Senate Economics Legislation Committee inquiry into the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020

Submissions by Consumer Credit Legal Service (WA) Inc.
3 February 2021

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Introduction

The Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) takes the opportunity to provide submissions to the Senate Economics Legislation Committee's Inquiry into the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020.

About CCLSWA

CCLSWA is well placed to provide the Senate Economics Legislation Committee (the **Committee**) with insight into, and information on, how Western Australians would be adversely impacted by the proposed roll back of responsible lending laws in the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (the **Bill**).

CCLSWA is a not-for-profit specialist community legal centre based in the Perth metropolitan area. CCLSWA advises and advocates for consumers in relation to consumer credit issues.

CCLSWA operates a free telephone advice line service which allows consumers to obtain information and legal advice in the areas of banking and finance. 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 programs relating to credit and debt issues, 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 credit and financial services.

CCLSWA's mission is to strengthen the consumer voice in WA by advocating for, and educating people about, consumer and financial, rights and responsibilities.

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

CCLSWA contributed to and signed the joint submission by consumer groups and other organisations, to Treasury dated 20 November 2020, that recommended the Government abandon the proposed legislation.[1]

[1] 201120-Treasury-sub-RLO-repeal-bill-final.pdf (cclswa.org.au)

CCLSWA has also contributed to and signed the joint submission to this Committee co-ordinated by Consumer Action Law Centre, and fully supports the broader position put forward therein. This submission will focus on the specific experiences of Western Australians who have contacted our legal service for help, and our concerns about how the proposed changes will severely affect people in WA.

We have incorporated case studies as examples of our experiences. In these case studies, all parties names have been changed and we have not named the credit or lease providers in order to protect our clients' confidentiality. We have also made these entities anonymous as some matters are ongoing and others are subject to confidentiality agreements.

If the Committee would like to know the name of a lender or lessor 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.

1. Our recommendations

1.1. Our recommendation in relation to Schedule 1 to the Bill is:

> **abandon the proposed legislation and instead, retain responsible lending laws in their current form**; and,

1.2. In relation to the proposed reforms to small amount credit contracts and consumer leases in Schedules 2 to 6 to the Bill, our recommendation is:

> **abandon the proposed legislation**; and, instead, **implement all the recommendations** of the independent review into small amount credit contracts and consumer leases, dated March 2016.

2. Responsible lending obligations

2.1. Since the introduction of responsible lending obligations (**RLOs**) under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**), consumers in Australia have been better protected from banks and other lenders approving unsuitable home loans, car loans, credit cards and other forms of consumer credit.

2.2. Our telephone advice line service receives daily calls from people in Western Australia about misconduct relating to consumer credit.

2.3. From 1 January 2019 to 1 January 2021, CCLSWA delivered 196 services, including one-off telephone advice as well as lengthy and complex case file work, which dealt specifically with breaches of RLOs.

2.4. We consider the Bill will cause immense harm to people in Australia, due to the proposed removal of important consumer protections.

2.5. The key RLOs under the NCCP Act that currently protect consumers from unsuitable loans, include:

(1) that credit providers (and brokers) must make "reasonable inquiries" about a person's finances, and their requirements and objectives; and take reasonable steps to verify that information.

(2) that credit providers (and brokers) must assess whether the credit is "not unsuitable", and must not approve any credit that is unsuitable, or likely to be unsuitable for a consumer.

2.6. At CCLSWA, we regularly assist clients who have unsuitable loans that were approved in breach of RLOs.

2.7. While the evidence before the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Royal Commission**) exposed poor compliance with current RLOs, the Royal Commission ultimately concluded that the law is sound. We consider that RLOs are vital to prevent harm, and address the power imbalance between consumers and credit providers, and rather than remove these protections, as the Bill proposes, stricter compliance should be required.

2.8. Prior to the NCCP Act, people were more easily able to obtain unsuitable loans because lenders and brokers were not required to verify a borrower's information, and assess a loan's suitability. People could access risky financial products such as "low doc" loans.

2.9. While the NCCP Act has been in force for a decade now, we are still seeing clients at CCLSWA with problematic loans that pre-date the NCCP Act and RLOs.

2.10. The impact of these pre-RLO loans, can be devastating for people – for many of our clients, the unsuitable loan leads to further indebtedness, relationship breakdown due to the stress of their circumstances, and sometimes homelessness as Beverley's story below illustrates.

Case study – Beverley's story

Beverly is an 80-year-old widow and pensioner who lives alone in her home. She previously owned a small business that suffered severely during the GFC.

In around 2008, at the age of 69, Beverly entered into a 10-year interest only home loan. The loan refinanced her existing home loan and the balance of approximately $230,000 sat in an offset account as "available funds". Interest only repayments were taken by the bank from the "available funds" in the offset account, until the account was empty.

Beverly contacted CCLSWA after she received a default notice from her bank once the

offset account had been emptied, several years later. It was clear that Beverly did not understand the concept of 'interest only repayments', and she did not understand her repayment obligations or the purpose of the offset account.

Beverly's loan was a "low doc loan" and the application was filled in by a broker and approved by a big four bank based on a "Borrowers Income Declaration". The information contained in her application was not verified.

It was clear from CCLSWA's review of the loan application that Beverley's income, and assets were listed as being much higher than they truly were.

Beverly must now sell her home, with little or no equity, to repay her debt. She is now 80 years old and facing homelessness.

2.11. The errors in Beverly's loan application would have been obvious to the bank, if it had made the necessary inquiries or verified the information, pursuant to the current responsible lending laws. However, Beverly's low doc loan pre-dated responsible lending laws. Properly applied, responsible lending laws would have prevented Beverly's real risk of homelessness.

