–[1847].

111 Ibid, [1826]–[1844].

112 Ibid, [1834]–[1837].

113 ASIC, 'ASIC Commences Legal Action Against Cairns-Based Lender and Broker', above n 104.

C Interviews Regarding Consumer Leases and Indigenous Consumers

1 The Interviewees

The discussion presented in Parts IIIA and IIIB set out some of the ongoing problems of consumer leases as they operate in Indigenous communities as well as attempts to punish those who breach their regulatory obligations and to deter others from engaging in activities that are likely to harm vulnerable Indigenous consumers. The challenges presented in the earlier sections of Part III are confirmed by the views presented in a series of interviews conducted by the authors with senior solicitors and financial counsellors from several organisations working in the field that had experience with Indigenous consumers.¹¹⁴

Between July–September 2015 the authors conducted interviews with staff from the following organisations: Consumer Action Law Centre, Melbourne; Legal Aid NSW, Sydney; Mallee Family Care, Mildura, Victoria; Dareton Community Centre, Dareton NSW; and Good Shepherd Microfinance, Melbourne. Twenty-four participants, 13 financial counsellors and 11 solicitors, took part in the interviews. Eighteen participants were women and six were men. All were interviewed in person except the participants from Legal Aid NSW who were interviewed by phone. These organisations were selected because they work consistently with clients who are experiencing financial hardship, financial exclusion or who are adversely impacted by consumer leases.

Interviews focussed on the case work experience of organisations involving clients from Indigenous communities. The solicitors interviewed indicated that consumer lease contracts make up a significant proportion of their case work. For instance, a senior solicitor working in NSW Legal Aid's Civil Law Service for Aboriginal Communities stated that more than 50 per cent of the office's workload relates to contracts for the hire of household items,¹¹⁵ meaning that those interviewed had significant experience in the field.¹¹⁶ Those interviewed worked across metropolitan Melbourne and Sydney as well as in regional and rural areas of NSW and Victoria and provided a cross-section of views regarding the impact of consumer leases in various regions.

114 The information in this section is provided on the basis of interviews with these organisations unless otherwise stated.

115 Legal Aid NSW explained that they had seen an increase in clients over the last several years experiencing problems regarding consumer lease contracts. Two possible reasons were provided for this increase. The first was the potential improvement in outreach by the office. The second, and according to the interviewees, more likely reason, was the tightening of regulatory provisions regarding other forms of credit contracts, like payday loans. These credit contracts now require a cap on the total cost of the contract leading Providers to rely more heavily on consumer lease contracts to avoid more stringent credit contract regulation.

116 Legal Aid NSW, Submission to Financial System and Services Division, Commonwealth Treasury, *Review of the Small Amount Credit Contract Laws*, October 2015, 32. Legal Aid NSW has recently stated that '[s]ince 2013 Legal Aid NSW has experienced a 500% increase in disputes concerning consumer leases compared to the previous two year period. In the past 18 months we have assisted over 150 clients across five Aboriginal communities alone.'

2 *The Clients*

Those interviewed confirmed the trends identified earlier in this article regarding the common characteristics of consumers who enter consumer leases.¹¹⁷ Interviewees noted that their clients tended to be financially excluded, experienced financial hardship and were harmed by consumer leases. These clients were usually low-income earners whose only source of income was social security benefits.

In regional or remote communities, where public transport is unavailable and where there are limited options to obtain financial and legal advice as well as options from which to purchase household items, interviewees expressed the view that consumers signed up to consumer leases simply because a Provider offered them a convenient way to obtain consumer goods. As a consequence, interviewees noted that the vast majority of consumer lease contracts they dealt with were not suitable for the consumer in question and lower cost alternatives, such as second hand goods or community sector loans, would have provided affordable options.

