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ECONOMICS LEGISLATION COMMITTEE

Reference: National Consumer Credit Protection Bill 2009

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SYDNEY

BY AUTHORITY OF THE SENATE

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**SENATE ECONOMICS
LEGISLATION COMMITTEE
Wednesday, 26 August 2009**

Members: Senator Hurley (*Chair*), Senator Eggleston (*Deputy Chair*), Senators Cameron, Joyce, Pratt and Xenophon

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cash, Colbeck, Collins, Coonan, Cormann, Crossin, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Hefernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams and Wortley

Senators in attendance: Senators Bushby, Hurley, Pratt and Xenophon

Terms of reference for the inquiry:

To inquire into and report on:

National Consumer Credit Protection Bill 2009

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Committee met at 3.35 pm

CHAIR (Senator Hurley)—I declare open this third hearing of the Senate Economics Legislation Committee inquiry into the national consumer credit protection reform package. On 25 June 2009 the Senate referred the National Consumer Credit Protection Bill 2009 and three related bills. The committee is due to report by 7 September 2009. The bills implement a decision by the Council of Australian Governments to replace state based credit legislation with a national regulation and oversight regime. The reform includes the implementation of comprehensive licensing for people providing credit or credit assistance. Lenders will also be required to adhere to new responsible lending obligations which include an assessment of suitability and the consumer's capacity to repay the loan. Credit providers will be provided to make reasonable inquiries to verify the details provided to them. The bills include new disclosure and dispute resolution requirements. The inquiry will also look into the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009, which brings margin lending into the Corporations Act as a financial product, regulates the traditional services provided by trustee companies and amends the Corporations Act so that the issue of all promissory notes issued to retail clients will be subject to the same regulatory regime as debentures.

These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer a witness may request that the answer be given in camera.

[3.38 pm]

BOND, Ms Carolyn, Co-CEO, Consumer Action Law Centre

BRODY, Mr Gerard, Senior Manager, Financial Inclusion, Brotherhood of St Laurence

HITTER, Ms Monique, National Legal Aid

LANE, Ms Katherine, Principal Solicitor, Insurance Law Service, Consumer Credit Legal Centre NSW Inc.

MORATELLI, Mr John, National Legal Aid

RICH, Ms Nicole, Director, Policy and Campaigns, Consumer Action Law Centre

CHAIR—Welcome. I understand some people have opening statements.

Ms Bond—I am just covering the seven points that Consumer Action Law Centre and Consumer Credit Legal Centre want to make today, and I will list those now. They are: the risk of some businesses avoiding the credit legislation and the need for anti-avoidance provisions; responsible lending provisions are too narrow and could restrict the regulator's response to unfair lending practices; the broker verification clause—section 130(3)—could undercut responsible lending provisions; the exemption for point-of-sale retailers is too broad; enforcement and remedy powers are inadequate and out of line with the national consumer law; small claims procedures are inadequate; and the hardship provisions.

CHAIR—Thank you.

Ms Lane—Apart from those seven points one of the things I would be focusing on is hardship because Consumer Credit Legal Centre is extremely interested in that and has made a number of submissions, and I would like to talk on that briefly. One issue is that the difficulty with hardship at the moment is that the new laws and the new threshold that the minister announced will not apply to existing contracts. That means that anybody who has a hardship with a loan over the threshold, which is currently just over \$300,000, will not have access to the hardship provisions. The Treasurer announced principles but those principles are absolutely useless when you are in court trying to defend and cross-claim on the grounds of hardship.

I have a case at the moment where the person's loan is \$400,000 and they are over the threshold. The bank, Westpac, was not listening to any issues on the principles of hardship, the person is now back in work and they have no access to any remedy whatsoever to get themselves back on track. Obviously that is a huge issue for us. We get a huge amount of calls with people with hardship problems, and it is something that we think needs to be addressed urgently rather than waiting until phase 2. It is not even on the agenda for phase 2. We think that the hardship provisions, as they are, are inadequate and they need to be improved as a matter of urgency so that every Australian has access to hardship up to \$500,000, and they can use it as a defence if the bank is unreasonable. That is the only thing I wanted to add.

Ms Hitter—The issues that we hope to urge the committee to consider prior to the passage of the bill include section 130 subsection (3) of the bill, which appears contrary to the objective to finding the right balance in responsible lending by tipping that balance unfairly against consumers. That section, essentially, absolves a credit provider who has obtained a credit application through a broker within the last 90 days from responsibility of independently verifying information that is used to assess the consumer's suitability for that credit contract in circumstances where the verification was obtained by the broker. We believe that provision has the potential to undermine the effectiveness of the national regime in that it provides legislative endorsement for credit providers to outsource that assessment of risk where a broker or similar intermediary is involved, which is for the first time the case in the Australian credit history and allows lenders to argue that information endorsed in this way can be reasonably believed under section 131 subsection (4) of the bill. The problem is that brokers bear no direct risk in respect of default, but do have a financial incentive in ensuring that credit is approved. There is an inherent conflict of interest because the broker, who was thought to be acting for borrower, is verifying information that is used to assess suitability on behalf of the credit provider.