3. The Royal Commission

3.1. The evidence before the Royal Commission showed the deep harm that banks and other credit providers caused to individuals and communities in Australia, and the importance of having appropriate regulatory oversight of consumer credit.

3.2. The Royal Commission's Final Report was released on 1 February 2019, almost exactly two years ago. Commissioner Hayne's first recommendation in the Final Report, Recommendation 1.1, was that the "**NCCP Act should not be amended to alter the obligation to assess unsuitability**".[2]

3.3. Now, however, this Bill proposes to do the opposite of Commissioner Hayne's first and most important recommendation. The justification given by the Government in the Explanatory Memorandum to the Bill for the broad removal of RLOs (aside from "low level credit contracts"), is to "improve the flow of credit", by reducing the "time and cost" associated with the provision of credit.

3.4. We wholeheartedly disagree with the Government's justification for the Bill, and disagree with the Bill itself, for multiple reasons.

3.5. The first, is that the Bill's broad roll back of RLOs will cause immense and genuine long-term harm to ordinary people in Australia.

[2] Royal Commission Final Report, dated 1 February 2019, Volume 1 https://treasury.gov.au/sites/default/files/2019-03/fsrc-volume1.pdf

3.6. The second, is that we consider the Bill will have minimal positive effect on economic recovery from the impacts of the COVID-19 pandemic. On the contrary, we consider that the Bill will instead harm the economy in the long term.

3.7. There is little evidence to support any assertion that RLOs are preventing people from accessing credit. Rather, there does not appear to be any real impediments to Australians accessing enormous amounts of credit under the current RLO framework.

3.8. Recent lending statistics from the Australian Bureau of Statistics (**ABS**) indicate that the number of home loans approved by lenders in Australia reached record highs in November 2020.[3] All of these loans were approved within the current framework, requiring credit providers to comply with RLOs.

3.9. According to the ABS, the total value of new loan commitments for housing, rose 5.6% to **$24 billion in November 2020**, seasonally adjusted, which is an increase of 23.7% on November 2019. The value of new owner occupier home loan commitments also rose by 5.5% to **$18.3 billion in November 2020**, which is 31.4% higher than November 2019.[4]

3.10. This Bill unjustifiably proposes to fix a problem that evidently does not exist. In contrast, the evidence before the Royal Commission and presented in our case studies, clearly show the immeasurable harm to people in Australia when RLOs are not applied. In our experience the cost of unsuitable credit can weigh heavily on consumers. The financial ramifications will ultimately be borne by businesses, society and the Australian economy.

3.11. Removing RLOs as proposed by the Bill to all consumer credit (aside from "low level credit contracts" under $2,000 and consumer leases) will have long term negative impacts on the Australian economy. Australians already have record amounts of debt.[5] It is highly likely that people will be more easily able to take on riskier loans, resulting in higher amounts of unserviceable debt.

4. Removal of penalties encourages riskier lending

4.1. Currently, the NCCP Act contains civil and criminal penalties that apply to credit licensees for breaches of RLOs.

[3] Lending indicators, November 2020 | Australian Bureau of Statistics (abs.gov.au)
[4] Lending indicators, November 2020 | Australian Bureau of Statistics (abs.gov.au)
[5] Jonathan Kearns, Mike Major and David Norman, "How Risky is Australian Household Debt?" (rba.gov.au) RDP 2020-05.

4.2. This penalty regime protects borrowers, as it creates a clear framework for banks and other credit licensees – they must comply with RLOs when assessing suitability for credit and approving credit, otherwise face a penalty.

4.3. Without these penalties, as proposed by Schedule 1 to the Bill, banks and other lenders may fail to comply with good lending practices, as there is less incentive to do so.

4.4. Under Schedule 1 to the Bill, loans from banks as Authorised Deposit-taking Institutions (**ADIs**) will be subject to the Australian Prudential Regulation Authority (**APRA**) standards. APRA standards are not consumer focused. They are not designed to protect consumers, but rather, APRA's focus is on prudential regulation – APRA's stated aim is "maintaining the safety and soundness" of ADIs.[6]

4.5. For non-bank lenders, we consider the proposed standards to be made by a Minister under section 133EA NCCP Act (the **Ministerial Standards**)[7] to apply to non-bank loans will be much weaker than current RLOs. The Ministerial Standards will not be adequate to protect individual borrowers from unsuitable lending. The proposed civil penalties provisions for non-bank lenders, will only apply where a lender has "repeated" breaches. This focus on systemic breaches means that consumers will have great difficulty bringing claims as individuals.

4.6. There is a high risk that without a robust penalties regime to incentivise credit licensees to comply with good lending practices, that more people like Beverley (case study page 4) may easily end up with unsuitable loans, which they do not understand and cannot afford to repay.

5. Consumers face significant harm in Western Australia

5.1. CCLSWA and our clients will be deeply impacted by the Bill. This submission will now address the unnecessary harms we fear that Schedule 1 to the Bill will cause individuals such as our clients, and their families.

5.2. At present, Western Australians who seek CCLSWA's help, frequently rely on the protections under the current RLO framework to resolve their disputes about their loans.

5.3. Our key concerns are that the Bill will both remove the civil and criminal penalties regime for breaches of RLOs as outlined above, AND the Bill will reduce consumers' rights, and their ability to enforce these rights.

[6] Prudential policy | APRA

[7] Based on the draft standards, "Non-ADI Credit Standards", released by Treasury in their consultation in November 2020, https://treasury.gov.au/consultation/c2020-124502

5.4. In Western Australia, borrowers who purchased homes during the peak of the previous mining boom, are in a situation where their homes are generally worth less than their loans owing to the bank.[8] This situation is despite the recent increases in property prices in Perth. Tina's story below is illustrative.

