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Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Submissions by Consumer Credit Legal Service (WA) Inc.

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1. Introduction

The Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) takes the opportunity to provide submissions to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**).

About CCLSWA

CCLSWA is well placed to provide the Royal Commission with insight into, and information on, how Western Australian's engage with financial services entities (**FSE**).

CCLSWA is a not-for-profit specialist community legal centre based in the Perth metropolitan area. CCLSWA advises and advocates for consumers on consumer credit issues and Australian Consumer Law related problems.

CCLSWA operates a free telephone advice line service which allows consumers to obtain information and legal advice in the area of banking and finance and consumer law. CCLSWA provides ongoing legal assistance to consumers by opening case files when the legal issues are complex and CCLSWA has capacity to do so.

CCLSWA also provides:

(1) assistance to financial counsellors and other consumer advocates who work closely with disadvantaged and low-income individuals for the resolution of their credit and debt related problems;

(2) community legal education programmes relating to credit and debt issues, and the Australian Consumer Law including financial literacy programs to high school students and select groups within the community;

(3) contributions to relevant policy and law reform initiatives; and

(4) a training and supervision program for law students and graduate volunteer paralegals.

In providing these services, CCLSWA aims to create awareness, knowledge and understanding of consumer issues relating to FSE's, and the Australian Consumer Law.

CCLSWA's mission is to support the community by educating people about, and advocating for, their consumer and financial rights.

In these submissions CCLSWA provides its experience and views and makes recommendations as to how the issues may be resolved.

We have incorporated case studies as examples of our experience. In these case studies, we have not named the FSE's and debt management firms. We have made these entities anonymous to protect our client's confidentiality. We have also made these entities anonymous as some matters are ongoing and others are subject to confidentiality agreements. If the Royal Commission would like to know the name of a FSE or debt management entity or further detail on a particular case study, CCLSWA can approach the relevant client and seek his or her permission for those details to be provided.

Summary of key issues and recommendations

No.	Issue	Recommendations
1	Over provision of credit	a) Inclusion of criminal penalties in legislation for non-compliance with obligations b) 'Name and shame' FSE's in determinations c) FSE's should have mandatory training for their staff on responsible lending obligations d) Increase information FSE's must obtain before providing credit e) Creation of scoring system to create competition between FSE's
2	Disclosure obligations	a) Increase and enforce penalties for non-compliance with disclosure obligations b) Inclusion of compensation in legislation to consumers for non-compliance with obligations c) Creation of scoring system to create competition between FSE's d) FSE's should have mandatory training for their staff on document provision obligations e) FSE's should provide easy to use document requests systems
3	Lack of clarity and information	a) Improve disclosure methods b) Inclusion of ongoing requirements in legislation to inform consumers of changes to their liability
4	Small Amount Credit Contracts	a) Expand protected earnings and include a bright line test b) Creation of a SACC database c) Earlier income assessments d) Increase penalties e) Ban unsolicited offers
5	Debt management firms	a) Ban debt management services
6	Guarantors for small business loans	a) Extend the NCC to protect individual guarantors for small business loans
7	Financial abuse	a) Inclusion of mandatory policies on financial abuse b) FSE's should have mandatory training for their staff on financial abuse c) Creation of a reporting body d) Increase penalties e) Undue influence be incorporated into the legislation and extended f) FSE's to make enquiries and conduct assessments to uncover abuse
8	Mechanisms for redress	a) Increase awareness of dispute pathways

2. Over provision of credit

2.1 The *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**), the *National Credit Code* (**NCC**) which is included in Schedule 1 of the NCCPA, and *National Consumer Credit Protection Regulations 2010* (Cth) (**NCCPR**) make up the consumer protection legislation for credit in Australia.

2.2 The purpose of the NCCPA is to regulate credit industry participants and to protect consumers and the economy by promoting responsible lending. A key aspect of responsible lending is ensuring that consumers are able to meet their repayment obligations when taking out credit.

Our experience

2.3 CCLSWA opened 17 case files in 2017[1] directly related to clients being provided with an unsuitable level of credit. In our experience, the over provision of credit often comes in the form of consumers being provided with loans and credit card limit increases that consumers cannot afford to repay.

2.4 Consumers expect that FSE's will not suggest products to consumers that they cannot afford. In our view, if/when FSE's suggest such products to consumers they may be in breach of NCCPA, s 114(1).

2.5 CCLSWA notes that in the Financial Ombudsman Services' (**FOS'**) submissions to the Royal Commission, FOS has found this to be a systemic[2] and growing issue.[3]

2.6 CCLSWA provides case studies below relating to the over provision of credit.

2.7 Case study – Trish's story

(1) Trish was employed as a management assistant on a full time basis. Despite her full time employment, Trish often found herself in a position of financial hardship and has previously utilised the services of a financial counsellor.

Personal Loan (Lender A)

(2) In 2004 Trish and her then partner obtained a loan from Lender A.

(3) This loan has been rolled over a total of 12 times as at May 2017. The most recent rollover CCLSWA is aware of occurred in November 2015 for the amount of $14,800 solely in Trish's name. This loan was secured over her car.

(4) The balance of the rollover at 19 May 2017 was $13,403.70.

Credit card

(5) In 2007 Trish obtained a credit card from Lender B with a limit of $3,000.00. Over the next few years, the credit limit of the card was gradually increased to $22,000.00 as at 24 December 2015.

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[1] The total number of case files opened in 2017 was 89.
[2] [37].
[3] [60] – [62].

(6) Trish has had overdue payments on her credit card since 4 May 2016. The current balance is over $23,450.88, consisting mostly of interest.

(7) With the assistance of a financial counsellor, Trish negotiated to pay off the remaining balance interest free over a seven year term.

Home loan

(8) In or around November 2012 Trish approached Lender B to apply for a home loan. Trish cannot recall what specific enquiries Lender B made when assessing her home loan application, but she does recall Lender B asking about her expenses.

(9) Trish was approved for the home loan in the amount of $458,802. Under the home loan contract Trish was to pay interest only for the first 5 years with monthly repayments of approximately $1,900.00.

(10) Trish used the proceeds of the loan to purchase a house and land package that she intended to rent out once construction was complete.

(11) Trish was unable to find tenants for the property and without receiving rental income, she was unable to meet her repayments on the loan and fell into default on numerous occasions.

(12) Each time Trish fell into default she was granted a temporary hardship variation but was never offered a long term repayment arrangement.

(13) With the help of a financial counsellor, Trish eventually managed to negotiate time to sell the property in order to pay out the home loan. The house has since sold and the home loan is paid out.

Personal loan (Lender B)

(14) In August 2014 Trish obtained a personal loan from Lender B. Trish was initially seeking $16,000.00 to buy a car but Lender B told her that she was eligible for up to $50,000.00 but that her credit card with Lender B might make it difficult for her to obtain the personal loan.

(15) Lender B offered her the $50,000.00 personal loan on the proviso that part of the proceeds of the personal loan would be used to pay off her credit card debt, her credit card limit would be reduced and her personal loan with Lender A would be paid out. Trish agreed to this and received the $50,000.00 personal loan. $24,000.00 was used to purchase a car, $15,192.26 was applied to the credit card debt and the remainder was used to pay for a holiday.

(16) At the time Trish was making repayments on her personal loan with Lender A of $945 a month.

*Small Amount Credit Contracts (**SACCs**)*

(17) Trish was struggling with multiple debts. When Trish struggled to make repayments she often availed herself of 'payday loans' or SACCs.

(18) Trish obtained various cash advances and payday loans from Lender from its branches in Midland, Perth City and Joondalup. Lender loaned money to Trish 26 separate times between 3 March 2010 and 15 September 2016.

The loans were usually for about $200-$300, the highest obtained was for $900.

(19) Trish also obtained a $3,000.00 loan from another Lender in or around April 2015. Trish applied for another loan from this Lender in April 2016 for $3,900.00. This was a continuing credit contract that she was 'topping up' monthly. The balance of the loan as at 22 March 2017 was $3,217.67.

2.8 Case study – Ryan's story

(1) Ryan was a 25 year old electrician who suffered from a serious gambling addiction. Ryan underwent counselling for his addiction and granted his mother enduring power of attorney to deal with his legal and financial affairs.

(2) Between 2015 and 2017 Ryan obtained at least:

(a) 43 small amount credit contracts, and

(b) three credit cards

from 10 different Lenders in order to fund his addiction.

(3) Many of these SACCs were approved concurrently, with some Lenders aware that Ryan was already servicing up to 12 other SACCs, a credit card debt and a car loan at the time of approval.

(4) The approval of these SACCs was in clear disregard of the presumption that a SACC will be unsuitable for the applicant if they have received 2 other SACCs in the 90 days preceding an application.

(5) In addition to this, two of the credit cards (with combined credit facilities totaling $21,000) were approved by Lender despite Ryan and his mother requesting that the Lender refrain from providing him with any further credit, as it would only be used for gambling.

(6) Based on the documents CCLSWA managed to obtain, it appears that many of these SACC providers failed to conduct assessments of suitability or to take reasonable steps to verify Ryan's financial situation.

(7) Despite Ryan managing to comply with his obligations under these credit contracts, save for the occasional default, CCLSWA is of the opinion that these practices still amount to the over provision of credit.

(8) This over provision of credit has caused both Ryan and his mother considerable financial and emotional stress that could have been easily avoided by compliance with the responsible lending obligations.

Suggestions

Increase deterrence

2.9 While CCLSWA advocates for prevention of over provision of credit, CCLSWA acknowledges the importance of deterrence in prevention. In that regard, CCLSWA recommends that:

(1) the current precautions that are in place to reduce the likelihood of consumers being provided with credit that they cannot afford to repay be rigorously applied; and

(2) further precautions are put in place.

2.10 CCLSWA suggests a further precaution in the form of greater consequences for breaching NCCPA, s 114(1). For example adding a criminal penalty in addition to the existing civil penalty. The greater consequences may incentivize FSE's to comply with current legal obligations.

2.11 CCLSWA also suggests a deterrent in the form of industry ombudsman determinations naming the FSE's. The 'name and shame' element may provide a powerful public relations deterrent that will promote FSE's compliance with the law.

Mandatory training

2.12 FSE's should train their staff on the importance of compliance, and how to comply with responsible lending laws. In order to ensure that FSE's conduct training, it ought to be mandatory and compliance ought to be monitored by a regulator. Breaches of training obligations ought to result in penalties. Further, training obligations ought to be incorporated into FSE's licensing requirements. Training may also assist in changing the culture of FSE's.

Increase information to be obtained

2.13 CCLSWA suggests that FSE's be required to obtain more information from consumers prior to providing credit or credit assistance in order to ensure that the credit is suitable. This may be achieved through an update to ASIC Regulatory Guide 209 Credit licensing: Responsible lending conduct, or by incorporating requirements under ASIC RG 209 into the legislation

2.14 Further, the information obtained by FSE's ought to be assessed more thoroughly. That assessment may take the form of FSE's 'double checking' their own assessments. There may be a system in which high risk circumstances are automatically flagged, and this flag prompts the FSE to make further enquiries of the consumer. High risk circumstances that may lead to a flag being raised include advanced age, low levels of savings or the consumer having a certain number of other credit products.

Incentivise FSEs through scoring system

2.15 Incentives play an important role in prevention of poor behavior. CCLSWA suggests the creation of a publicized scoring system for FSE's. Each FSE would have its own score which reflects its compliance with responsible lending obligations and how it manages disputes relating to same. The scoring system would allow consumers to be easily aware of an FSE's track record in relation to complying with its legal obligations and complaint processes. The scoring system should be managed by one body, for example the regulator. The scores may be based on information such as FSE's compliance with consumer credit law, numbers of complaints made to FSE's, numbers of complaints made to the regulator, how complaints are resolved, customer service and training. Such scores would be prominently displayed on the FSE's website as well as on the regulator's website.

2.16 The score may have the effect of creating competition between FSE's as they may seek to achieve better scores than other FSEs. Perhaps competition and not deterrence may motivate FSE's compliance with the law.

2.17 CCLSWA acknowledges that the scoring system would require the collection and transference of significant data between FSEs and the regulator. However, this may be beneficial as it would allow the regulator to more easily monitor FSEs.

2.18 CCLSWA further acknowledges that this system may not assist vulnerable Australians who may seek out credit from less reputable FSE's in attempts to gain some reprieve from hardship.