This is a particularly important point in light of the significant costs that interviewees reported that their clients were paying when entering into consumer leases. Many of the interviewee's Indigenous clients had multiple consumer lease contracts, which ranged between \$1000 and \$30 000 in total.¹¹⁸ The majority of the goods obtained through these leases were for basic furniture, whitegoods and entertainment units including laptops and tablets. The solicitors interviewed noted that it was common for consumer leases to be used to purchase gifts for friends and family during Christmas or birthdays, rather than for individual use, raising issues regarding ownership of the goods.

3 *Poor Client Understanding of Consumer Leases*

A key theme that emerged from our interviews was that clients had little or no understanding of the total cost of the goods under the contract they had entered into. In most cases, sales assistants in stores or employees of Providers that visited remote or regional communities obscured the total cost of the goods, and instead emphasised the smaller, fortnightly repayment amount due under the contract. Further, clients frequently reported that they did not understand that they were signing a consumer lease contract, and not a contract for payment in instalments. In many cases the consumer did not receive a copy of the contract or was unable to understand the contract. This meant that clients were often unaware that they were required to contact Providers at the end of the contract term to make an offer to purchase the leased item and as a result they continued to pay for the item beyond the end of the contract term. Finally, many clients reported that they assumed that the company had assessed their ability to repay without financial hardship, but then found that the repayments were placing significant strain on their already strained financial situation.

¹¹⁷ See Part I.

¹¹⁸ Legal Aid NSW told the authors that one of its clients had made repayments of up to \$35 000 over a three year period.

Financial counsellors and solicitors noted that contracts were also often drafted in a manner that ensured payments continued to be withdrawn through the Centrepay system long after the term of the contract had ended. For clients experiencing disadvantage, life circumstances were so difficult that following up on the contract, and putting a stop to a Centrepay deduction, was difficult. This was particularly an issue for Indigenous consumers living in remote or regional communities as cancellation often requires a phone call, internet access or visiting a Centrelink office in person and for many Indigenous consumers this was not possible. It was only when they sat down with a community worker or a financial counsellor that they realised this was an option.

This general lack of understanding was exacerbated by the fact that it was common for clients not to be given copies of their contracts. Consumers were therefore unaware of the amount that was being withdrawn each fortnight from their social security benefit payment to pay for the goods hired. Finally, consumers were also not informed of lower cost alternatives, even when it was very evident that a consumer lease contract was not suitable for their needs.

4 *Predatory Targeting of Indigenous Consumers*

Interviewees overwhelmingly expressed a view that Providers did not comply with responsible lending laws, and that there were significant business disincentives for Providers to adhere to these requirements. Interviewees felt that if the responsible lending laws were adhered to, then they would not be seeing the current volume of clients experiencing financial distress. These concerns point to continued breaches by Providers of their obligations under the consumer lending regulations, often by engaging in predatory practices.

Legal Aid NSW stated that it was clear that Providers had targeted specific Indigenous communities in regional NSW. In these communities it was not uncommon for almost every household to have furniture and appliances obtained through consumer leases.¹¹⁹ The solicitors described regional communities of 100 households, where every house is furnished by one to two companies that have visited the communities in trucks or vans, confirming concerns raised in Part IIIA regarding geographic isolation.¹²⁰ Community workers in Dareton and Mildura explained that small Providers frequently drove vans with products into remote communities, with contracts and Centrepay deduction forms with them. These Providers would often set up a barbeque or food in a public area close to Indigenous homes to tempt consumers to sign up to a consumer lease. Other practices observed by community workers were company representatives offering cash, cigarettes or alcohol to younger members of the community to initiate

119 Community workers in Dareton and Mildura described the same situation in communities in northern Victoria and southern NSW.