5.5. For our clients in WA who cannot afford their regular home loan repayments, and are in default, to be in negative equity is devastating – their choices are stark – selling the property at a loss/repossession of the property and then either bankruptcy or owing a shortfall debt to the bank.

5.6. Without RLOs applying to all forms of consumer credit, we are concerned that more and more individuals could be approved loans that are unaffordable. To compound the anguish that such debt causes, within the Western Australian boom and bust economy, consumers not protected by RLOs may end up hugely indebted, in negative equity, and with fewer legal rights and avenues for redress.

Case study – Tina's story

Tina is a 40 year old single professional woman who contacted CCLSWA in early 2019 when she had multiple credit card debts and had a home loan of about $350,000, over a unit in suburban Perth. The unit had dropped in value since she bought it in 2012, and it was now worth about $200,000.

Tina's home loan was secured by a guarantee given by Tina's parents over their family home. At the time that Tina was approved for her home loan in 2012, she was living with her parents and had credit card debts. A mobile lender from a big four bank visited Tina and her parents at their home, and offered Tina a loan of $400,000, along with arranging the guarantee for her parents.

Tina's loan was used to buy her unit for $330,000 to live in, and the extra loan money was used to pay out Tina's previous credit card debts. The mobile lender from the bank performed an assessment of suitability for the loan, but falsely included "projected rental income" for the unit to make the numbers add up, although Tina had bought the property to live in and it was not an investment loan. Tina's parents guaranteed the loan, with their family home that had a mortgage with the same bank.

When Tina contacted us, she had been living off credit cards because her salary was not enough to meet the monthly home loan repayments for her unit. Meanwhile, the Perth property market had dropped as the mining boom ended, so her unit was now worth

[8] See: WA Today article dated 3 December 2020, reporter Hamish Hastie, Mining boom 'death spiral' still trapping WA households in mortgage stress (watoday.com.au)
ABC news article dated1 May 2019, reporter Stephen Letts "Mortgage delinquencies mount as more borrowers find their home is worth less than their loan - ABC News"
The Guardian article dated 12 May 2017, reporter Calla Wahlquist,
'They've lost the lot': how the Australian mining boom blew up in property owners' faces | Western Australia | The Guardian

around $150,000 less than the balance owed to the bank.

Tina was facing a shortfall debt of about $150,000 and her parents were at risk of losing their family home.

Tina also had around $60,000 owing on six different credit cards, due to her trying to live on credit cards while her salary went towards her unaffordable home loan.

Had responsible lending laws been followed, this situation would never have occurred as Tina would never have been granted the loan.

5.7. The impact of Tina's unsuitable loan was enormous – when Tina contacted CCLSWA, Tina was considering bankruptcy but did not want her parents to lose their family home, which was security for her parents' guarantee. Tina also had numerous credit card debts to manage, and the strain of years of working several jobs to meet her home loan repayments led to Tina suffering a chronic health condition caused by stress.

5.8. As the Western Australian property market is affected by the rise and fall of our mining economy, consumers in WA such as Tina, have less equity to absorb the impacts of unaffordable loans. RLOs are a vital protection for people like Tina, and an essential weapon in CCLSWA's armoury when seeking redress for WA consumers like Tina (see 6.2 – 6.4 below).

6. Importance of reasonable inquiries and verification

6.1. RLOs are in place to protect consumers from harm that stems from unsuitable credit. One crucial aspect of RLOs, is the requirement for lenders and brokers to make assessments of a loan's suitability for a consumer, and to make reasonable inquiries of the borrower, and verify the information provided. The Bill will remove this requirement and with it all the protection it offers for people accessing consumer credit over $2,000 such as home loans, credit cards, car loans and personal loans.

6.2. In Tina's case, on CCLSWA's review of her home loan application documents prepared by the mobile lender for the bank, it was immediately apparent that the home loan was unsuitable and in breach of responsible lending laws. Tina's income on the home loan application was exaggerated by the broker to include projected "rental income" for the unit, whereas Tina had sought a residential loan for a property she would live in.

6.3. Further, on the loan application documents, Tina's income from her salary was not enough to cover the monthly loan repayments, let alone enough to cover any other expenses. The loan was also for a far greater amount than the property's

value, as the broker had arranged for the surplus to pay out Tina's existing credit card debts.

6.4. CCLSWA was able to raise an argument for breach of RLOs to negotiate an outcome with the bank. Tina was able to surrender her property to the bank, the bank sold the property and kept the proceeds and then waived her $150,000 shortfall debt. This outcome had the effect of placing Tina theoretically back in the position she would have been, had the unsuitable loan not been approved (as the amount of interest, fees and charges which would usually be refunded to the borrower, within the remedy for a breach of RLOs, cancelled out the shortfall debt).

6.5. In addition to removing the assessment requirement that a loan is "not unsuitable", under the Bill, lenders and brokers may rely on financial information provided by the borrower unless there are "reasonable grounds" to believe it is unreliable. This is instead of lenders and brokers being required to make inquiries, and to verify information provided.

6.6. We consider it is reasonable for brokers and lenders, to assess a borrower's suitability for a loan. Given that many consumers, particularly borrowers seeking a home loan (which may occur only once or twice in a person's lifetime), are unfamiliar with the forms and processes required, we have deep concerns that borrowers providing their own information without verification, are more likely to make an unintentional mistake. Whereas lenders and brokers are experts in the forms and processes, and borrowers rightly rely on that expertise for guidance through unfamiliar territory. Our clients aver to this and recount to us their belief that the bank would not lend to them if they could not afford it – they take the bank approval as confirmation of affordability.

6.7. We have strong concerns that this removal of verification requirements will increase the number of people taking on unsuitable and unaffordable loans, and will increase instances of financial abuse.