3. Disclosure obligations

3.1 The NCC and NCCPA both require FSE's to provide certain information and documents to consumers on request and within a certain time frame.

3.2 In CCLSWA's experience, FSE's often:

(1) do not respond to document requests;

(2) only respond to document requests partially;

(3) respond out of the required timeframe; and/or

(4) respond only after a complaint has been lodged with the FSE's external dispute resolution scheme (**EDR**).

3.3 From CCLSWA's point of view, FSE's provision of documents upon request is crucial as consumers require their documents in order to be aware of their legal position.

Our experience

3.4 CCLSWA made 41 document requests on behalf of clients to FSE's from January 2017 to May 2018 and only 20 of those requests were complied with within the statutory period.

3.5 CCLSWA draws particular attention to the conduct of the big four banks (**Big Bank**) in relation to document requests under the NCC.

3.6 In 2017, CCLSWA dealt with a number of matters in which CCLSWA encountered difficulties when attempting to request and obtain documents from a Big Bank on behalf of clients. CCLSWA refers to three particular matters in which a Big Bank did not respond to document requests within the prescribed statutory period, did not provide all of the requested documents, or made the process for requesting documents under the NCC highly inaccessible. CCLSWA summaries the three cases below.

3.7 Case study – Trish's story

(1) Trish had a number of loans with Big Bank. This included a credit card, a home loan, and a personal loan. Trish was in arrears on each of these loans and approached CCLSWA in February 2017 for assistance.

(2) CCLSWA sent a request for documents to Big Bank on 3 March 2017. While Big Bank did respond to the request within the statutory period, a review of

the documents revealed some inconsistencies which could not be explained by Trish.

(3) CCLSWA made a request for further information on 29 May 2017. Big Bank responded on 1 June 2017 requesting a letter of authority, despite the fact that CCLSWA had previously provided this.

(4) CCLSWA was unable to provide a response to Big Bank within the next two weeks, and on 15 June 2017, CCLSWA received an email from Big Bank stating that they had closed the complaint pending further contact from us. CCLSWA contacted the designated representative, who was unable to locate our document request, or the relevant documents that CCLSWA had provided.

(5) CCLSWA emailed the relevant documents for a second time on 15 June 2017, and sent follow up emails to Big Bank on 3 July and 11 July 2017. CCLSWA also left a voicemail with the designated representative on 24 July 2017. CCLSWA received no response to any of our correspondence.

(6) CCLSWA lodged a complaint with Big Bank's Internal Dispute Resolution Department on 2 October 2017. Big Bank responded on 3 October 2017 with documents regarding the home loan, but not the credit card or personal loan.

(7) CCLSWA then lodged a complaint with FOS.

3.8 Case study – Jill's story

(1) Jill had a joint home loan with her ex-spouse, and approached CCLSWA to advise on whether Big Bank had breached their obligations by providing top ups to the loan without her permission.

(2) CCLSWA made a request for documents to Big Bank on 26 May 2017, allowing Big Bank the statutory 30 days to provide the requested documents. Big bank did not acknowledge or respond to the request within this period. CCLSWA made a follow up request on 3 July 2017, which allowed 10 days to supply the documents. Big Bank did not provide the documents.

(3) CCLSWA called Big Bank's customer relations team on 17 July 2017, explaining the requests CCLSWA had made concerning the home loans. Big Bank transferred us to the home loans team, who advised us that they were not authorised to release documents. CCLSWA were then directed to the "productions department", who could only be contacted by email. Big Bank also informed us that all requests for documents must be made using the form on the Lender's website, titled "request for access to personal information under the Australian Privacy Principles".

(4) Following this conversation, CCLSWA sent a further email to Big Bank requesting that the documents be provided no later than 18 July 2017. CCLSWA advised Big Bank that if they did not provide the documents, CCLSWA would lodge a dispute with the FOS. Big Bank did not provide the requested documents.

(5) CCLSWA raised a FOS dispute on 25 July 2017. Big Bank provided documents on 8 August 2017 and 16 August 2017.

3.9 Case study - Emilia's story

(1) CCLSWA acted on behalf of Emilia in relation to a dispute with Big Bank regarding the surrender of a property. In doing so, CCLSWA discovered that Emilia also had a credit card with Big Bank, which was in arrears. However, Emilia had disposed of the credit card and did not have any details.

(2) CCLSWA sent a request to Big Bank for information regarding Emilia's credit card on 4 August 2017, and for various documents that Big Bank should hold in relation to the account. CCLSWA received a generic email response on the same day.

(3) Big Bank did not provide a response within the statutory period. On 13 November 2017, CCLSWA sent a follow up email to Big Bank. CCLSWA received no subsequent correspondence regarding the document request.

3.10 As can be seen in the case studies above, Big Bank has not complied with the requirements of the NCC regarding document requests. Big Bank has not only delayed excessively beyond what is contemplated by the NCC, but have in some instances not provided the requested documents at all. It should be noted that each of these matters were managed by three separate solicitors and spanned a variety of issues, demonstrating that this is not an isolated issue.

3.11 These issues continued into 2018. CCLSWA made two separate document requests in January and April 2018 on behalf of two clients to a Big Bank. The requests were made via the email address available on FOS' website under Big Bank's dispute resolution contact details. Big Bank responded to the document requests by requesting that CCLSWA send the document requests to another email address (not provided on the FOS website) in relation to both requests. In relation to one of the two requests, Big Bank did not accept CCLSWA's authority to act for our client and sought payment for the document request.

3.12 We detail one of the document requests referred to in paragraph 3.11 above, in which:

(1) CCLSWA requested documents from Big Bank on behalf of Ryan by letter dated 14 December 2017. CCLSWA provided Big Bank with our standard authority to act.

(2) Big Bank wrote to CCLSWA on 11 January 2018 and stated that:

(a) as the customer authority provided was generic and not addressed expressly to Big Bank, Big Bank was not under any compulsion to provide any of the information as requested; and

(b) the costs incurred in compliance of CCLSWA's request would be $47.50 and take roughly 10 business days to complete.

(3) CCLSWA wrote to Big Bank on 25 January 2018 and asked for clarification on Big Bank's response.

(4) Big Bank wrote to CCLSWA on 29 January 2018 stating that it 'reassessed' the request and would accept CCLSWA's authority. A portion of the requested documents were provided on that same date.

(5) Big Bank continued to contact our client directly, even though our client was represented by CCLSWA.

(6) CCLSWA again wrote to Big Bank on 15 February 2018 and requested the remainder of the documents.

(7) Big Bank did not comply with the document request and CCLSWA lodged a FOS complaint on 1 March 2018.

3.13 The case studies provide clear examples of FSE's non-compliance with document provision obligations.

3.14 The case studies also show how laborious the document production process can be. Consumers are unlikely to know that they can, or have the will to, persist when up against an FSE which is denying them of their legal rights to obtain copies of their documents.

3.15 The case studies also show FSE's treatment of documents requests. CCLSWA suggests that FSE's treat document requests with disregard to their legal obligations and consumers' rights and are culturally unhelpful in providing documents to consumers and consumer advocates.

3.16 CCLSWA acknowledges that the lack of compliance with document requests is likely to be a result of FSE's staff not knowing what to do (see case study – Jill's story at paragraph 3.8 above). However we suggest FSE's staff not knowing how to handle document requests and of the FSE's legal obligations are indicative of FSE's disregard towards their legal obligations.

3.17 Occasionally when documents are requested from FSE's under the NCC and NCCPA, the FSE's do not provide the documents as required but instead question the purpose of the request and what claims our client purports to have against the FSE. These unnecessary queries are unrelated to our client's right to obtain the documents requested and delay the client's access to advice. Further, consumers may not be aware of what potential claims they may have without considering the documents requested.

Suggestions

Increase deterrence

3.18 As it stands FSE's non-compliance with requirements to provide information and documents does not automatically result in a penalty, or to compensation to the consumer. Some document request provisions of the NCCPA and NCC allow for criminal penalties and other provide civil penalties for non-compliance with document provision requirements. These penalties are rarely imposed. The lack of repercussions (except those connected to the cost of an EDR dispute being raised) connected with a lack of compliance with information or document requests may be a factor in FSEs' lack of compliance.

3.19 We note that consumers may seek compensation for financial loss or non-financial loss caused by the FSE's non-compliance. In CCLSWA's experience, non-financial loss is difficult to both quantify and obtain. Financial loss is uncommon. As such, EDR rarely award compensation for the non-provision of documents.

3.20 CCLSWA suggests the penalties for breaches of the NCC and NCCPA in relation to information and document requests ought to be bolstered and enforced.

3.21 CCLSWA suggests that the NCC and NCCPA be amended to incorporate compensation to consumers for breaches of the NCC and NCCPA in relation to information and document requests.

3.22 These changes may reinforce FSE's perceived importance of these provisions.

Incentivize FSE's through scoring system

3.23 In addition to the introduction of penalties for non-compliance with obligations to provide information and documents, regulators should create and publish a score for FSE's compliance with their obligations. Please see CCLSWA's comments in this regard in paragraphs 2.15 to 2.16 above.

Mandatory training

3.24 CCLSWA also suggests that FSE's train their staff on the FSE's legal obligations and the importance of compliance with the information and document request provisions in the legislation. Please see CCLSWA's comments in this regard in paragraph 2.12 above.

Document request system

3.25 CCLSWA suggests that FSE's be required to set up an online information and document request system. Under this system, consumers would be able to input their details and the FSE's online system would generate a list of what documents the consumer is entitled to at law. The consumer should then be able to select which documents he or she would like copies of. This system would remove the following steps for the consumer:

(1) finding the relevant contact person or team at the FSE to address the request to,

(2) finding out what documents the consumer is entitled to,

(3) formally setting out a request in writing, and

(4) sending that request.

3.26 Many of these steps form barriers to the consumer as they may not be aware of whom to contact or what information or documents they are entitled to. Consumers may also have difficulty writing requests. This system would make it easier for consumers to request documents from the FSE's and be more aware of their rights.

4. Lack of understanding and information

Consumers' lack of understanding of their credit contracts

4.1 FSEs do not have a clear obligation to ensure that their customers understand the terms and conditions of the agreements between them.

4.2 In CCLSWA's view, if FSEs provide unclear terms and conditions and do not take adequate steps to ensure that their customers understand these terms and conditions, they may be failing to fulfil their responsible lending duties under the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), Part 2,

NCCPA and ASIC's Regulatory Guide 209 Credit Licensing: Responsible Lending Conduct.

4.3 FSE's that have signed up to the Banking Code of Practice may also be obliged to explain the contents of written information about banking services *when asked* and provide information to consumers in plain language.

4.4 Even if FSE's comply with the legislation and regulatory and industry guidance by providing information in plain language and explanations when asked, there is no requirement to ensure that consumers *understand* their rights and obligations under their credit contracts.

4.5 Consumers' lack of understanding of their rights and obligations restricts their ability to interact with FSE's in an informed matter and assert their rights.

Our experience

4.6 In CCLSWA's experience, many consumers do not understand the terms and conditions of their credit contracts. CCLSWA regularly advises clients:

(1) on the meaning of the terms and conditions of their contracts and related documents; and

(2) that even if they did not understand the terms and conditions of their credit contracts, they are generally bound by the terms and conditions agreed to.

4.7 CCLSWA sets out case studies below demonstrating examples of where our clients have been unaware of the terms and conditions governing their contractual relationships with FSEs.

4.8 Case study - Catherine's story

(1) Catherine believed that her and her late husband Bob had a joint personal loan with Lender.

(2) After Bob passed away, Catherine found out that what she thought was a personal loan was in fact a reverse mortgage. Catherine was unaware of her contractual relationship with Lender.

4.9 Case study - Beverly's story

(1) Beverly took out a $650,000 home loan from Lender. Beverly was 68 years old when she took out the loan. The loan was for a term of 10 years, interest only, and required a final lump sum payment of $653,869.90 on 20 January 2019.

(2) Beverly was not aware of the lump sum payment requirement and was unaware of how payments were being made and did not understand why she received a default notice in December 2016.

Suggestion

Disclosure methods

4.10 CCLSWA endorses the concept of innovative forms of disclosure to consumers that may increase the likelihood that consumers understand their rights and obligations under their credit contracts.[4]

4.11 CCLSWA suggests that FSE's institute disclosure methods that will improve consumers' understanding of the terms and conditions they are agreeing to.