120 Those interviewed explained that there was an incentive for those consumers living in remote communities, where access to goods was limited, if not non-existent, to have household goods driven to them. However, they also stated that in many cases these goods were not necessarily wanted by the consumers, but rather, they had been convinced by the sales person to sign the contract. NSW Legal Aid noted however, that they had witnessed a decrease in door-to-door sales.

invitations into homes, where older members of the family could be approached to sign consumer lease contracts.¹²¹

Another disturbing finding is the fact that consumers are making payments under consumer lease contracts even when this means they cannot pay essential items such as utility bills and rent. Consumer lease payments can constitute up to 80–90 per cent of a client's fortnightly income. Solicitors and financial counsellors interviewed emphasised that many clients are in receipt of either a Disability Support Pension (\$877.10 per fortnight) or a Newstart Allowance (\$528.70 per fortnight).¹²² Unlike payday loans, where there is a protected earning amount of 80 per cent of a person's social security benefit,¹²³ there is no equivalent provision for consumer leases.¹²⁴

Interviewees believed that several factors contributed to this.¹²⁵ The debt collection practices of some Providers appear to be harsh and punitive particularly when compared to the practices of other companies. Interviewees in Mildura and Dareton reported that consumer lease companies engaged in harassing behaviour including phone calls and threats to call police or sending people to a consumer's house to apply pressure to receive payment only a few days after payment falls due. This contributed to clients prioritising the payment of consumer leases over their utilities, bills, school fees or even food. While Providers engaged in these harsh tactics, other companies, such as utilities and public housing authorities were more likely to offer hardship provisions or to arrange different repayment schedules to help customers pay their bills.¹²⁶ As a result, financial counsellors in regional centres noted that clients are often referred to them after visiting welfare organisations for emergency assistance with food or other essential costs such as

121 Financial counsellors in the Mildura area, and solicitors from Consumer Action Law Centre interviewed stated that this was a continuing practice in the Mildura, Dareton and Robinvale regions. The impression of 'closeness' that was created by these practices between Providers and potential consumers increased the likelihood that consumers would not seek advice from community welfare workers about the contracts, because there was a perception that the seller was a 'friend.'

122 Department of Human Services, Australian Government, *Disability Support Pension* (October 2016) <<https://www.humanservices.gov.au/customer/services/centrelink/disability-support-pension>>; Department of Human Services, Australian Government, *Newstart Allowance* (October 2016) <<https://www.humanservices.gov.au/customer/services/centrelink/newstart-allowance>>.

123 *Regulations* reg 28S. For further discussion of the regulation of payday loans, see Paul Ali, Cosima McRae and Ian Ramsay, 'Payday Lending Regulation and Borrower Vulnerability in the United Kingdom and Australia' [2015] *Journal of Business Law* 223; Paul Ali, Cosima McRae and Ian Ramsay, 'The Politics of Payday Lending Regulation in Australia' (2013) 39 *Monash University Law Review* 411.

124 *Regulations* reg 28S(3).

125 Interviewees stated that the Centrepay system was an integral aspect of consumer leasing for Providers that targeted Indigenous communities. They explained that without the use of direct debit services, targeting Indigenous consumers would not be possible or worthwhile. Despite this, not all those interviewed believed that removing consumer rental companies from Centrepay would be a 'magic bullet' but they did believe that access to Centrepay was a key aspect of the predatory conduct of these Providers.

126 The debt collection practices engaged in by Providers were described as so harsh that consumers were told that they could not miss a payment. Legal Aid NSW also expressed the view that consumers having their electricity cut off would become more common as energy companies became increasingly unwilling to allow customers to accrue large deficits in payment.

medical expenses.¹²⁷ Particularly concerning were reports that in some instances, Indigenous consumers were falling behind on their rental payments, leading to thousands of dollars in rent arrears and in some cases eventual eviction and homelessness.