6.8. CCLSWA represents many victims of financial abuse, lumbered with liability for loans which serve no purpose for them or that they may not even have been aware of. In many instances, we believe that reasonable inquiries and verifications would have raised red flags and may have revealed that the credit applications were actually made under duress and/or for the benefit of third parties (we address this further at 10 below).

7. Vulnerable people and debt spirals

7.1. The current global pandemic has taught us that we are all potentially vulnerable consumers, and this should be the starting point for any review of consumer credit law. CCLSWA notes many callers to our telephone advice line since the emergence of COVID-19, are experiencing financial hardship for the first time.

Now is not the time to remove consumer protections or make changes to already unfamiliar territory for these people.

7.2. We consider that repealing RLOs will cause vulnerable people to more readily access more unsuitable credit, leading to potential debt spirals and greater harm for individuals and their families.

7.3. Matthew's story below is representative of CCLSWA clients who often sought further credit, when in financial hardship, as a short term, but flawed, way of managing their financial situation. (This is to be distinguished from refinancing, as CCLSWA recognises that the ability to refinance on more favourable terms may be pivotal to overcoming financial hardship).

7.4. Responsible lending laws operate to prevent further indebtedness where a consumer is already in financial hardship, as credit providers and credit assistance providers (brokers) must assess a person's suitability for any additional credit.

Case study – Matthew's story

Matthew and his partner moved to Perth from England. Their house in the UK had sold for less than that expected and so they arrived with a large debt. They jointly took out loans to purchase land and build a house in Perth.

Matthew's partner unfortunately then became very ill and was unable to work and they began to rely on credit cards to live. To add to this stress, their medical bills were piling up.

When Matthew came to CCLSWA, he had credit cards maxed out with three different lenders with the total cumulative debt over $60,000.

The debt has accumulated from a variety of objectively small credit limit increases and balance transfers.

Matthew was working an unsustainable amount of overtime to supplement his income. Matthew's mental and physical health was suffering as a result of the overtime, and the stress of trying to constantly meet repayments.

Our review of the credit card application documents concluded that the various lenders did not make reasonable inquiries or verify that information, before granting more credit.

CCLSWA raised complaints with each of Matthew's lenders for breach of responsible lending laws. So far we have managed to negotiate a reduction of $30,000 in the debt.

7.5. CCLSWA is concerned that without RLO protections, vulnerable people may more easily gain access to credit such as credit cards and personal loans, and continue to access further credit in order to stay afloat, ending in a debt spiral as Matthew did above.

7.6. Similarly, in Tina's case described on page 8, in her desperation to keep up with her unaffordable home loan repayments, Tina took out six different credit cards over several years, and relied on these credit cards to meet her basic living expenses, and to repay her home loan.

7.7. CCLSWA assisted Tina to dispute each of her credit cards that had been approved after she was granted the unaffordable home loan, on the grounds that they were causing Tina substantial hardship, and were in breach of RLOs. Ultimately, each of the banks who had provided these credit cards, agreed to refund the interest, fees and charges on the credit card debts to Tina. This outcome drastically reduced the debts owed by Tina to these banks. Some of the banks also granted Tina a compassionate waiver for a portion of the principal sum owing, given Tina's chronic ill health and inability to work. The outcome may have been very different for Tina if CCLSWA could not argue breach of RLOs.

8. Harm from credit cards

8.1. As Tina and Matthew's cases demonstrate, people often rely on multiple credit cards to pay for daily living expenses in order to maintain repayments on their unaffordable home loans. This is reflected by Financial Counselling Australia's view: "If these laws are removed, many people will forgo other essentials like groceries and medicine. Unaffordable debt is often a pathway to poverty."[9]

8.2. The Australian Securities and Investments Commission (**ASIC**) Report 672, "Buy now pay later: An industry update" further supports the view that consumers will cut back on or go without essentials (e.g. meals), and take out additional loans, in order to make repayments on time.[10] Acknowledging that the buy now pay later industry is not subject to current consumer credit laws, we consider that removing RLOs will place more credit products on a similar footing, leaving consumers with limited avenues for redress and few options for dealing with the negative consequences of a missed or late repayment.

8.3. Credit cards are highly risky credit products with high interest rates and, in our experience, often propel people already in financial hardship into debt spirals. Both Matthew and Tina owed around a total of $60,000 each, across multiple credit cards. Default fees and high interest rates on credit cards, quickly compound debts, and make it almost impossible for a person to pay off their debts within a reasonable time frame.

[9] See FCA website https://www.financialcounsellingaustralia.org.au/financial-counsellors-dismayed-as-bill-to-axe-safe-lending-tabled-just-before-christmas/
[10] ASIC Report 672, November 2020, page 15, https://asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf

8.4. In 2018, in recognition of the harm caused by credit cards, the Government introduced protections through the *Treasury Laws Amendment (Banking Measures No. 1) Act 2018* (Cth). This Act amended the NCCP Act so that lenders must assess a borrower's ability to repay their entire credit card within a certain time period of three years, as set by ASIC.

8.5. While it appears, under the proposed Ministerial Standards, that non-bank lenders will have to consider this assumption that a credit card is repayable within three years, the Bill will remove this important protection for consumers who apply for a credit card from a bank.

8.6. For banks, there does not appear to be any requirement under current APRA prudential standards that would require banks to include this three year period, when approving a consumer's application for a credit card.