4.12 However, CCLSWA cautions against disclosure methods in the form of 'click-through' systems in which consumers move through sequential steps and at each step acknowledge their understanding of a particular aspect of the credit contract in order to obtain credit. Such a system may not be effective, as consumers may simply click through without understanding the requirements in order to obtain credit. This system may also be able to be used against such consumers as FSE's may rely on the fact that the consumer confirmed that he or she understood the contract when this may not be true.

FSE's not providing consumers with information affecting their credit contracts

4.13 CCLSWA advises consumers who either:

(1) are joint parties to a credit contract; or

(2) guarantee obligations under a credit contract, and

have not been informed about changes to related credit contracts. These changes often adversely affect those clients.

4.14 These clients are often not legally entitled to information relating to credit contracts that affect them. CCLSWA acknowledges that privity of contract stops our clients from being informed of actions taken by parties to the loan(s) to which they are not a party. However, CCLSWA considers that FSE's who do not inform co-borrowers or guarantors of changes to loan accounts may be in breach of their obligation to "*act fairly and reasonably towards* [consumers] *in a consistent and ethical manner*".[5]

Our experience

4.15 CCLSWA sets out case studies below demonstrating examples of where clients have not been provided with information that affects their liability under their contract with a FSE.

4.16 Case study - Hope's story

(1) Hope provided a guarantee to Lender to secure her daughter and son-in-law's home loan from Lender. The loan was for $77,000 and Hope's guarantee was limited to $77,000. Hope's guarantee was secured by her residential home.

(2) Hope did not receive legal advice before entering into the guarantee, nor was she supplied with documents as required under the Banking Code of Practice.

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[4] Financial System Inquiry Final Report (November 2014) *Commonwealth of Australia,* page 213.
[5] Banking Code of Practice, s 3.2.

(3) Hope's daughter and son-in-law had another loan account with Lender which Hope was unaware of (the **Other Loan**). Hope's daughter and son-in-law provided a mortgage to Lender securing their loans.

(4) Hope's daughter and son-in-law's property was sold by Lender in around April 2017 for approximately $328,000. Lender applied sales proceeds from the sale of the daughter and son-in-law's property to the debt due under the Other Loan. There were no sales proceeds left to apply to the debt under the $77,000 loan which Hope guaranteed.

(5) Hope received correspondence from Lender's lawyers asking her to pay the shortfall under the guarantee.

(6) Hope requested documents from Lender so that she could understand her liability under the guarantee, but Lender did not not provided them.

(7) Hope was unaware of:

(a) her liability and obligations under the guarantee; and

(b) the Other Loan; and

(c) how the Other Loan that could affect her liability under the guarantee.

(8) This dispute is currently in progress.

4.17 Case study - Anastasia's story

(1) Anastasia and her then husband took out a home loan and opened an offset account with Lender in 2005. The loan account and offset account were in their joint names.

(2) Anastasia and her ex-husband separated in 2015. Anastasia asked Lender not to make any changes to the joint bank accounts. Anastasia's ex-husband subsequently asked Lender to make changes to the joint accounts and Lender made the changes requested.

(3) Anastasia asked Lender for information on the joint bank accounts. Lender refused to provide Anastasia with copies of information or documents connected with the joint bank accounts and cannot make changes to the bank accounts.

(4) CCLSWA lodged a document request on behalf of Anastasia. The document request portion of the dispute has been resolved.

4.18 Case study – The Alfred's story

(1) Ms Alfred was married to Mr Alfred for 12 years and they took out a joint loan in 2006. Ms Alfred disclosed that Mr Alfred was verbally abusive and aggressive throughout the relationship.

(2) After the relationship dissolved, Ms Alfred agreed to let Mr Alfred keep the property if he continued to pay off the mortgage. To Ms Alfred's surprise, she was served with a Writ of Summons because the mortgage was in default. Ms Alfred was unaware that Mr Alfred had not being making mortgage repayments.

(3) Mr Alfred had obtained multiple financial hardship variations but failed to comply with them. As Ms Alfred was a co-borrower, she was jointly and severally liable for the loan.

(4) The Lender took action against Ms Alfred for a debt due under the credit contracts. Ms Alfred contacted many community legal centres in regards to the Writ of Summons, but was referred to multiple centres. CCLSWA was only able to advise Ms Alfred to sell the property and pay the shortfall debt, as there were no other defences available at law. Ms Alfred could not afford to go to the Family Court to get a court order to remove her name from the mortgage.

(5) If Ms Alfred had been aware of Mr Alfred's hardship applications, and the likelihood of his default she may have been able to take precautionary steps.

Suggestion

Ongoing requirement to inform

4.19 CCLSWA suggests that the law be amended to require FSE's to:

(1) inform persons significantly affected by changes to credit contracts to which they are not a party of those changes to that credit contract, and

(2) provide copies of documents that directly and significantly affect a consumers obligations and liabilities under their credit contract to that consumer.

4.20 CCLSWA notes that one of the amendments that could assist in remedying this issue is expanding FSE's obligations to provide guarantors with documents *before* a guarantee is entered into,[6] to also *after* the guarantee is entered into.

5. Small Amount Credit Contracts

5.1 CCLSWA regularly advises, and advocates for disadvantaged consumers who have been provided with unsuitable SACCs to their serious detriment.

5.2 It is unclear whether the Royal Commission is considering issues in relation to SACCs. We include submissions on SACCs as in our view FSE's that provide SACCs are required to hold an Australian Financial Services licence under *Corporations Act 2001* (Cth), section 911A and thus are '*financial services entit*[ies]' as defined in the Terms of Reference. We also note that large FSE's may have interests in, and/or fund SACC lenders.[7]

5.3 Consumer credit legislation provides consumer protections directed specifically at SACCs. NCCPA, section 133CC(1) provides protections for consumers who derive at least 50% of their gross income from Centrelink. NCCPR, regulation 28S(3) provides that the total amount of repayments in each cycle of income must not

[6] Banking Code of Conduct, s 31.4.
[7] Andy Kollmorgen, 'Short-term loan industry continues to grow' CHOICE (online) 1 July 2014 <https://www.choice.com.au/money/credit-cards-and-loans/personal-loans/articles/payday-lenders>; Peter Ryan, 'Payday lenders Cash Converters, Money3 hit as Westpac cuts off finance', ABC News (online) 5 August 2015 <http://www.abc.net.au/news/2015-08-05/payday-lenders-hit-as-westpac-cuts-off-finance/6673692>.

exceed 20% of gross income. In CCLSWA's experience, FSE's do not abide by this law.

Our experience

5.4 CCLSWA's experience suggests that the existing SACC laws have failed to be effective in curbing the growth of the payday lending industry and the frequency of consumers experiencing debt spirals.

5.5 The high demand for SACCs is, in most circumstances, driven by members of a low socio-economic background. SACCs appear to have become a necessary evil for many consumers who do not have access to alternative forms of credit. High levels of repeat borrowing appear to be causing financial harm as consumers try to borrow themselves out of debt.

5.6 CCLSWA believes that financial literacy is vital in facilitating community awareness of the true nature of SACCs, namely that while a SACC is generally promoted as being a one-off short-term solution, the reality is that SACCs are highly likely to exacerbate a consumer's financial position, as opposed to improving it.

5.7 CCLSWA has observed that repeat borrowers are at the greatest risk of debt spiraling and concludes that these consumers are those must vulnerable to mismanagement at the hands of FSEs, as evidenced by the case studies below.

5.8 Case study – Christina's story:

(1) Christina is a 74-year-old indigenous Australian whose income is derived from a Centrelink pension and a superannuation pension. Christina experiences crippling financial difficulty. Christina has extensive expenses, due primarily to her role as legal or de-facto guardian to eight grandchildren. She lives in government housing and struggles to manage her living expenses while taking care of her three children and eight grandchildren.

(2) All the above facts were known to Christina's Lender. Between March 2012 and October 2014, Lender approved 19 SACCs and advanced a total of $9,800 to Christina.

(3) Christina made repayments totaling $13,000 on these SACCs.

(4) In CCLSWA's view, all 19 SACCs were unsuitable for Christina pursuant to the NCCPA. Christina could not afford the repayments without suffering substantial hardship. For two of the SACCs, Lender failed to obtain any form of supporting documentation before it approved and advanced the funds to Christina. Lender ostensibly discharged its obligation to make reasonable enquiries into Christina's financial position for the remaining 17 SACCs.

(5) In CCLSWA's view, Lender's request for and purported review of the documents did not amount to a verification of Christina's financial position at the time of each SACC loan.

(6) Lender also provided Christina with five personal loans in addition to the 19 SACCs, between January 2011 and July 2013.

(7) In CCLSWA's view, in four of these five loans, Lender breached their responsible lending obligations. The loans were also unjust transactions.

5.9 Case study – Colin's story

(1) Colin was a recovering drug addict and was unemployed. Colin instructed us that he entered into SACCs with eight lenders. Colin also had a credit card debt with a separate Lender.

(2) Colin defaulted on the SACCs and his credit card.

(3) CCLSWA advised Colin that there may have been breaches of the NCC.

(4) After CCLSWA engaged with the SACC providers, six of the SACC providers (or their assignees) and the credit card lender waived Colin's debt. One of the SACC providers stated there was no outstanding amount and the other SACC provider did not respond to our initial document request and so we could not advise Colin in relation to that SACC.

5.10 CCLSWA also refers you to Trish's and Ryan's stories at paragraphs 2.7 and 2.8 respectively above.

Suggestions

Expansion of protected earnings and bright line test

5.11 NCCPA, section 133CC provides protections for consumers who derive at least 50% of their gross income from Centrelink. NCCPR, regulation 28S(3) provides that the total amount of repayments in each cycle of income must not exceed 20% of gross incomes (this is referred to as the **protected earnings amount**).

5.12 CCLSWA supports:

(1) expanding the protected earnings amount to ensure that no consumer can devote more than 10% of their gross income to SACC repayments; and

(2) extending the protected earnings amount to cover all consumers, not just those who are on Centrelink.

5.13 NCCPA, s 118(3A) contains a rebuttable presumption that a loan is presumed to be unsuitable if the consumer is in default under another SACC, or in the 90-day period before the assessment, the consumer has had two or more other SACCs.

5.14 If the suggestions in paragraph 5.12 are implemented, CCLSWA suggests that the rebuttable presumption in NCCPA, s 118(3A) be replaced with a bright line test. The bright line test would have the effect that if:

(1) a consumer is in default under another SACC, or

(2) in the 90-day period before the assessment, the consumer has had two or more other SACCs,

then that consumer is deemed to be only able to comply with their obligations under a SACC with substantial hardship.

5.15 A bright line test is a clearly defined standard of what a SACC lender can, and cannot do. This is superior to a rebuttable presumption from a regulatory perspective.

5.16 In theory, a bright line test would go significantly toward reducing the number of consumers trapped in debt spirals. However, CCLSWA acknowledges that there remains governance and regulatory compliance concerns that must be dealt with.

5.17 Further, many consumers are heavily reliant on a consistent stream of SACCs to fund weekly expenditure.[8] For this class of consumer, a bright line test in place of a rebuttable presumption may have negligible material impact. Thus, the expansion of the protected earning amount is not the only solution.

Database system

5.18 CCLSWA strongly believes that SACC laws can be made significantly more effective if they are supplemented by a system of oversight, enforcement and community education. CCLSWA recommends that a SACC database be created to provide a system of supervision for payday lending.

5.19 A regulated SACC database has been successfully implemented in numerous jurisdictions in the United States and a regulated SACC database was supported by a number of credit providers, consumer advocate groups, and ASIC.

5.20 A regulated database would serve to strictly enforce the proposed bright line test, and provide important governance and oversight to all regulated SACC lenders.

5.21 CCLSWA has assisted numerous clients who were and are in severe financial hardship due to debt spirals directly resulting from predatory lending. In the majority of these cases, a SACC database is highly likely to have ensured compliance with responsible lending, where instead; the clients were merely asked whether they had two or more SACCs on foot. This behaviour suggests a clear and consistent pattern of avoidance, and exemplifies the ability of credit providers to circumvent responsible lending obligations.

5.22 CCLSWA acknowledges the cost to the industry,[9] however CCLSWA avers that the benefits and protections consumers would experience as a result of a regulated database, far outweigh the potential costs to FSEs.