Interviewees further reported a number of ‘psychological tactics’ used by Providers. Many Providers take advantage of the shame and stigma associated with the financial situation experienced by the vulnerable consumers that they deal with. Financial counsellors reported that clients often felt that the sales assistant was a ‘friend’ and even when repayments were causing harm, had difficulty believing that the assistant would have signed them up to a contract that was harmful. Providers also ‘bundled’ household items, meaning that although a client may have only wanted to hire one household item, they were convinced by Providers to hire many items by making it seem that they were receiving a ‘good deal’. After signing up to a consumer lease however, consumers were often shocked to realise that they could not afford multiple goods and that the deal offered to them was not beneficial. Another common practice highlighted by Legal Aid NSW interviewees is that of repeat contracting. Consumers were often approached by Providers towards the end of the contract term with ‘loyalty’ offers from the Provider or ‘special deals’ for existing customers. In fact, these new contracts were the same in cost and substance as those for new customers, but some clients felt that they were making a saving. This meant they were locked into another lengthy contract, paying far in excess of the retail cost of a household item. These practices all relate to the common business model adopted by some Providers that relies on the provision of misleading information to vulnerable consumers in an effort to get them to enter into a contract that they would not otherwise agree to.

Finally, some of those interviewed explained that Providers were becoming increasingly savvy at avoiding intervention. This means that Providers may be trying to avoid enforcement actions or are looking to circumvent regulatory requirements. These avoidance techniques include Providers visiting remote communities over the weekend so as to avoid community centre workers who only work during the week and may be able to provide assistance to vulnerable consumers. The absence of these services has meant that no one was available to explain to consumers the consequences of the contract and to explain the cost provisions of the contract.

IV FURTHER ANALYSIS AND CONCLUSION

This article has set out several of the ongoing problems experienced by Indigenous consumers in remote and rural communities when entering into consumer leases. As the interviews in Part IIIC illustrate, these problems

127 In NSW, financial counsellors have seen clients unable to put food on the table or buy essential health care items such as medication. In Mildura and Dareton, financial counsellors told of households where utility arrears caused the power to be shut down, with people leaving their homes in winter because they were unable to repay these debts. In all these cases, consumer lease contracts were taking a significant proportion of their social security benefits.

persist despite attempts to amend the regulatory regime so as to provide additional protection to vulnerable consumers. Further, although ASIC attempts to ensure compliance with the regime through its enforcement action powers,¹²⁸ our interviews suggest that there are limits to what ASIC has been able to achieve. This means that there are still considerable problems with the regime, including limited understanding of the arrangement by Indigenous consumers and predatory conduct on the part of some Providers. ASIC's use of its penalty powers provides assistance for Indigenous consumers but more needs to be done to provide Indigenous consumers with the financial skills and knowledge to make decisions in this area and to prevent predatory conduct by Providers. Of particular note in this regard are efforts by ASIC to use its enforcement powers to improve the capacity of community groups to assist Indigenous consumers (for instance, requiring Providers to give funds to community groups as part of enforceable undertakings). ASIC has sought to provide information and educational assistance to Indigenous consumers through its Indigenous Outreach Program.¹²⁹ This includes consumer education services in areas such as consumer leases that add to its enforcement actions activities.

A Reforms to Centrepay

These education and punishment efforts need to be combined with regulatory reforms that assist vulnerable consumers. Perhaps the most pressing issue relates to the use of Centrepay in the consumer leasing field. This article illustrates that the use of Centrepay, although initially adopted by the DHS in an effort to assist low-income earners who receive social security benefits to better manage their funds, when used in the context of consumer leases can produce significant hardship to consumers. Our analysis shows that Indigenous consumers (and other low-income consumers) who use the Centrepay facility often preference payment to Providers over other vital services meaning that they do not pay for things such as their electricity bills or their rent. Further, low-income earners often have limited financial literacy skills and the 'set-and-forget' phenomenon that the DHS points to as an advantage for credit providers using Centrepay, often means that consumers end up paying for household items long after their contract has ended.

Ending the use of Centrepay for consumer leases would ensure that all credit contracts are excluded from the arrangements.¹³⁰ If however, it is thought that

128 Some of those who the authors interviewed noted that community centres often played an important role in assisting ASIC with these actions.

129 See, eg, ASIC, 'ASIC Encourages Indigenous Consumers to "Take a Minute With Their Money"' (Media Release, 16-215MR, 5 July 2016). Several interviewees discussed the need to improve community information and education, particularly making low-income consumers aware of alternative lending facilities, such as the No Interest Loan Scheme: see Victorian Health and Human Services, *Loans* (14 September 2017) <<https://services.dhhs.vic.gov.au/loans>>.