8.7. It does not make any sense to give the banks a free pass or distinguish between credit cards provided by banks and non-bank lenders – credit cards, including those from banks, cause serious harm. These very recent protections are crucial to protect people from debt spirals that stem from relying on multiple credit cards. CCLSWA stands by its submissions to ASIC's Consultation Paper 303 "Credit cards: Responsible lending assessments".[11]

9. Impact of debt on people and their families

9.1. The harm from serious indebtedness not only affects individuals, but deeply affects their families and community.

9.2. Some of our clients have told us of simple examples of avoiding social or family occasions out of embarrassment of their lack of funds (such as not being able to afford a present for a family wedding or pay for petrol). Other have suffered serious issues such as developing mental health problems onset by the stress relating to their finances, relationship breakdown due to their debt, or risk of homelessness.

9.3. It is well documented that debt has significant impacts on people's wellbeing. The "100 Families WA Baseline report", found that debt had a significant impact on their survey members' lives, resulting in stress related illness, inability to sleep and relationship breakdown attributable to their debt.[12]

[11] https://asic.gov.au/media/4858030/cp303-submission-cclswa.pdf
[12] 100_Families_WA_Baseline_Report_Aug19.pdf (csi.edu.au) page 7.

10. Potential for financial abuse

10.1. We are concerned that removing the obligations on credit providers and brokers to make inquiries and verify information prior to approving a loan, will increase the instances of financial abuse in Australia.

10.2. Asking basic questions of potential borrowers of their requirements and objectives for a loan, and assessing the suitability of the loan, is a simple way to identify where a loan is not in the interests of the borrower, and that abuse is occurring.

10.3. Where financial abuse does occur, and the loan is unsuitable for the victim/survivor of abuse, the RLOs provide that person with an appropriate avenue for redress.

Case study – Claire's story

Claire was referred to the CCLSWA by a specialist domestic violence unit in Perth in June 2019.

Claire is a single mother raising five children. Claire was born overseas and came to Australia around ten years ago. Claire does not read or write English, and her spoken English is very limited. We used the services of interpreters to communicate with her. Claire was married to Andy. Andy would physically and emotionally abuse Claire.

In 2013, Andy forced Claire to see a friend of his in Perth, a mortgage broker, and Claire signed documents in English without being able to read or understand what she had signed. She had become the sole borrower on a $400,000 home loan to purchase a home for Andy, herself, and the children. At the time, they had one child and another on the way. Claire was 6-months pregnant which would have been obvious to the broker. Instead, Andy had presented the broker with forged payslips showing that Claire worked for Andy's business and received a monthly income from the business of $6,000.

Despite Claire's obvious pregnancy the broker ticked "no expected change in circumstances" on the home loan application. The loan was granted without the bank taking any steps to contact Claire directly.

Around two years later, in 2015, Claire was taken by her husband to the same broker and was told to sign more paperwork. Claire was coerced into signing the documents by her husband, and she became the sole borrower of an investment home loan, with a different bank.

On the loan documents for the investment loan, Claire was listed as being a single person with no dependants and earning $5000 per month. This was clearly false, as Claire had multiple children, did not earn any income and was taken by her husband to the broker's office to sign the paperwork.

Claire separated from Andy in 2017 and has violence restraining orders in place against him.

The loan for the investment property went into default and was repossessed by the bank in 2018.

Had the broker, or lenders complied with RLOs and make reasonable inquiries and verified the information provided, each of these loans would have been assessed as unsuitable.

10.4. While lenders are not to blame for such abuse, they can assist in its prevention. Proper application of RLOs would likely have prevented Claire's financial abuse from occurring.

10.5. Under Schedule 1 to the Bill, lenders and brokers will be permitted to rely on the financial information provided by the borrower unless there are "reasonable grounds" to believe it is unreliable. This is instead of the requirement to make inquiries, and to verify information provided.

10.6. We have strong concerns that the Bill's proposed removal of verification requirements and reliance on borrower-supplied financial information, will allow more financial abuse to occur undetected more easily, and the broad removal of RLOs will leave victims like Claire with no avenue for redress.

11. Fewer rights for redress

11.1. Consumers who have been provided unaffordable loans and those that are caught up in predatory lending will have fewer legal rights against lenders, and it will be more difficult to enforce those rights if the Bill is passed.

11.2. Under the current NCCP Act, if a consumer is granted an unsuitable loan by a lender in breach of RLOs, that person has clear legal rights for redress though the Australian Financial Complaints Authority (**AFCA**) and through the courts.

11.3. Currently, consumers can rely on section 178 NCCP Act if they wish to seek compensation through the courts, for losses suffered due to a breach of RLOs. The court may order a lender to compensate a person for loss or damage suffered, due to the lender's breach of the civil penalty provisions of the NCCP Act.[13]

11.4. Under the Bill, however, individual borrowers with loans over $2,000 from a bank, will not be able to take a bank to court for a breach of the APRA lending standards under the proposed regime, unless systemic breaches are proven. Similarly, individuals with loans over $2,000 with non-bank lenders, will be prevented from bringing a claim against a non-bank lender, unless there are

[13] Section 178(1) NCCP Act.

"systemic breaches" of the Ministerial Standards. There will be no clear avenue for individual redress.

11.5. The Bill will also reduce the legal rights that consumers can rely on in disputes and seek to enforce through AFCA. Under the AFCA Rules, AFCA decision makers consider what is "fair in all the circumstances", including by "having regard to legal principles", when determining a credit related complaint.[14]

11.6. We are particularly concerned it will be difficult, if not impossible, for a consumer to uncover whether a "systemic breach" of Ministerial Standards has occurred in relation to their loan with a non-bank lender, as consumers will not be able to easily access this information - we would expect lenders treat their systems and processes as confidential and commercially sensitive.

11.7. In our work at CCLSWA, we regularly assist clients to bring disputes to AFCA against banks, other lenders and brokers, for breaches of RLOs. AFCA provides an efficient process for consumers, and their representatives. CCLSWA often achieves quicker and more cost-effective outcomes for our clients through AFCA in circumstances where our clients (and our centre) would simply not have the resources to take a credit licensee to court.