Timing of assessment

5.23 In CCLSWA's view, FSEs should be required to make the income assessment some time prior to a consumer entering into the SACC, as opposed to "*at the time*" the SACC is entered into.[10] This measure should be taken to ensure true regard is given to the consumer's purpose, objectives and financial position.

Increase deterrence

5.24 NCCPA, section 133CC is both a civil and criminal penalty provision. CCLSWA supports strengthening this provision by increasing the penalty units to be imposed upon a breach to deter irresponsible lending, alleviating some concerns about the efficacy of a rebuttable presumption.

[8] CCLSWA notes that credit cards may be used in a similar way.
[9] Review of the small amount credit contract laws – Final report (March 2016) *The Treasury, Commonwealth of Australia*, p 28-29 https://static.treasury.gov.au/uploads/sites/1/2017/06/C2016-016_SACC-Final-Report.pdf.
[10] NCCPA, s123.

Ban on unsolicited offers

5.25 SACC providers should be prohibited from making unsolicited SACC offers to current or previous consumers.

6. Debt management firms

6.1 In CCLSWA's view, debt management firms fall under the Royal Commission's purview as they "*act or hold*" themselves out as "*acting as an intermediary between borrowers and lenders"* and are thus FSE's under the Terms of Reference.

6.2 While some debt management firm conduct may be captured under the ASIC Act, debt management firms' behavior is not specifically regulated.

6.3 As debt management firms' behavior is unregulated there is a lack of access to justice for aggrieved consumers. The lack of formal alternative dispute resolution pathways reduces consumers' ability to resolve disputes with debt management firms. The only mechanisms for recourse available to our clients are to:

(1) make complaints to the businesses (which in our experience is generally ineffective);

(2) make complaints to a regulator such as the Australian Securities and Investments Commission (**ASIC**), the Australian competition & Consumer Commission (**ACCC**) or the Department of Mines, Industry Regulation and Safety, Consumer Protection division;

(3) commence court action; or

(4) wait for the debt management firm to bring proceedings for debts due and defend those proceedings.

6.4 These mechanisms for recourse are either unlikely to resolve the dispute or are not simple, fast or cost effective.

Our experience

6.5 CCLSWA routinely advises clients in relation to debt management firms. Between 1 January 2016 and 1 June 2018, CCLSWA advised 154 Western Australian consumers in relation to credit and debt management.

Spotlight on debt management firms

6.6 In May 2017 alone, CCLSWA took instructions from three separate clients who are in dispute with the same debt management firm (the **Firm**) . Two of the three clients instructed us that they received letters from numerous debt management firms (including the Firm) around the time the FSE's commenced court proceedings against them.

6.7 In the period between 7 May 2014 and 16 November 2017, CCLSWA provided telephone advice and representation services to at least 10 clients in relation to disputes with the Firm.

6.8 The Firm purports to assist consumers to stop the FSE from repossessing their homes, by assisting them in lodging complaints, negotiating and refinancing.

6.9 Case study – Sophia's story

(1) Sophia took out a home loan with a Lender. The loan was secured by a mortgage over Sophia's property. Sophia defaulted under her home loan and mortgage and was subject to mortgage default proceedings by the Lender. Sophia was under financial stress. Sophia was approached by the Firm and signed a cost agreement with it on 13 April 2016 for the provision of services. The services were intended to stop repossession of Sophia's home.

(2) The Firm registered an absolute caveat on the certificate of title of Sophia's property. The Firm continues to hold an absolute caveat on the certificate of title of Sophia's property.

(3) Sophia negotiated a resolution with the Lender on her own to bring an end to their dispute. The Firm did not provide her with any services.

(4) Sophia contacted the Firm to inform it that she no longer required its services. Sophia was subsequently repeatedly contacted by the Firm to the extent that she blocked all calls from the Firm.

(5) The Firm both took and attempted to take funds from Sophia's bank account, unauthorised by her. As a result of these transactions Sophia lost $304.80 in withdrawals and dishonour fees. Sophia closed her bank account to stop further unauthorised withdrawals.

6.10 Case study – Charlie's story

(1) Charlie took out a home loan with a Lender. The loan was secured by a mortgage over her property. Charlie defaulted under her home loan and mortgage and was subject to mortgage default proceedings by the Lender. Charlie was under financial stress. Charlie was approached by the Firm.

(2) Charlie signed a cost agreement with the Firm on 13 December 2016 for the provision of services. The services were intended to stop repossession of Charlie's home. The Firm did not provide Charlie with any services. The Firm registered an absolute caveat on the certificate of title of Charlie's property.

(3) The Firm issued a tax invoice to Charlie dated 23 February 2017. In this invoice the Firm purported to charge her for caveat preparation and withdrawal fees. She requested a fee breakdown but was not provided with one. Charlie has not paid this invoice.

(4) Charlie resolved her dispute with the Lender herself by selling her property. The Firm's caveat stopped settlement from taking place on 20 March 2017

as scheduled. Charlie applied to Landgate for the Firm's caveat to be withdrawn. The caveat subsequently lapsed and settlement of the property was effected on 5 May 2017.

(5) On 28 August 2017 the Firm provided CCLSWA with a copy of an invoice dated 28 August 2017. Charlie has not paid this invoice. Charlie suffered loss totalling about $7,802.44, comprised of caveat withdrawal fees and delayed settlement costs.

6.11 Case study – Susana's story

(1) Susana guaranteed a home loan taken out by her son. Susana's son defaulted on his home loan repayments. Susana was under financial stress and could not make payments under the guarantee. The Lender commenced proceedings to (among other things) repossess Susana's property. Susana was approached by the Firm and initially believed that the Firm was the Lender's lawyers.

(2) The Firm provided Susana with a cost agreement in both her name and her son's name dated 22 July 2016, this agreement was unexecuted. The Firm provided Susana with another cost agreement in only her name and this was executed on 25 March 2017. The Firm registered an absolute caveat on the certificate of title of Susana's property. The Firm continues to hold an absolute caveat on the certificate of title of Susana's property.

(3) The Firm issued a tax invoice to Susana dated 7 July 2017. In this invoice, the Firm purported to charge Susana for fees under the first, unexecuted agreement.

(4) The Firm did not provide Susana with any services. The Firm may have made a settlement offer to the Lender on behalf of Susana under which Susana would refinance her son's loan. Susana was not in a position to do so. Any services that were arguably supplied by the Firm CCLSWA says were done so in breach of the contractual provision to provide services with "all due care, skill and attention" and in breach of the implied warranty to provide "financial services" with "due care and skill".[11]

6.12 CCLSWA lodged complaints in relation to the Firm's conduct with the:

(1) ASIC dated 30 July 2015;

(2) Supreme Court of Western Australia regarding access to writs dated 25 January 2018; and

(3) Legal Practice Board of Western Australia dated 31 January 2018, and

(4) Department of Mines, Industry Regulation and Safety, Consumer Protection division dated 30 April 2018.

[11] ASIC Act, s 12ED.

6.13 CCLSWA considers that the Firm's actions are predatory, misleading and deceptive. The Firm approached our clients at a highly stressful time. The Firm misrepresented the outcomes that it could achieve. It misrepresented our client's ability to manage the dispute themselves or utilize free services to obtain the same outcome. Further, the Firm did not supply the services set out in the agreements, and yet still invoiced the consumers.

6.14 When CCLSWA requested documents from the Firm the responses were incomplete and delayed (if a response was received at all). When CCLSWA wrote to the Firm with disputes in relation to their conduct towards our clients CCLSWA did not receive any response. There is no mechanism by which to force a response from debt management firms.

Spotlight on credit file "cleaners"

6.15 CCLSWA also advises clients who are approached by debt management firms who claim to the in the business of credit file "cleaning".

6.16 CCLSWA's view is that credit file cleaning firms cannot provide consumers with any services that the consumers cannot perform for themselves or obtain free assistance from a community service.

6.17 Case study – Hugh and Rebecca's story

(1) Hugh and his wife Rebecca each had one listing on their respective credit files. Both listings were due to be removed shortly due to five years having nearly elapsed since the records were made.

(2) In August 2015 Hugh called "Credit File Cleaners" (**CFC**) and told CFC that he only wished to engage it to remove the listings on his and his wife's credit files. Hugh agreed to pay $1,095 for himself and $1,095 for his wife if the listings would be removed. Hugh and Rebecca each entered into service contracts with CFC.

(3) An hour later on the same day CFC told Hugh that the credit files were now clean and that payment was required in full or the files would be cancelled. Hugh told CFC that he could only afford to pay it $400. CFC told Hugh that he must pay the whole amount within two hours and that he could borrow the money from friends, co-workers or anyone else.

(4) On the same day, Hugh paid CFC $400. CFC called Hugh and told him that if he did not pay the balance CFC would 'shred' his files, Hugh must pay the balance and CFC would engage a debt collection agency.

(5) On 26 August 2015 CFC issued a demand to Hugh for $1,790. On the same day CFC called Hugh and demanded payment suggesting again he could borrow money to pay it. CFC contacted Hugh and Rebecca on 27 and 29 August 2015 in relation to the debt.

(6) CFC did not remove the listings from Hugh and Rebecca's credit files. The services under the service contract did not include the removal of the listings on Hugh and Rebecca's credit files. The services under the service contracts were not provided.

(7) CCLSWA advised Hugh that CFC may have breached the Australian Consumer Law (Schedule 1 of the *Competition and Consumer Act 2010* (Cth)). CCLSWA wrote a letter of demand to CFC and a follow up letter. CFC did not engage with CCLSWA.

(8) CCLSWA assisted Hugh in making a complaint to the ACCC. The ACCC referred the complaint to ASIC. ASIC sought affidavit from our clients to assist in the prosecution of CFC group. CFC offered Hugh and Rebecca a refund before affidavits were provided. Hugh and Rebecca accepted the refund and did not provide ASIC with an affidavit.

Suggestion

Banning debt management services

6.18 CCLSWA suggests that companies purporting to offer services to consumers in relation to managing their debts where the consumers are able to take steps to manage their debts themselves or with free assistance be prohibited.

6.19 Debt management firms purport to provide services that consumers are able to do themselves free of cost or are able to obtain assistance in doing so from free community services. The harm that is done by debt management firms is vastly outweighed by any potential utility the services may provide.

7. Guarantors for small business loans

7.1 In CCLSWA's opinion there is inadequate consumer protection surrounding individuals who provide guarantees for small business loans. These individuals are consumers who are not connected with the business but receive no consumer protection under the NCC or NCCPA. Individual consumers who provide guarantees for small business loans are inadequately protected under common law, equity and statute.[12]

7.2 The guarantors have usually agreed to provide a guarantee because of their relationship with the borrower, even though they are not involved in the business. Case law suggests that a recurring and significant theme in guarantee transactions is the personal relationship between the borrower and guarantor.[13] These cases predominately involve the relationships that exists between:

[12] *Australian Securities and Investment Commission Act 2001* (Cth).
[13] *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *Barclays Bank plc v O'Brien* [1994] 1 AC 180; *Peters v Commonwealth Bank of Australia* [1992] ASC 57; A*kins v National Australia Bank Ltd* (1994) 34 NSWLR 155.

(1) parent and adult child; and

(2) de facto or married couples.

7.3 As the law currently stands, such individual guarantors may seek to deny liability on the basis that they were unduly influenced into entering the loan contract as guarantors; or there was some form of unconscionable conduct when they entered into the loan contract as guarantor.

7.4 A brief discussion of the current general law protections available follows.

7.5 Undue Influence

(1) A court may set aside a guarantee if it can be established that the guarantor was unduly influenced into entering into the loan contract.

(2) Undue influence occurs when one party (the dominant party) has greater power than the other party (the weaker party) and the dominant party uses its power to influence the acts of the weaker party to the extent that the weaker party's actions are not in the fullest sense of the word, his or her free, voluntary acts.

(3) As the law currently stands, to establish undue influence there are two elements that need to be established:

(a) there is a relationship capable of giving rise to the necessary influence; and

(b) that influence was improperly used.

(4) Given that the FSE is unlikely to be the dominant party, the FSE must usually be shown to have known or ought to have known about the undue influence exerted on the weaker party by the dominant party.