130 Consumer Action Law Centre, above n 75, 30–31. The Consumer Action Law Centre notes that consumer leases are effectively credit contracts, which are not permitted access to the Centrepay system. Several interviewees noted that removing consumer leases from the Centrepay system may lead Providers to rely more heavily on direct debit payment facilities instead. Any reforms to Centrepay should take this into account so that the issue is not simply moved from the Centrepay system to another type of payment

excluding consumer leases from the Centrepay facility is too extreme a response, several less severe alternatives exist that could help vulnerable consumers. For instance, a monetary limit could be imposed on the amount that could be paid through Centrepay for consumer leases to ensure that vulnerable consumers receiving social security benefits have enough funds to pay for vital services. Further, a time limit could be imposed on the use of Centrepay for each consumer lease entered into with a Provider (in conjunction with the monetary limit or on its own). This would ensure that vulnerable consumers are forced to make a positive decision to continue with a consumer lease arrangement.

The DHS, in its response to the Independent Review of Centrepay,¹³¹ has taken some of these concerns into consideration as they relate to the use of the Centrepay for consumer leases.¹³² The DHS has acknowledged that leases regulated under the *NCCPA* “provide better protection for vulnerable customers as businesses must comply with the responsible lending obligations overseen by the Australian Securities and Investments Commission”.¹³³ As a result, from 1 July 2015, consumer leases not regulated under the *NCCPA*, including short term and indefinite leases, have been excluded from the Centrepay system.¹³⁴ This is a positive step, however, the acknowledgment by the Government that consumer leases offer less protection for vulnerable consumers suggests the need for the *NCCPA* to be amended so as to bring them with its regulatory ambit.¹³⁵

The DHS rejected a proposal for annual reauthorisation of perpetual deductions under the Centrepay system and instead introduced a ‘Deduction Statement’ that lists the deductions that are being made from a customer’s regular allowances to allow customers to better track their ongoing deductions.¹³⁶ While the exclusion of indefinite consumer leases from the Centrepay system may limit the dangers associated with payments being made on an ongoing basis, the limited financial literacy skills of many Indigenous consumers and the practices engaged in by some Providers to use the Centrepay system to take advantage of vulnerable Indigenous consumers suggests that a positive decision made by consumers each year to continue with certain deductions, perhaps with the aid of information explaining the consumer’s rights under the regime, would provide the greatest level of protection for these consumers.

system. A negative effect of increased reliance on direct debit would be the potential for consumers to be charged overdraw fees by their bank if they do not have sufficient funds to cover a payment.

131 Buduls, above n 14.

132 Department of Human Services (Cth), ‘Full Response to the 89 Recommendations of the Independent Review of Centrepay’ (January 2016) 33–34 <<https://www.humanservices.gov.au/corporate/publications-and-resources/independent-review-centrepay/response-recommendations>>.

133 Marise Payne, Minister for Human Services, ‘Changes to Centrepay Deduction’ (Media Release, 22 May 2015) <http://pandora.nla.gov.au/pan/65939/20150915-1714/www.mhs.gov.au/media/media_releases/2015/05/22_05_2015_-_changes_to_centrepay_deductions.html>.

134 Ibid; Department of Human Services (Cth), above n 132, 9, 29–30, 32, 34, 37. Pre-existing deductions are subject to a maximum 12-month grandfathering period.

135 The Consumer Action Law Centre has noted the ongoing problems associated with the different regulatory regime applied to consumer contracts on the basis of the term of a contract: Consumer Action Law Centre, above n 75, 32.