11.8. We fear that consumers will have a limited legal basis on which they may bring claims for unsuitable loans to AFCA or to court, if RLOs are rolled back as proposed by the Bill. Particularly, for our clients, our centre and other vital community services that regularly bring claims of RLO breaches to AFCA, there will no longer be viable avenues for redress.

12. Complex alternatives to remedy misconduct

12.1. Under Schedule 1 to the Bill, borrowers' legal rights will be significantly reduced. For a borrower with an individual complaint against a bank or other lender, the alternative, more complex options may be to bring a claim that the credit contract is unconscionable, or an "unjust contract" under section 76 of the National Credit Code (**NCC**). [15]

12.2. Section 76 of the NCC gives a court the power to reopen unjust consumer credit transactions involving a loan, mortgage, or guarantee. Under section 76 of the NCC, in determining whether a contract is unjust at the time the contract was entered into or changed, the court must consider the public interest and all the circumstances of the case.

[14] AFCA Complaint Resolution Scheme Rules, A.14 "Decision making approach", page 17, dated 13 January 2021, AFCA - Rules 13 January.pdf
[15] Schedule 1 to the NCCP Act.

12.3. These provisions are less effective for consumers, than RLOs. First, the provisions under section 76 NCC do not operate to prevent harm to consumers from occurring (for example, unlike RLOs, these provisions do not impose any positive duties on credit providers, or brokers, to assess whether a loan is suitable at the outset before credit is approved).

12.4. Second, there are many challenges for consumers to successfully bring an unjust contract claim under section 76 NCC. Courts are generally reluctant to interfere in a contract between two parties, unless there is a clear injustice, and the number of factors relevant to reopening an unjust transaction is to the exercise of the court's discretion.

12.5. The recent case in the Western Australian Supreme Court of Appeal, in *Shannon v Permanent Custodians Limited* [2020][16] demonstrates the many challenges facing individual consumers in bringing legal proceedings about misconduct relating to a home loan, outside of the current RLO framework in the NCCP Act.

12.6. CCLSWA was not involved in this case, but closely followed the outcome given its implications for consumers in Western Australia. In this case, the appellants in this protracted litigation, Mr and Mrs Shannon, had originally borrowed $452,000 in May 2006 from a lender to purchase a home in Baker's Hill, a small town between Perth and Northam, WA. Mr and Mrs Shannon were first home buyers and were financially unsophisticated. Within several months, Mr and Mrs Shannon defaulted on the loan.

12.7. The originator of the home loan, a broker at "Yes Home Loans", had misrepresented details in the loan application provided to the lender and mortgage insurer (for example, giving false details regarding Mr and Mrs Shannon's employment, income, assets and liabilities). The loan pre-dated the NCCP Act and RLOs.

12.8. In February 2013, court proceedings were commenced to repossess the Shannons' property. In response, Mr and Mrs Shannon alleged various counter-claims against the other parties, in relation to the loan and the misrepresentations made by the broker. At this stage, Mr and Mrs Shannon's loan balance had risen to $581,042, and interest of 8.27% per annum continued to still accrue on the loan.

12.9. By the WA Supreme Court trial in December 2017, the loan balance was over $1,301,000. Mr and Mrs Shannon lost at trial,[17] but decided to appeal. While the appeal was pending, the judgment sum of $1,386,920 continued to accrue

[16] *Shannon v Permanent Custodians Limited* [2020] WASCA 198 5c8dc9d5-156b-4b6c-99ca-dd664dff46b6 (justice.wa.gov.au)

[17] His Honour Le Miere J, rejected the counter-claims brought by the Shannons, and ordered payment of the outstanding debt, which by September 2018, had accrued to $1,386,920 and the Shannons were to give vacant possession of the property within 42 days.

interest over three more years. In November 2020, the Court of Appeal found in favour of Mr and Mrs Shannon, that the loan agreement was an unjust contract under s 76 NCC, and the parties were referred to mediation.

12.10. We consider that the financial and emotional costs of bringing this matter to court, would be almost immeasurable. For the bulk of the legal proceedings, the record shows that Mr and Mrs Shannon were unrepresented, as they had no funds to pay legal fees. The other parties were represented by senior barristers and a global law firm. Mr and Mrs Shannon's original loan was for $452,000 and by the end of their seven-year court battle, the balance owing on the loan was well over $1,386,920.

12.11. To compound the stress in bringing legal proceedings for an unjust contract under section 76 NCC (where a favourable outcome is far from certain), consumers in financial hardship cannot usually afford legal representation, let alone afford the enormous costs should their court battle end in the bank's favour. This David and Goliath-type scenario, as experienced by Mr and Mrs Shannon, shows the enormous risk for consumers in bringing unjust contracts disputes – whereas these high costs are more easily absorbed by a large bank.

12.12. The current NCCP Act provides a crucial framework for people to seek an outcome at AFCA and through the courts, for misconduct by banks and other lenders, where RLOs have been breached. Had Mr and Mrs Shannon's loan been approved after the NCCP Act came into force, their pathway for redress as a breach of RLOs, would likely have been significantly less challenging, time consuming and costly.

13. Disappointing SACC and consumer lease reforms

13.1. Schedules 2 to 6 of the Bill are a weak attempt to address much-needed reforms regarding small amount credit contracts (**SACCs**) and consumer leases. The Bill, in its entirety, including Schedules 2 to 6, should be abandoned.

13.2. An independent review of the laws regulating SACCs and consumer leases undertaken in 2015-2016 (the **Review**) resulted in 24 recommendations being made in a final report provided to the Government on 3 March 2016 (the **Recommendations**).