(5) To demonstrate that there was undue influence, it must be shown that either:

(a) the dominant party had the capacity to improperly influence the weaker party, that in fact occurred and the transaction was a result of that influence;[14] or

(b) there was a presumed relationship of influence, either as a matter of law or proof of the existence of a special relationship of influence.

(6) Currently, no presumption of a relationship of influence exists for:

(a) parent and their adult child (where the child is the dominant party) regardless of the degree of dependency;[15] and

(b) husband and wife.[16]

(7) Thus, if a parent or spouse wishes to prevent the FSE from enforcing the loan or guarantee, the parent or spouse must demonstrate that there was actual

[14] *Johnson v Buttress* (1936) 56 CLR 113 at 134.
[15] *Whereat v Duff* [1972] 2 NSWLR 147 (CA).
[16] *Yerky v Jones* (1938) 63 CLR 649.

undue influence by the dominant party and that the FSE had notice of the undue influence.

7.6 Unconscionable conduct

(1) A court may set aside a guarantee if the guarantor establishes that there was unconscionable conduct by the FSE in obtaining the guarantor's consent to the giving of the guarantee.

(2) Under the common law, the guarantor must first show that:

(a) the guarantor suffered from some special disability or was in some special situation of disadvantage (this may be because of age, sickness, mental incapacity, illiteracy or lack of education);

(b) the FSE knew or ought to have known of the existence of that condition or circumstance and of its effect on the ability of the guarantor to make a judgment as to the guarantor's own best interests; and

(c) the FSE takes unfair advantage of the FSE's superior position by entering into the transaction.

(3) Once the guarantor proves the above elements, the onus passes to the FSE to establish that the transaction in the circumstances was fair, just and reasonable.

7.7 In the context of couples, the Australian Law stems from the High Court's decision in *Yerkey v Jones* (1939) 62 CLR 649. The principle of 'special wives' equity' in *Yerkey v Jones* gave married women seeking to set aside guarantees special treatment, when compared to other guarantors; in situations where the husband procures the wife's consent. The principle operates as a rule of evidence, placing the burden on the creditor to establish that the guarantor wife has a full understanding of the transaction.

7.8 The High Court affirmed the rule in *Garcia v National Australia Bank* (1998) 194 CLR 395 and held that the principle will apply to a business loan where the borrower is a business controlled by the husband. If the wife is able to prove the elements set out above, the FSE has the burden of proving that the transaction was not the result of undue influence but was the free and voluntary act of the guarantor.

Our experience

7.9 CCLSWA has encountered many instances where a small business borrower was unable to meet repayments and defaulted on the loan, resulting in an individual guarantor being called upon to repay the balance of the loan.

7.10 CCLSWA receives many calls from parents and partners who:

(1) provided guarantees to credit providers securing loans for their child's or partner's business, and

(2) did not receive any benefit.

7.11 These clients usually contact CCLSWA for advice once the FSE has taken steps to enforce the guarantee against them. When guarantors contact CCLSWA for advice, they are often unaware of their obligations under the guarantees.

7.12 While the rule in *Yerky v Jones* and *Garcia* remains, and CCLSWA has been able to successfully apply the principles, those disputes require an extensive dispute resolution process.

7.13 There is cross-over between financial abuse and people in relationships providing guarantees for small business loans. Financial abuse will be discussed in detail in the following section of these submissions.

Parent and adult child

7.14 A typical case would usually involve a parent being approached by their adult child to be a guarantor for a loan for the benefit of the child's business and the parent using the family home or other asset as security under the guarantee.

7.15 The parent is usually unaware of the potential consequences of entering into the transaction and, over time, may even forget about the existence of the loan or guarantee. The parent is usually only reminded of their entry into the transaction once the FSE seeks to enforce the guarantee. The parent is usually shocked at receiving notices of demand or court documents, and may seek advice from CCLSWA.

7.16 Case study - The Langdon's story

(1) Mr and Mrs Langdon owned their own home, Asset A. Their son, Adam, asked them to guarantee a loan. The loan was taken out by Adam's company as trustee for Adam's family trust and was used for the purposes of renovating Asset B. Adam intended to sell Asset B after renovations were completed to make a profit for Adam's family trust. The initial loan was for $600,000 and a 6 month term. Mr and Mrs Langdon agreed to be unlimited guarantors and provided a mortgage over Asset A as security.

(2) After 6 months, Adam was unable to repay the loan and agreed with the Lender to extend the loan period and increase the loan amount by $500,000. Lender did not communicate this to Mr and Mrs Langdon. At the end of the extended loan period, Adam was unable to repay the loan and Lender commenced proceedings to enforce the loan including the guarantee provided by Mr and Mrs Langdon.

(3) Mr and Mrs Langdon are currently challenging the guarantee in the courts.

(4) When asked about their motivations for providing the guarantee, Mr and Mrs Langdon said that their concern for Adam and their wish to assist him because he was their son motivated them to become guarantors. They also indicated that they placed a significant amount of trust in Adam due to the fact that he was their son. Mr and Mrs Langdon did not focus on the financial aspects of the transaction and the potential implications for their family home if the loan was not repaid due to the level of trust they had in their son.

(5) It would appear that the relative difference in wealth and assets between Adam and Mr and Mrs Langdon led Adam to request Mr and Mrs Langdon to be guarantors and Mr and Mrs Langdon's trust in Adam spurred them to be guarantors.

(6) Mr and Mrs Langdon had received independent legal advice and the implications of entering into the guarantee were clearly communicated by the lawyer to Mr and Mrs Langdon. However, Mr and Mrs Langdon's trust and concern for Adam rendered the legal advice ineffective.

(7) Mr and Mrs Langdon repeatedly cited their trust in Adam to the exclusion of legal advice. Mr and Mrs Langdon seemed eager to provide the guarantee notwithstanding the implications of default and their knowledge of Adam's lack of employment. Mr and Mrs Langdon also did not consider it likely that their guarantee would be called upon because in their opinion the sale of Asset B would pay off the loan. They even admitted to not reading the guarantee before signing it.

(8) As the loan was for business purposes, the NCC did not apply, and there was no requirement for Lender to be a member of an EDR scheme. Lender commenced proceedings in the Supreme Court of Western Australia for repossession of Asset A. CCLSWA acts for Mr and Mrs Langdon.

Married and de facto couples

7.17 The relationship between married and de facto couples can be similar to the relationship between a parent and an adult child, in that the personal circumstances, vulnerability, dependency and emotional relationship creates a strong reason to enter into deeds of guarantee.

7.18 CCLSWA's experience has been in the form of women providing guarantees to secure credit contracts taken out by their male partners. CCLSWA has encountered several instances involving women seeking to set aside guarantees provided by them as additional security for loans taken out to support new or existing business ventures of their husbands. These clients instructed us that at the time they signed the guarantee, they did not understand its contents, nor their obligations or the ramifications should they be pursued by the FSE.

7.19 Case law shows that it can often be difficult for a wife to succeed in having a guarantee set aside on the grounds of unconscionability as in order to succeed, the wife must not have received any kind of benefit.

7.20 The following case studies illustrate scenarios encountered by CCLSWA in which a spouse, de-facto partner or ex-partner has felt pressured into signing a guarantee due to the relationship that exists between the two.

7.21 Case study - Stella's story

(1) Stella was married to Alan for many years and they had a son together. After 30 years of marriage, the couple separated.

(2) Shortly after Stella separated from Alan, Alan contacted Stella requesting that she guarantee a $30,000 loan. Alan assured Stella that the purpose of the loan was to pay off some of his debt, get up to date with his mortgage repayments and to cover travel expenses for a job he had lined up overseas. Stella felt guilty and was pressured into agreeing to sign the guarantee.

(3) There was a meeting at Stella's home, attended by Alan and Mr Bamboo, Alan's solicitor. At this meeting Stella found out that the loan was actually for $100,000 and she did not want to guarantee the loan, however, once again

Stella felt pressured to sign the deed of guarantee. Stella provided a mortgage over her own property as security for her guarantee.

(4) Stella did not receive:

(a) independent legal advice before signing the documents,

(b) any benefit from the loan; or

(c) signed copies of the documents executed at the meeting.

(5) Stella later found out that the loan was actually advanced to 'Upbeats Pty Ltd', Alan's company. Furthermore, the loan was actually a business kick-starter loan rather than a personal loan.

(6) Alan defaulted on his repayments and has since disappeared leaving Stella to deal with the Lender.

(7) When asked why she agreed to be guarantor, Stella stated that she felt guilty, and that they still had a child together who at the time was living with Alan. Ultimately, Stella succumbed to Alan's request and felt deeply pressured into signing the guarantee.

(8) As the loan was for business purposes, the NCC did not apply to the loan or guarantee and the Lender was not required to be a member of an EDR scheme. The Lender commenced proceedings in the Supreme Court of Western Australia and the matter was transferred from CCLSWA to a private law firm.

(9) If the NCC applied, more stringent rules would have applied to the credit provider and Stella would have:

(a) been provided with some protections such as being required to seek independent legal advice, and

(b) had the option of lodging a dispute with an EDR scheme.

7.22 Case study - The Jackson's story

(1) Mrs Jackson is from the Middle East and was married to Mr Jackson. Upon arriving to Australia, Mrs Jackson was totally dependent on her husband as she spoke very little English. While they were married, Mr Jackson started a small business. Mrs Jackson did not work in the business nor did she receive any benefits from the business.

(2) Mrs Jackson guaranteed a loan taken out by her husband. However, when she signed the guarantee, Mrs Jackson could not speak English well and due to the complexity of the document, she did not understand its contents. A translator was not used. Mrs Jackson did not have any contact with the Lender before or after signing the guarantee, and did not receive any documents from it. Several years later Mr Jackson became bankrupt. Mrs Jackson received a letter from the credit provider stating that she was liable under the guarantee.

(3) As the loan was for business purposes, the NCC did not apply. This dispute was resolved by settlement agreement.

7.23 Case study - Yuki's story

(1) Yuki was born in Japan and immigrated to Australia in 2005. Her spoken English was enough to get by on a day to day basis, but her reading and writing skills in English were poor. In 2006, Yuki married Cooper and they had two children. In 2008 Cooper passed away, and Yuki had the home transferred to her name. The family home was and is Yuki's only significant asset.

(2) In 2011, Yuki began dating Price. The couple had been dating for one year and in January 2012, Price suggested that they buy a business – a consulting firm. Yuki left it to Price to speak to Polo (broker), Marco (agent) and the FSE.

(3) Yuki did not have any experience in consulting, or any business for that matter. Her usual employment was as a cleaner.

(4) In July 2012, the Lender made an offer for the business loan and overdraft to 'Multi S'. Multi S was a company set up by Price in which Price was the sole shareholder, director and secretary. Yuki provided two forms of security for the business loan and overdraft. Yuki signed the Letter of Offer and Guarantee in Marco's (agent) office, in the presence of Marco and Price. Price also signed an individual guarantee and indemnity in favour of the Lender. However, Price did not provide any real or personal property as supporting security for his guarantee.

(5) Yuki met with Marco only once when she signed the guarantee in his office. The meeting lasted 15 minutes and Yuki had a stack of paperwork to sign. Marco only addressed Price and Yuki felt very rushed. Further, Marco did not give Yuki an opportunity to read the Guarantee (or take it home overnight to read), nor did he say that she could or should seek independent legal advice before signing it.

(6) Yuki had never been a guarantor before and did not understand what giving a guarantee meant.

(7) The consulting business was never profitable and in 2014, Price closed the business down. Price moved out of the family home and disappeared. Consequently, Yuki was left with paying off the loan.

(8) It took CCLSWA two years to negotiate with the Lender to have the guarantee set aside on grounds of unconscionable conduct and undue influence. While CCLSWA were successful, it was an extremely lengthy process.

(9) Had the NCC applied, the credit provider would have been bound by far more stringent rule, allowing Yuki to seek independent legal advice, and give her at least 14 days to read over the guarantee. This would have allowed Yuki to understand what a guarantee was.

Suggestions

Extending the NCC

7.24 Currently, the NCC is applicable to credit contracts that were commenced on or after 1 July 2010, where the borrower is a natural person or strata corporation and the loan is predominately for personal, domestic or household purposes. The NCC also applies to credit contracts entered into on or after 1 July 2010 to purchase,

renovate or improve residential property for investment purposes. This means, if the credit is provided for business purposes, or for investment other than residential property investment, the NCC does not apply to the transaction.