136 Department of Human Services (Cth), above n 132, 33–34.

B Other Reforms

Outside of reforms to Centrepay, reforms are necessary to bring short term and indefinite hire arrangements within the consumer lease regime. There appears little reason for the exclusion from the regime of these contracts and it only provides an incentive for Providers to structure their consumer lease contracts in a manner that would avoid the more stringent consumer lease regulations that apply to contracts of a limited period.¹³⁷ Consumer leases should also be regulated in the same way as other credit contracts. There seems to be no good reason for retaining the regulatory distinction between consumer leases and credit contracts in light of the reforms introduced by the *Enhancements Act*. Finally, a cap should be imposed on rental payments under consumer leases (equivalent to the fee and interest rate caps that have been imposed by the *Enhancements Act* on small amount credit contracts and credit contracts provided by non-bank lenders) as well as a requirement to provide consumers with information about the total cash price of the leased goods.¹³⁸ These reforms are important in regulating both those consumer lease contracts that rely on Centrepay and those that are paid through direct debit facilities. Prescribing information that must be provided to consumers under consumer leases as well as the format for the provision of this information will go some way towards ensuring that vulnerable consumers receive full and accurate information about the contract that they are entering.

In November 2016, the Government set out its response to the *Review of the Small Amount Credit Contract Laws: Final Report*, published by the Commonwealth Treasury Department,¹³⁹ which deals with some of these issues.¹⁴⁰ Reforms to the consumer lease regime will as a result include:

- provision of a cap on the total amount of the payments to be made under a consumer lease of household goods. The cap will be a multiple of the base price of the goods which is determined by calculating the base price for the goods (this is (a) for new goods - the recommended retail price or the price agreed in store where this price is below the recommended retail price); or (b) for second hand goods - this same price minus 10 per cent per annum, up to a maximum of 30 per cent) and adding 4 per cent of the base price for each whole month of the lease term. Where a lease is longer than 48 months, the term will be deemed to be 48 months for the purpose of calculating the cap;
- a cap of 10 per cent of net income in rental payment under consumer leases of household goods so that the total amount of all rental payments cannot exceed 10 per cent of net income in each payment period. Lessors are

137 The Consumer Action Law Centre provides a useful summary of further reforms that may be useful in the context of Indigenous consumers, including improved disclosure requirements: Consumer Action Law Centre, above n 75, 29–33.

138 This proposal was put forward by interviewees from NSW Legal Aid.

139 Commonwealth Treasury, 'Review of the Small Amount Credit Contract Laws' (Final Report, March 2016) <<https://treasury.gov.au/consultation/review-of-small-amount-credit-contracts-final-report>>.

140 Kelly O'Dwyer, Minister for Revenue and Financial Services, 'Government Response to the Final Report of the Review of the Small Amount Credit Contract Laws' (Media Release, 28 November 2016) <<http://kmo.ministers.treasury.gov.au/media-release/105-2016/>>.

entitled to rely on bank statements when determining a consumer's average income (unless there is evidence to suggest that it is inappropriate to do so);

- the DHS has been asked to consider making these caps mandatory for lessors who use the Centrepay System;
- a ban on door-to-door selling of consumer leases;
- a requirement that lessors provide consumers with warning statements to assist consumers make more informed decisions;
- imposition of strict compliance obligations that when breached will result in automatic loss of the right to payment received under a consumer lease; and
- introduction of an 'anti-avoidance' provision to reduce regulatory arbitrage. The aim of the provision is to stop the drift towards the adoption of business models (for instance, indefinite term leases) that avoid stricter regulation.

The reforms suggested, together with ongoing efforts to increase information available to Indigenous consumers and educational services, seek to produce a consumer lease regime that is fairer for vulnerable consumers, particularly Indigenous consumers in remote and rural regions. These consumers have limited access to information, are often some of the most disadvantaged consumers and are vulnerable to the predatory practices of Providers. The reforms discussed above, when introduced, need to be monitored closely and further consideration should be given to excluding consumer leases from the Centrepay regime if the proposed restrictions do not have their intended effect. Therefore, while the proposed reforms to consumer leases are welcome, further consideration needs to be given, once the new regime is in place, to how effective the reforms are in protecting particularly vulnerable groups such as Indigenous communities.