13.3. The Government accepted most of the Recommendations in November 2016. Since the Recommendations were made in March 2016, there have been attempts to introduce these important protections, into legislation in various guises.

13.4. We repeatedly see vulnerable consumers grappling with the numerous issues surrounding SACCs and consumer leases. The Bill is a poor attempt to reform

SACCs and consumer leases. The Bill does not meet the Recommendations, nor does it properly protect vulnerable consumers from predatory lending.

13.5. We refer to our previous submissions to the following inquiries that set out what we consider to be imperative for SACCs and consumer lease reform:

(1) Written submissions to the Senate Economics Legislation Committee's Inquiry into the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No.2) (February 2020);[18] and

(2) Written submissions to the Senate Economics Reference Committee's Inquiry into Credit and Financial Services Targeted at Australians at risk of financial hardship (November 2018)[19].

13.6. The proposed SACCs and consumer lease reforms in the current Bill do not adequately protect vulnerable people, nor meet the Recommendations.

13.7. Further, the watered-down protections proposed in the Bill for SACC equivalent "low level credit contracts" (**LLCCs**) of loans under $2,000 and consumer leases should not be traded off for the broader roll back RLOs. These meagre protections **will not offset the enormous risks** to consumers by the Bill removing RLOs to all other forms of credit.

14. People have debts from both larger loans and SACCs

14.1. Our clients rarely present to CCLSWA with an isolated SACCs matter. More often they come with multiple forms of debt from consumer credit products, including car loans, personal loans and credit cards in addition to SACCs with payday lenders.

14.2. There is no reassurance for these clients from the Bill's attempt to reform legislation on SACCs or consumer leases, as the Bill removes RLOs from all other forms of consumer credit. In many cases the same vulnerable people who will access loans under $2,000 will not be protected by RLOs where they apply for car loans, credit cards and other forms of consumer credit for any amounts higher than $2,000. The inconsistent approach will not "simplify" credit, but compound consumer confusion in this regard, and cause great harm.

[18] https://cclswa.org.au/wp-content/uploads/2020/04/20200221-Submission-for-SELC-Inquiry-into-SACC-and-Consumer-Lease-Reform....pdf
[19] https://cclswa.org.au/wp-content/uploads/2018/11/20181109-FNL-SUB-Submissions-to-Senate-Inquiry-into-Credit-and-Financial-Services-Industry-and-Attachments.pdf

14.3. In CCLSWA's case files, it is usually the unaffordable and larger scale credit contracts, (car loans, home loans, or multiple credit cards), that forces a vulnerable consumer to the desperate measure of seeking small cash advances from payday lenders.

Case study – Sandra's story

Sandra is an Aboriginal woman, and a single mother of three children, one with special needs, living in Perth.

Sandra contacted CCLSWA when she was in default on her car loan. Sandra's car loan was arranged by a broker at a car yard in 2016 when she was desperate to replace her car that had been written off in an accident.

Sandra's sole income was from Centrelink, and she could not afford the loan repayments and pay for her family's basic expenses. Sandra bought the used car for $8,000 and after add-on fees and charges, the loan was for $11,000. The value of the car was far less, being around $3,000.

The lender was a 'fringe' lender, who charged Sandra a very high interest rate (of almost 25% interest), so the car loan with establishment fees and interest, ended up costing Sandra over $17,000.

Sandra was in significant financial hardship, as her sole income was Centrelink and after paying for the car loan, she could not cover the fees for therapy required by her child with special needs.

During our work on Sandra's car loan, CCLSWA discovered that Sandra had also taken out 14 separate payday loans over three years from 2016 to 2019 while Sandra was struggling to repay the unaffordable car loan.

Sandra had defaulted on many of these payday loans, as well as defaulting on her car loan.

CCLSWA negotiated on Sandra's behalf with the lender for the car loan, on the basis that the car loan breached responsible lending laws.

After reviewing the documents for the multiple payday loans, it was clear that each of these payday loans were also unsuitable - Sandra was in substantial hardship when she sought these cash advances from the payday lender.

14.4. Sandra's story is a clear example of how a debt spiral can occur, prompted by an unaffordable car loan, that led to multiple payday loans.

14.5. The proposed Bill will do nothing to protect vulnerable people such as Sandra from borrowing unaffordable car loans with high interest rates, which have the flow-on effect of making them highly vulnerable to payday lenders.

14.6. The SACC and consumer lease reform proposed in Schedules 2 to 6 of the Bill will do little to prevent such harm, let alone meet the stated aim of the reforms in the Bill to "promote financial inclusion" as suggested by the Explanatory Memorandum.[20]

14.7. In the reverse, the Bill will likely encourage fringe lenders to "upsell" and approve risky, high-cost loans to vulnerable people. There will be no obligations on lenders to assess the borrower's suitability for loans over $2,000 aside from general lending standards, which for fringe non-bank lenders, would be set by the Ministerial Standards. This is an absurd situation, and potentially very dangerous for vulnerable borrowers.

14.8. Trish's story is a further example of an unsuitable home loan sending a consumer into a dangerous debt spiral – after her unsuitable home loan, Trish then obtained a large personal loan, then credit cards and finally numerous payday loans.

Case study – Trish's story

Trish was 51 years old, divorced, with one dependent son and grand-daughter she helped to care for, when she sought assistance from CCLSWA. She worked full time and had a yearly gross income of around $68,000.

She had various debts including a home loan obtained in 2012 for $450,000, personal loan obtained in 2014 for $50,000, credit card obtained in 2007 with an initial limit of $3,000 rising to a limit of $22,000 as at December 2015 and medium amount credit contracts of $3,000 and $3,900 obtained in April 2015 and April 2016.