7.25 The term "consumer" is defined in section 5 of the NCCPA and includes a 'natural person or strata corporation'. CCLSWA is funded to provide legal advice to consumers. In our view, an individual who acts as a guarantor for a business loan may be a consumer.

7.26 CCLSWA submits that the NCC should be extended to cover individual consumers who provide guarantees for small business loans, and who are not involved in the business. This is because the consumer is a volunteer, who is providing the guarantee without receiving a benefit from the business, and therefore, should be afforded consumer protection.

7.27 For the law to provide effective protection for such consumers, the NCC should:

(1) recognize such individuals as consumers; and

(2) encapsulate the entire span of the transaction -- from the formation of the contract, its operation, right up to the time of its enforcement or termination.

7.28 If the NCC were extended, it could be applied in the following ways:

(1) guarantors would be entitled to the statutory disclosures under s 55(3) of the NCC. That is a form 8 'warning box' placed immediately above, and on the same page as where the guarantor signs, or the guarantee would be unenforceable;

(2) guarantors would need to be given a copy of the credit contract before signing the guarantee;

(3) guarantors would need to be given a form 9 'information statement' under s 56(1)(b);

(4) guarantors would generally need to be given a signed copy of the guarantee within 14 days after signing;

(5) the guarantee would not automatically cover any increases in the liability under the underlying credit contract; and

(6) the 'unjust transactions' provisions under s 76(1) of the NCC could apply.

7.29 Extending the reach of the NCC to consumers who provide individual guarantees for business loans would provide these consumers with clear protections, and provide them with access to free EDR schemes.

7.30 Furthermore, if the NCC were extended to include individual guarantors who are not connected with the business, it would be clear that CCLSWA would be able to provide legal advice to such consumers. Secondly, as case law illustrates, the legal doctrines in relation to third party guarantees are highly complex and expensive to litigate; therefore, by extending the NCC to individual guarantors of small business, it will be a step towards preventing guarantors from signing up to unjust loans, rather than simply relying on reactionary processes.

8. Financial abuse - Elder abuse and family violence

Elder abuse

8.1 Elder abuse is a recognized form of abuse.[17] It is described by the World Health Organisation as '*a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person*'.[18]

8.2 Elder abuse can take many forms, including financial abuse.[19] Financial abuse itself can take many forms, such as misleading older people about what they are signing, influencing them to sign contracts or deeds and pressuring them into being guarantors.[20]

8.3 Although the term "abuse" suggests malicious intent, the perpetrator might in some circumstances not set out to harm the elderly person but may as a consequence of bad luck or incompetence be placed in a position where they inevitably choose their own interests over the elderly person's interests.

8.4 Elderly people are a group in our community that can easily be targeted and taken advantage of, especially in financial situations.[21]

8.5 Under the Australian Bankers' Association Inc's (**ABA**) Industry Guideline: Protecting vulnerable customers from potential financial abuse[22] the ABA seeks to raise awareness about financial abuse, what it can present as and provides FSE's with a framework on how to manage financial abuse.

Our experience

8.6 CCLSWA has assisted consumers who have suffered from elder abuse in the form of financial abuse. Our experience indicates that there is limited recourse for victims of elder abuse. This is in line with commentators' views that current laws do not adequately protect elderly people.[23]

8.7 CCLSWA advises elderly people who have provided guarantees or entered into other financial arrangements with younger family members, only to later find out that what they had agreed to was significantly different to what they understood the arrangement to be. This suggests that FSE's have not complied with obligations under Australia's consumer credit legislation which provide protection. This is

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[17] United National Population Fund and HelpAge International (2012) *Ageing in the Twenty-First Century: A Celebration and A Challenge*, p 95 https://www.unfpa.org/sites/default/files/pub-pdf/Ageing%20report.pdf .
[18] World Health Organisation (2002) *The Toronto Declaration on the Global Prevention of Elder Abuse*, p 3 http://www.who.int/ageing/projects/elder_abuse/alc_toronto_declaration_en.pdf .
[19] Australian Law Reform Commission (May 2017) *Elder Abuse—A National Legal Response* (ALRC Report 131), p 19 https://www.alrc.gov.au/sites/default/files/pdfs/publications/elder_abuse_131_final_report_31_may_2017.pdf.
[20] Australian Bankers' Association Inc. (2014) Industry Guideline: Protecting vulnerable customers from potential financial abuse, p 1-2. https://www.ausbanking.org.au/images/uploads/ArticleDocuments/207/Industry_Guideline_Protecting_vulnerable_customers_from_potential_financial_abuse2.pdf.
[21] Webb, Eileen (2016) Papering over the void — Could (or should) consumer law be used as a response. to elder abuse, *Competition & Consumer Law Journal* 24, 101, p 116 – 118.
[22] (December 2014) https://www.ausbanking.org.au/images/uploads/ArticleDocuments/207/Industry_Guideline_Protecting_vulnerable_customers_from_potential_financial_abuse2.pdf.
[23] Above n 19.

particularly a concern when it comes to elderly people that may solely rely on the pension (or other social security payments) or are asset rich but income poor.

8.8 As discussed in paragraph 7.14 above, situations often arise where parents are guarantors or co-borrowers to loans taken out by their children, and mortgage the family home as security for the guarantee or loan. They may feel an obligation to assist their children or family members, to either enter the housing market, or pursue other financial goals such as starting a business.

8.9 Another typical case would usually involve an elderly person being approached by a relative (usually an adult child) to either be a co-borrower or guarantor to a loan for the relative's benefit; and involving the elderly person's primary home or other asset as security for the loan. Once the elderly person has signed the documents, the loan proceeds would usually be disbursed by the financial service provider to the relative with the relative being solely responsible for making repayments. At this point, the elderly person is usually unaware of the potential consequences and may even forget the existence of the loan. Subsequently, the relative would fail to make repayments, either willfully or due to financial hardship, and default on repayments. The financial service provider would then attempt to enforce the security on the basis that there has been a default and the elderly person would usually be shocked by court documents and the impending consequences.

8.10 Parents who are elderly often may not understand the roles and responsibilities they are undertaking when they enter into these guarantees and/or loan agreements. The extent of the risk of their legal and financial liability is often unknown to them, despite the protections in Australia's consumer credit legislation. Where FSE's, such as banks, become aware of any disadvantage, in Equity they are required to act in good faith, and act in a way that does not exploit this known disadvantage.

8.11 CCLSWA agrees with commentators that the current law does not adequately protect older people.[24]

8.12 The following case studies provide examples of elder abuse cases CCLSWA has encountered.

8.13 CCLSWA refers to the Langdon's story setout in paragraph 7.16 above.

8.14 Case study – The Banner's story

(1) Mr and Mrs Banner wanted to help their son further his ambitions and decided to use their own home (Asset A) as security for their son, Sam to purchase his home (Asset B). Sam obtained a loan from Lender to fund the purchase of Asset B. Originally, Mr and Mrs Banner believed that they were 20% guarantors on the loan used to purchase Asset B. However, Mr and Mrs Banner were in fact co-borrowers with Sam. It was intended that Sam would make all repayments.

(2) Subsequently, Sam obtained an additional line of credit from Lender of $250,000 which Sam used to purchase Asset C. The line of credit was secured by Assets A, B and C. Mr and Mrs Banner consented to this.

(3) Sam subsequently sold Asset B. Sam used the proceeds to reduce the debt on the line of credit (which was used to purchase Asset C). Due to a bank error, Lender believed that Sam had sole ownership of Asset B and was the

[24] Above n 18; above n 19.

sole borrower and allowed Sam to use the proceeds of sale to reduce the debt on Asset C without discharging the debt on Asset B. The loan for Asset B was thus only secured by Asset A which was Mr and Mrs Banner's family home.

(4) Sam then sold Asset C and discharged the remaining loan on Asset C and received a surplus. Sam then moved overseas, leaving Mr and Mrs Banner responsible for the remaining loan on Asset B with only Asset A, their family home, as security.

(5) Sam had effectively obtained the benefit of the loan on Asset B at the expense of Mr and Mrs Banner.

8.15 Case study - Georgina's story

(1) Georgina was an elderly widow who migrated to Australia as a child. She had difficulty communicating in English. She was heavily dependent on her late husband and after her husband passed away, she was dependent on her children. In particular she had a close relationship with her eldest son, Greg.

(2) In 2004, Georgina's children discussed that Greg would borrow $80,000 and Georgina would provide security in the form of a mortgage over her house. Georgina does not remember being a party to these discussions.

(3) In 2004, Greg asked Georgina for a loan and she agreed and signed the documents even though she did not understand the documents. The documents were for a loan solely in Georgina's name and her home was mortgaged as security. Greg received the proceeds of the loan and led Georgina to believe that the loan was in his name rather than hers.

(4) Greg stopped making loan repayments in 2010. Greg had negligible assets.

(5) It was only in or around 2012 that Georgina's other children realised that the loan was in Georgina's name, the loan was in default and the Lender intended to enforce the mortgage.

(6) A settlement agreement was reached.

8.16 Case Study – The Smith's story

(1) Mr and Mrs Smith took out a loan for $100,000 to purchase their residence several years ago and continued to make regular payments on their mortgage. Both Mr and Mrs Smith were in their 80's and received the aged pension. The residential property was the only asset owned by the Smiths. At the time the property was purchased, the Smiths included their son, John, on the certificate of title for the property. John later passed away.

(2) After John's death, his partner, Sally remained in touch with the Smiths. Sally had been friends with the Smiths for years and there was a relationship of trust and confidence

(3) Sally offered to make all the repayments on the loan and although the Smiths had the funds to make the payments, they agreed to her request. There was not a significant amount left to repay on the loan.

(4) Sometime later, Sally took out a loan for $200,000 and offered to discharge the Smiths' initial loan of $100,000, which had $25,000 outstanding. The

Smiths declined this offer. The Smiths thought that Sally continued to make payments towards the $25,000 loan.

(5) Sometime later the Smiths were shocked to receive a default notice in relation to the $200,000 loan. The Smiths did not go to the Lender and did not sign any loan documents in relation to this loan. The same Lender provided both the $100,000 and $200,000 loans.

(6) The Smiths were co-borrowers on the $200,000 loan with Sally and alleged their signatures were forged.

(7) Sally was able to obtain the $200,000 loan by using the Smiths' property as security for the loan. The Smiths' property was transferred so that Sally was a registered proprietor on the certificate of title. Again the Smiths allege they didn't agree to this.

(8) Sally effectively obtained the benefit of the loan by using the Smiths' property as security.

8.17 FSE's can arguably also be perpetrators of elder abuse, as can be seen in the following case study of Julietta's story:

(1) Julietta, an 85 year old woman entered into a reverse mortgage with a Lender.

(2) The Lender failed to adequately fulfil its responsibilities in three ways.

(a) Firstly, the Lender provided Julietta with documents for her loan that contained many inaccuracies and inconsistencies. The extent of the mistakes were such that it was unreasonable to expect that our client could have understood the terms and conditions of the loan.

(b) Secondly, the Lender failed to ensure that Julietta had received independent legal or financial advice about the loan agreement.

(c) Thirdly, the Lender failed to take reasonable steps to ensure that the legal and practical effect of the agreement were accurately explained to Julietta, and failed to ascertain whether she actually understood the provisions and their effect.

(3) Furthermore, the Lender breached the SEQUAL Code of Conduct.

(4) Due to this failure of the Lender, Julietta was in an immensely difficult financial situation. This matter was resolved through EDR.

8.18 The above case study is just one example of how FSEs can fail to lend responsibly, leaving older people, such as our client, in difficult financial situations and with tremendous legal issues.

Family violence

8.19 Similarly to elder abuse, CCLSWA has observed the lack in protections within the law for people suffering from family violence in the form of financial abuse.

8.20 Family violence is a pattern of controlling and coercive behaviour that includes violent, threatening or other behaviour, to gain and then maintain power and control over the behaviour of an intimate partner or a person in a 'domestic' or 'familial' relationship with the abuser.[25]

8.21 Financial abuse is a form of family violence.[26] Financial abuse concerns conduct such as coercing a person to relinquish control over assets or income, disposing of a person's property without his or her consent, preventing a person from accessing joint financial assets for the purpose of meeting normal household expenses, or withholding financial support necessary for the maintenance of the person or the person's children.[27]

8.22 The ABA, FOS and Credit and Investments Ombudsman (**CIO**) have provided guidelines for FSE's to, among other things protect confidentiality and reduce communication, in an attempt to recognize financial abuse.

8.23 The ABA released an industry guideline regarding financial abuse and family and domestic violence.[28]

8.24 Following ABA's guidelines, in March 2017, FOS released 'The FOS Approach to Joint Facilities and Family Violence', to help consumers and FSE's better understand how FOS reaches decisions about key issues.[29] These guidelines raise awareness of financial abuse, provides FSE's with a framework on how to manage financial violence and 'encourages best practice'.

8.25 Similarly, CIO addressed family and domestic violence in their 2016 Annual General Meeting, drafting guidelines for conduct when responding to people who demonstrate signs of family violence.[30]

Our experience

8.26 CCLSWA assists persons who suffer, and have suffered, from financial abuse.

8.27 CCLSWA advises people in financial violence relationships who are co-borrowers. CCLSWA generally advises co-borrowers that they are jointly and severally liable for obligations under credit contracts. Due to the nature of and laws surrounding joint loan agreements our general advice on liability applies where our clients are joint borrowers with a financial abuse perpetrator.

8.28 CCLSWA advises people in financial violence relationships on applying for hardship variations. It is common for financial violence perpetrators to refuse to consent to

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[25] National Association of Community Legal Centres Inc. & Women's Legal Services, Submission No 26 to Senate Finance and Public Administration References Committee, Domestic Violence Inquiry, July 2014, 3.
[26] Emma Smallwood (2015) 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence', *Report on the Stepping Stones Project*, Women's Legal Service Victoria), p 6 < http://apo.org.au/node/57450>.
[27] Domestic Violence Laws in Australia (June 2009) *Department of Social Services, Commonwealth of Australia*, 2.6.18 < https://www.dss.gov.au/sites/default/files/documents/05_2012/domestic_violence_laws_in_australia_-_june_2009.pdf>.
[28] Australian Banker's Association Inc, Industry guideline: Financial abuse and family and domestic violence policies (November 2016) <https://www.ausbanking.org.au/images/uploads/ArticleDocuments/207/ABA_Industry_Guideline_-_Financial_Abuse_and_Family_and_Domestic_Violence%20Nov%202016.pdf>.
[29] Financial Ombudsman Service Australia, The FOS Approach to Joint Facilities and Family Violence (Version 3, March 2017) < https://www.fos.org.au/custom/files/docs/fos-approachjointfacilities-and-family-violence-final-4-may-17.pdf>.
[30] Credit & Investments Ombudsman, Family Violence, CIO News – July 2016 (July 2016) < http://email.cosl.com.au/t/ViewEmail/y/B4132CB91D20AF74>.

the victim making a hardship application or refinancing a loan into their sole name.[31] We note that in the first 12 months after divorce, 60% of women experience financial hardship.[32] While FSEs have acknowledged the consequences of the financial abuse, most FSEs require the client to provide evidence of the violence. This can put the client in emotional distress given the sensitive nature of the relationship, and possibly in danger with the perpetrator. Many people who experience family violence do not disclose the violence out of fear of their own safety, and cannot provide such evidence.

8.29 In several cases where a person has entered into a joint loan agreement for which they did not receive a benefit, CCLSWA has been able to advocate on the person's behalf and successfully negotiate with FSEs to have the debt waived, because the FSEs were in breach of their responsible lending provisions under the NCCPA.

8.30 CCLSWA has dealt with FSE's who failed to make reasonable inquiries about the borrower's financial situation, and failed to make an assessment of the 'suitability' of loan contracts where the client exhibited that they would not benefit from the agreement. Additionally, these FSEs failed to provide the clients with sufficient information regarding their rights and obligations as a co-borrower or guarantor.

8.31 Case study – Giada's story

(1) Giada entered a mortgage agreement solely in her name in 2010. Shortly after, Giada met her ex-partner who eventually became physically violent. After the relationship ended, Giada had to leave her job for her own safety and became homeless. As a result, in 2014 Giada fell into arrears and could not pay her mortgage. Giada's lender failed to sell Giada's property, and so Giada was charged with utility rates, increasing her debt. CCLSWA lodged a formal complaint to Lender and FOS.

(2) Giada came to CCLSWA because she was struggling to make repayments on her personal credit card. Giada's ex-partner had taken possession of her credit card for his own personal benefit, and pressured Giada to continually increase the limit of her credit card.

(3) Giada suffered physical and sexual violence during the course of her relationship. CCLSWA managed to negotiate with her lender to reduce the liability to the original amount, have zero interest on the account, and create a repayment plan.

(4) Unfortunately, as the negotiation process had taken over a year and 5 months, it was too late and Giada filed for bankruptcy.

8.32 Case study – The Ebe's Story

(1) Ms Ebe and Mr Ebe were married and had a joint account with Lender. The Ebes owned two properties: Property 1 and Property 2. In 2001, the Ebe's divorced and finalised their property settlement, with Ms Ebe getting sole title in Property 1.

(2) During the course of, and continuing after the relationship, Ms Ebe suffered family violence. Mr Ebe constantly threatened and abused Ms Ebe and her

[31] Smallwood, above n 26, p 21.
[32] Belinda Fehlberg et al, Australian Family Law: The Contemporary Context (Oxford University Press, 2nd ed, 2015) 130.

children. Out of fear for the safety of herself and her children, in 2006 Ms Ebe signed as a guarantor for Mr Ebe's brother and sister-in-law with Lender.

(3) Mr Ebe was originally on the agreement as a second guarantor but was subsequently removed. Upon signing the guarantor agreement, Ms Ebe was under the impression that the loan was secured with Property 2, and was not provided with independent legal advice.

(4) Again, in 2009 Ms Ebe signed as a guarantor for Mr Ebe's own personal loan with Lender. Property 1 was used to secure the loan.

(5) Further, in 2010, Ms Ebe signed on as a co-borrower on a joint loan with Lender to cover Mr Ebe's personal debts, which included a mortgage for Mr Ebe and his new partner.

(6) The Lender failed to make reasonable inquiries into Ms Ebe's situation, and dealt solely with Mr Ebe. Ms Ebe was not advised to obtain independent legal advice, and was not aware of her liabilities as a guarantor.

(7) Ms Ebe did not contact CCLSWA until a judgment was made against her, and she lost Property 1.

8.33 We refer you to the Alfreds' story at paragraph 4.18 above.

8.34 Case study – Verity's story

(1) Verity suffered a history of domestic violence, receiving intimidation against herself and her children from her ex-partner. Verity was coerced into obtaining a car loan from Lender in her own name for the benefit of her ex-partner. Verity had limited English, and did not have a driver's license (Lender was aware of this).

(2) The relationship ended and Verity was left with a debt in her sole name, from which she did not benefit. Verity also received speeding fines, despite her ex-partner being in possession of the vehicle.

(3) CCLSWA lodged a formal complaint to both the Lender and FOS. CCLSWA managed to negotiate with the Lender to waive the debt (including any other fees and charges arising out of the loan), and refrain from listing and removing any defaults in relation to the car loan. Verity agreed to surrender the vehicle to the Lender.

8.35 Case study – Diana's story

(1) Diana was coerced into entering a car loan in her own name for the benefit of her ex-partner, whom could not obtain a car loan for himself. The loan was originally for both Diana and her ex-partner; however Lender A only included Diana's income in the credit application, in order for the finance to be approved.

(2) Diana suffered physical violence after signing the agreement, and fled the relationship out of her own safety. Diana was left with a loan from which she did not benefit.

(3) CCLSWA managed to negotiate with Lender A to surrender the car for auction, and use the funds from the sale to pay off the debt. However, Diana was still liable for the shortfall of the debt.

(4) CCLSWA then lodged a complaint to FOS on the basis that the Lender breached its responsible lending obligations. Lender A waived Diana's shortfall debt.

(5) Diana also had a joint loan in her and her ex-partner's name with Lender B, which was entered into prior to experiencing domestic violence. As Diana did benefit from the loan, the debt could not be waived, and no coercion was experienced upon entering the loan.

(6) However, as Diana experienced financial hardship as a result of the violent relationship, CCLSWA managed to negotiate with Lender B not to pursue Diana for the joint loan. Lender B listed a default on her credit report as an incentive to pay back the loan when she is financially capable.

8.36 While CCLSWA was able to successfully negotiate to waive some debts, in other cases, clients were still liable for shortfall debts, fees and interest. The negotiation process is drawn out, with limited responses from the FSE often taking up to a year to reach a solution. The lengthy negotiations resulted in one client withdrawing from the dispute resolution process and filing for bankruptcy.

Barriers to assistance – financial abuse

8.37 Many of the people facing elder abuse and family violence in the form of financial abuse do not know where to turn to for advice, or have the capacity to face the problem by themselves.

8.38 In CCLSWA's experience, after advice has been sought, people can be difficult to contact and thus advocate for due to mental and physical illnesses.

8.39 Another issue in cases of financial abuse is the significant under-reporting of abuse. Elderly persons and people in abusive relationships are often reluctant to raise problems of abuse to third parties.[33] People fear causing the perpetrators "trouble" or may not perceive that the perpetrator is doing anything wrong. People may also fear the wrath of their abuser.

8.40 Other factors that may prevent victims of elder and economic abuse from accessing justice include embarrassment or shame in being a victim to someone they trust. The shame element can be exacerbated where people are trying to protect the perpetrators' interests. Further, where there is a high degree of dependence on the perpetrator, the person may have little to seek help in relation to abuse.

Suggestions

Mandatory policies

8.41 CCLSWA has observed FSEs' lack of policies and processes in identifying and managing elder and economic abuse. The ABA has recommended FSE's create policies and procedures.[34] CCLSWA suggests that FSE's have mandatory policies and processes on how to manage elder abuse and family violence in the form of

[33] Australian Institute of Family Studies (1994) *Family Matters Issue 37: Abuse and Neglect of Older People* <https://aifs.gov.au/publications/family-matters/issue-37/abuse-and-neglect-older-people>.
[34] Australian Bankers' Association Inc. (2016) Industry Guideline: Financial abuse and family and domestic violence policies, p 4 <https://www.ausbanking.org.au/images/uploads/ArticleDocuments/207/ABA_Industry_Guideline_-_Financial_Abuse_and_Family_and_Domestic_Violence%20Nov%202016.pdf>.

financial abuse. Such policies should be easily accessible by consumers and consumer advocates.

Mandatory training

8.42 CCLSWA also advocates for FSE's to train their staff on identifying and managing financial abuse. Training may reduce the previously discussed barriers to assistance as abuse may be identified without the person who is being abused having to self-identify the abuse.[35]

8.43 Training should include how to manage cases of elder and economic abuse to ensure that it does not impact on the provision of credit. Such training may include how to keep records of exchanges between the victim and the perpetrator and how to proactively engage with consumers for example to confirm the person understanding of their obligations and responsibilities. This proactive role would assist in the identification of abuse and in future inquiries into undue influence or unconscionable conduct.

8.44 While training is useful in identifying potential cases of elder and economic abuse and ensuring that those cases are handled correctly, training does not go far enough to prevent the abuse and address the immediate and on flowing issues. For example, training alone would not be effective where the victim may not have thought the transaction through and was eager to assist the perpetrator in obtaining the loan in the first instance.

Reporting body

8.45 In order to have a more holistic approach to addressing financial abuse, CCLSWA recommends that a body be set up and that reporting of suspected financial abuse to this body be encouraged. This body would also have responsibility to investigate claims of suspected financial abuse.

8.46 The sharing of information on financial abuse (or suspected abuse) between stakeholders[36] would assist in the probability of financial abuse being detected and taken into account before FSEs provide products or services. Similar approaches have been taken elsewhere.[37]

8.47 As the case studies mentioned above demonstrate, there is little contact between the elderly person or spouse and the FSE in the period between the person becoming a guarantor or borrower and the period in which the abuse is reported. A government body that receives reports and undertakes investigations would help to bridge this gap and ensure that intervention does not end with the FSE's involvement.