Trish also presented with multiple SACCs ranging from $250 to maximum of $1,300 comprising of 24 separate advances from one lender between March 2010 and July 2016.

Our review and assessment of Trish's various loan applications revealed that Trish's need for SACCs was fueled by her inability to service other unsuitable debt.

Once we established that Trish's home loan was unsuitable, no sensible assessment could have determined that the 3 unsecured personal loans, 8 SACCs and 4 credit card limit increases were suitable given that they postdated and helped to service her unsuitable home loans.

Nevertheless, the suitability assessments we obtained from the various lenders reflected sufficient monthly income to service the credit contracts.

However, when we undertook our own assessments, we found that Trish had no discretionary monthly income and was in a position of financial deficit bar one of the assessments.

[20] Explanatory Memorandum to the Bill, paragraph 4.1 at page 95.

15. Inadequate Protected Earnings Cap reform

15.1. CCLSWA **does not support** any of the provisions of the Bill, including the "protected earnings cap" provisions which will facilitate regulations to provide different protected earnings amounts for Centrelink recipients, and non-Centrelink recipients.

15.2. The current law around the cap on repayments for SACCs, known as the "protected earnings cap", currently applies only to Centrelink recipients. This cap on repayments means that anyone who receives at least 50% of their income from social security payments has their repayments capped at no more than 20% of their gross income, and 80% of their income is "protected".

15.3. CCLSWA advocates for the implementation of all the Recommendations of the Review.

15.4. Recommendation 1 of the Review is that protected earnings for SACCs be capped, with a reduction to the amount available for SACCs to 10% of a consumer's **net** income for **all consumers**.

15.5. In contrast, the Government via regulations under the Bill, will double the amount recommended for these caps by the Review, for people who do not receive more than 50% their income from Centrelink.

15.6. The Bill proposes a regulations-making power under s 133CC(1) that can be used to *"ensure that all consumers are covered by a protected earnings amount (although different amounts may apply to different consumers)"*.[21]

15.7. The Explanatory Memorandum for the Bill, at 3.19, sets out further, that the regulations will provide separate protected earnings amounts to:

(1) consumers with at least 50% of their income from social security payments with a cap of 20% of their net income for SACCs and consumer leases (ie 10% cap of net income available for SACCs and another 10% net income available for consumer leases); and
(2) all other consumers have a cap of 20% net income which may be used for SACCs.

15.8. This means under the Bill, that it will be legal for a person on a salary (no matter how low their income), to have up to 40% of their net income after tax, repaying both SACCs and consumer leases.

[21] Explanatory Memorandum to the Bill, paragraph 3.16 page 75.

15.9. Trish's story above at page 21, and Ryan's story below, show the need for the protected earnings cap to extend equally to all consumers, as per Recommendation 1 of the Review.

15.10. Trish's financial hardships prevailed despite her salary from her full-time employment. Her story illustrates that financial hardship is not confined to a particular type of consumer. Accordingly, we recommend that legislative and regulatory protections should not differentiate consumers by income, or receipt of Centrelink, in relation to predatory lending.

15.11. Ryan's story below also supports the application of the protected earnings cap to all consumers equally. While Ryan had a solid income from his salary as an electrician, Ryan's other vulnerabilities made him susceptible to exploitation by predatory payday lenders. Ryan's SACC debt spiraled from his gambling addiction.

Case study – Ryan's story

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.

Between 2015 and 2017 Ryan obtained at least:

- 43 SACCs, and
- three credit cards

from 10 different lenders in order to fund his addiction.

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.

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.

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

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 responsible lending obligations.

15.12. We maintain that consumers such as Ryan and Trish remain vulnerable despite having employment, and advocate for all consumers to be properly protected from predatory pay day lending and consumer leases, as recommended by the Review.

16. Ineffective Consumer Leases cost cap reform

16.1. Appallingly, there is no current cost cap on consumer leases.

16.2. Recommendation 11 from the Review, in relation to consumer leases, recommended a 4% monthly fee cost cap for consumer leases, which would be calculated on the retail price of the leased good (for a maximum of 48 months).

16.3. The Bill fails to properly implement this Recommendation. Instead, the Bill allows consumer lease companies to charge people higher fees than the Review recommends.

16.4. The Bill's proposed "permitted cap" would be practically, a 4% monthly fee for 48 months, calculated on not only the base price of the goods, but also the additional "permitted" delivery and installation fees.

16.5. Accordingly, the Bill gives consumer lease companies access to more profits, at the expense of people who are in hardship – many of our clients take on consumer leases because they cannot afford the up-front cost of basic goods.

16.6. Further, the Bill allows consumer lease companies to charge separate establishment fees, over the cost cap recommended by the Review. The Bill's proposed establishment fee would be 20% of the base price of the goods, and would be separate to the "permitted cap".[22]

16.7. The stated justification for allowing a separate "establishment fee" of 20% of the base price of the goods, is that the Government considers it "reasonable in the circumstances".[23] We disagree.

16.8. Allowing a separate 20% establishment fee is unreasonable and unfair - vulnerable people, who are generally reliant on consumer leases when they cannot afford to purchase goods outright, will continue to be exploited by consumer lease companies.

16.9. The Bill in its entirety must be abandoned to protect ordinary Australians from great harm.

[22] Explanatory Memorandum to the Bill paragraph 4.33, page 101.
[23] Explanatory Memorandum to the Bill paragraph 4.35, page 101.

17. Conclusion

CCLSWA is grateful for the opportunity to provide submissions to the Committee. We would be happy to provide further assistance and attend at public hearings.

If you have any questions or would like to discuss these submissions, please contact acting Managing Solicitor, Roberta Grealish on (08) 6336 7020.

Yours faithfully

Roberta Grealish
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Consumer Credit Legal Service (WA) Inc.