8.48 There is significant debate surrounding whether reporting should be mandatory. Most of the debate revolves around increasing red tape and reducing autonomy and privacy concerns being balanced against the need to increase reporting by stakeholders.[38] However, there is little conclusive evidence that demonstrates

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[35] Above n 19, pp, 295 [9.1]; 299 [9.16].
[36] For example health workers and bank employees.
[37] Anthony Gilbert, David Stanley, Bridget Penhale and Mary Gilhooly, "Elder Financial Abuse in England: a policy analysis perspective related to social care and banking" (2013) 15(3) *Journal of Adult Protection* 153; Charles Pratt, "Banks' Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California", (2003) 40(1) *California Western Law Review* 195.
[38] See discussions in Office of the Public Advocate (Queensland) and Queensland Law Society, *Elder Abuse: How Well Does the Law of Queensland Work?* (2010); Pratt, above n 37.

mandatory reporting would or would not lead to an actual increase in reporting of abuse.[39]

8.49 It is against this background that CCLSWA advocates for a voluntary scheme that is contained within the Code of Banking Practice or other relevant codes of conduct. While this would have little or no hard legal effect, it would indicate model behavior and affect the FSE's consideration of whether a transaction is unconscionable. It would also avoid the initial political and practical difficulties in enacting and enforcing any mandated reporting scheme.

8.50 However, it should be noted that reducing barriers to reporting such as granting exemptions from liability for elder abuse and from FSEs' other legal duties as a quid pro quo for reporting suspected cases of financial abuse – for instance – may lead to a higher instance of reporting. This increased collaboration between FSE's and the government, may be just as successful in obtaining higher reporting rates.[40]

Changes to the law

8.51 CCLSWA advocates for the doctrine of undue influence to be incorporated into consumer credit legislation in a varied form. CCLSWA recommends that elderly parent-adult child and spousal or de facto relationships attract the presumption of influence in the context of credit contracts and credit related contracts such as guarantees. This would reduce the difficulty in demonstrating that the FSE had actual or constructive notice and would provide an incentive for FSE's to scrutinise credit provided to people who are assisted by people in their family.

8.52 The characteristics used to determine if undue influence exists are qualitative in nature and difficult to ascertain, particularly if the characteristics are determined based on events which may have taken place several years earlier.

8.53 However, altering the doctrine of undue influence should only be a part of the solution as it would also not assist in preventing the problems in the first instance.

Increase deterrence

8.54 A preventative system should be introduced to deter FSE's from entering into credit contracts or credit related contracts with people in financially abusive relationships. CCLSWA suggests that penalties for breaches of responsible lending provisions be increased. Responsible lending provisions being strictly adhered to should mean that FSE's make enquiries into the individuals position and reasons for seeking credit. If that enquiry process is conducted, financially abusive relationships may be uncovered.

8.55 Consideration should be given to the level of the penalties as – if they are too low, they may not act as a deterrent and if they are is too high, the regulator may be reluctant to impose the penalties.

Assessments to uncover abuse

8.56 CCLSWA suggests that FSE's should conduct further enquiries and assessments in order to identify abusive relationships and limit financial abuse.

[39] Pratt, above n 37.
[40] Ibid.

8.57 In CCLSWA's experience, FSE's make relatively low efforts to identify instances of abuse. Among the previous case studies, FSEs have often relied on the customer affirming that they have received independent legal advice before approving the loans. There was no indication that FSEs made inquiries into whether the guarantor or borrower had sufficient capacity, understanding and free will to enter into the guarantee or loan.

8.58 CCLSWA suggests that FSE's be obliged to consider financial abuse issues before:

(1) providing credit to co-borrowers who are parents and children or partners;

(2) accepting guarantees from parents or partners securing credit for their children or partners.

9. Mechanisms for redress

Negotiation or internal dispute resolution teams

9.1 CCLSWA writes letters of dispute to FSE's IDR teams setting out our clients' legal positions and requesting resolutions to legal issues. CCLSWA also advise clients how they may do so themselves.

9.2 In CCLSWA's experience, internal dispute resolution (**IDR**) processes rarely result in an outcome for the consumer. Raising disputes with FSE's is in practice simply a requirement to be met in order to progress to the FSE's EDR.

Barriers

9.3 Consumers often call CCLSWA's advice line because an element of their credit contract feels unfair or does not pass the 'pub test'. CCLSWA also receives calls from consumers who do not know the terms and conditions of their credit contracts and do not know how to obtain copies of them.

9.4 Consumers are often unaware of their rights. This lack of awareness makes it difficult to know when their rights have been breached, how to enforce their rights and what remedy they are entitled to. This lack of awareness makes it difficult for consumers to know that they can approach an FSE for a resolution and what a fair resolution may look like.

9.5 In order for consumers to frame a strong dispute based on their legal rights, they should make reference to their credit contracts and related documents. Consumers usually do not have their credit contracts and related documents. As discussed above, consumers face difficulties in obtaining copies of credit contracts and related documents.

9.6 Even when consumers are aware that they have rights and have access to their documents, they may not be aware of how to commence negotiations with the FSE. A barrier to consumers starting negotiations with FSE's is that they do not know which team or department of the FSE to address their dispute to. The FSE's internal dispute resolution team's contact details are not generally known. Many consumers approach branches. Others call the FSE's general lines. Some consumers do not keep a record of those interactions. Often weeks and even months can go by with consumers seeking a resolution to an issue by contacting the FSE through the wrong pathway. Consumers often become frustrated and may give up.

Suggestions

9.7 FSE's should increase the visibility of the contact details of the IDR teams, contact details and the IDR process. That visibility should be across different types of media and platforms.

9.8 FSE's should comply with their obligations to provide consumers with documents as discussed.

9.9 FSE's should be pro-active in explaining what the documents provided mean to consumers.

9.10 FSE's should dedicate more staff to deal with complaints, so that consumers do not have to wait overly long periods for responses.

9.11 FSE's IDR staff should be appropriately trained in the FSE's obligations and the consumer's rights.

9.12 FSE's should increase consumers awareness of the IDR contact pathways and what those pathways can be used for.

9.13 FSE's should be incentivized to make genuine attempts to resolve disputes with their customers. This may be done by a regulator scoring FSE's on their effectiveness at resolving disputes. This score may be made up of data relating to how easy it is to find the IDR contact details, the FSE's response times to complaints or disputes. Alternatively, incentive could be provided by increasing the cost to FSE's for each complaint that is made to their EDR.

External Dispute Resolution

9.14 CCLSWA advises consumers on their ability to progress disputes to the FSE's EDR scheme. CCLSWA often represents clients during the EDR process.

9.15 In CCLSWA's opinion, when we assist consumers through the EDR process, EDR allows individual consumers to be heard in relation to their specific issues and to receive an outcome.

9.16 We do not have experience on how individual consumers, unassisted find access to and utilization of the EDR processes. However, we note that the majority of the consumers we assist on the telephone advice line who require assistance in relation to credit law are unaware of how to access EDR or the EDR process.

Barriers

9.17 Barriers that will no longer impact on consumers due to the introduction of the Australian Financial Complaints Authority will not be discussed.

9.18 In CCLSWA's experience, consumers have gaps in their knowledge that form barriers in accessing EDR. These include:

(1) how to contact the EDR provider to lodge a complaint;

(2) A lack of knowledge about the EDR process (for example the requirement that a complaint be made directly to the FSE first, and that determinations are binding); and

(3) the EDR time limits within which complaints must be made.

9.19 Another issue faced by consumers is that even if they have worked through the EDR process they may not understand the terms of a negotiated settlement arrived at through the EDR process.

9.20 Case study – Michaela's story

(1) Michaela assisted her daughter Leonie and her ex partner Derrick in refinancing a home loan from Lender for the purchase of their own property. Michaela received 50% ownership of Leonie's and Derrick's property (the **Joint Property**). Lender secured Leonie's and Derrick's loan by registering a mortgage over both the Joint Property and Michaela's own property.

(2) Michaela also assisted Leonie and Derrick in refinancing their existing loan which was to be used for Leonie's and Derrick's car. Lender also secured this loan by way of a mortgage over both the Joint Property and Michaela's own property.

(3) In addition, Michaela, Leonie and Derrick jointly took out a line of credit.

(4) Michaela, Leonie and Derrick defaulted on the home loan. As at 31 January 2018 Lender was in possession of the Joint Property. A shortfall debt was anticipated.

(5) Michaela lodged a FOS dispute and after negotiation signed a settlement agreement with Lender.

(6) Michaela believed that under the settlement agreement Lender agreed "not to take her house" in order to satisfy the debts due. However, the settlement agreement merely provided that Lender would seek to recover the debts due by selling the Joint Property first and if there is a shortfall the Lender may seek possession of Michaela's property to sell it to satisfy the shortfall (a shortfall was highly likely to eventuate).

(7) Under the terms of the settlement agreement, Michaela agreed not to take any action against Lender in relation to the matter.

(8) Michaela was distressed to learn the meaning of the terms and conditions of the settlement agreement were different to what she thought and agreed to.

Suggestion

9.21 FSE's should take more steps to inform their customers the FSE's EDR, the EDR process and the EDR's contact details. This information should be prominently displayed on credit contracts, and media such as the FSE's website and phone applications.

9.22 We acknowledge and support the establishment of the Australian Financial Complaints Authority, which will assist consumers in accessing EDR by reducing existing confusion between the two current ombudsman schemes.

9.23 CCLSWA is pleased to be on the consumer liaison groups of both FOS and the CIO. This involvement has enabled us to provide direct feedback to FOS and CIO on their processes, and the behavior of their members. We strongly believe that it is important that the Western Australian consumer advocacy perspective is represented within these organisations.

Regulators

9.24 CCLSWA informs our clients of their ability to lodge a dispute with ASIC or the ACCC if disputes are not resolved directly with the FSE or through EDR.

9.25 In our experience, misconduct reports to ASIC and the ACCC do not result in outcomes for individual consumers, but assist consumers as a group.

9.26 When CCLSWA lodges reports to regulators it is generally because no other outcome is available, other than through court proceedings.

9.27 After CCLSWA lodges reports on behalf of clients we usually either:

(1) do not hear back from the regulator; or

(2) are informed that the regulator has allocated an investigating officer to the report.

9.28 Where the regulator appoints an investigating officer we often do not receive further correspondence from the regulator for over a year after the report is lodged.

9.29 Based on CCLSWA's experience and information from stakeholders we understand that when regulators note a particular trend in reports the regulators then look into companies or industries. At this stage CCLSWA is often contacted and asked for further information in relation to the report.

9.30 CCLSWA acknowledges the importance of lodging reports and the resource limitations of the regulators. While misconduct reports do not often assist in solving the consumers individual problem, often consumers seek to file reports so that other consumers do not have to go through the same issue that they went through.

9.31 Case study – Colin's story

(1) CCLSWA lodged an ASIC complaint on behalf of Colin in relation to a dispute with an FSE involving potential breaches of the NCCPA, NCC and ASIC Act.

(2) ASIC progressed the dispute through its teams and sought to discuss the matter with Colin.

(3) The FSE sold its debt to another entity which settled the debt with Colin. Colin did not discuss his matter with ASIC.

9.32 We also refer you to Case study – Hugh and Rebecca's story at paragraph 6.17 above.

Barriers

9.33 Consumers may be unaware of what both ASIC and the ACCC regulates and how to make a complaint to them.

9.34 CCLSWA understands from discussions with stakeholders that when consumers make complaints to ASIC or the ACCC unassisted often key documents or information can be missing. CCLSWA understands that a lack of documentation reduces ASIC and the ACCC's ability to consider complaints.

9.35 Clients that CCLSWA has assisted in lodging complaints rarely receive a personal outcome. When regulators do take action against FSE's our clients are rarely awarded compensation for the damage done to them by the FSE. This reduces

consumers' willingness to lodge disputes with ASIC and the ACCC when they may not receive a personal benefit.

Suggestion

9.36 CCLSWA suggests:

(1) the reporting process be made simpler and more accessible;

(2) greater funding and resources be provided to the regulators; and

(3) regulators take on more of an active role in identifying and taking action against FSE's that are in breach of their credit law obligations.

10. Conclusion

CCLSWA is grateful for the opportunity to provide input to the Royal Commission.

CCLSWA would be happy to be of assistance in providing further information or detail on CCLSWA's position or in relation to a case study. CCLSWA is available to attend at public hearings.

If you have any questions or would like to discuss these submissions further, please contact Gemma Mitchell on (08) 6336 7020.

Yours faithfully

Consumer Credit Legal Service (WA) Inc.

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