Our casework experience has seen the proliferation of predatory lending practices, categorised by asset lending and stripping, and driven by a culture of finance broking that is not consistent with prudent lending. We feel it is dangerous to allow credit assistance providers or brokers to verify the capacity of borrowers to meet repayments and in the process appear to absolve credit providers from their assessment responsibilities to borrowers.

The bill has also left some significant gaps in addressing practical problems associated with agents. In our view the legislation should clearly and explicitly be based upon that fundamental proposition that a broker, or

introducer or credit assistance provider is acting on behalf of the lender, unless it can be shown that details of the consumer's needs were obtained and considered, and the consumer was presented with a range of suitable products and given a genuine choice in relation to them.

Regulation 22 is the one that Ms Bond referred to earlier in that it excludes the facilitation of credit at point of sale from responsible lending provisions. We have a serious concern about that. In implementing phase 2 of the credit regime, it would be vital that all agents who facilitate the provision of credit, including at the point of sale such as in caryards, are regulated in an effective way.

We see countless examples of unsuitable credit products sold in this context. It is often the case that little or no choice of credit product is offered to consumers and there is no real assessment of capacity to repay the loan. In these circumstances it is difficult to see how it can be said that agents are acting for the borrower when there is only one source of credit on offer and no real choice given to the consumer that is based on their individual circumstances. These agents should be regulated as credit representatives of a licensed credit provider in order to provide appropriate protection to consumers.

We are also very concerned about licensing. Although we think it is a welcome development, there are concerns about its ability to work effectively, particularly if it only applies to persons who provide credit as defined in the UCCC, the Uniform Consumer Credit Code. Avoidance of the code has been a significant issue since its introduction, with legal form prevailing over substance. In our casework experience, unscrupulous conduct occurs mainly at the edges or the fringes of the credit sector and not usually in the mainstream. It is our experience that the focus of the fringe credit industry is often exclusively on selling to vulnerable, desperate and disadvantaged consumers, making it even more vital that this sector within the credit industry is effectively regulated. We say that ASIC should be specifically empowered to refuse to grant or cancel or suspend a licence where a person has engaged in systemic unfair conduct. That power should be explicitly inserted into sections 37(2) or 55(2) of the bill.

We also have some concerns about the way the regulations address the commencement of proceedings issue. The bill envisaged that proceedings could be commenced in any state. The regulations have tried to fix that, but there is an exclusion which says it does not apply when more than one consumer or more than one transaction is involved. That would exclude many mums, dads, parents and children who enter into contracts that are often multiple contracts. In that way it defeats the purpose of that remedy.

Lastly, we have real concerns about the capacity of the legal services sector to assist consumers to effectively access the protections in this bill. Low-cost legal services have for some time now been struggling to meet the demand for assistance. It started with the rise in interest rates and has continued with the global financial crisis and increasing unemployment. They all place different pressures on consumers, resulting in consumers finding it very difficult to negotiate appropriate outcomes with credit providers. Even though the enhancement of financial counsellors through the Commonwealth program has been very welcome, financial counsellors cannot do it on their own. They need the help and support of low-cost legal support services. Our concern is that currently there is not sufficient capacity to provide that support at the national level.

Mr Brody—I have three additional points. The first is in relation to the responsible-lending obligations. We are very supportive of the proposal in the bill. There have been some comments in the community about the responsible-lending obligations perhaps inhibiting small amount lending to people on low incomes in particular. The Brotherhood of St Laurence with the ANZ provides a small amount loan, known as the Progress Loan, for people on low incomes, those with healthcare cards or Centrelink cards. Our processes are already aligned with the requirements under the responsible-lending obligations. I want to emphasise that the bill would in no way inhibit the ability of responsible lending to take place for small amount loans.

My second point is in relation to use of disclosure. Recent research undertaken by the brotherhood and Griffith University found that pre-contractual disclosure documents did not help low-income people understand many of the important terms of credit contracts or know their rights. Often other prejudices, like their desperation to obtain credit or perhaps their belief that the lender was acting in their best interests, had a greater influence on their understanding. We have some concern about the bill proposing to increase disclosure requirements through the provision of a credit guide. We think there must be some work undertaken in the bill to ensure that the credit guide provides useful and relevant information and does not serve to just confuse borrowers further.

Finally I want to touch on the regulation of the cost of credit. We are aware that it has been agreed that this issue will be dealt with in phase 2 of the credit regulation amendments, but we raise the concern that a high cost of credit is common amongst payday and other fringe lenders and they often target vulnerable people who

have difficulty meeting essential living expenses such as utility expenses, food, rent or mortgage payments and medicine. The committee should be aware that a regulated cost of credit is needed in addition to responsible-lending obligations to ensure that people are not exploited in obtaining credit.

Senator PRATT—I want to begin by asking you all for comment about the current point-of-sale exemption, particularly as it relates to motor vehicles. I appreciate that this issue has been flagged to be resolved now in phase 2 as to the manner in which it comes back into the law. Is there a distinction between that and a store card that is contracting out to another credit provider? Where should responsibility for the credit assessment lie—truly at the point of sale, which might not be viable from the retailer's point of view, or the institution doing the lending? You might have Jones Car Dealers and Jones Car Finance, where you have a complicit hand-in-hand relationship, or you might have Harvey Norman and GE, where I would argue there is something of an overlap. Can you comment on some of those issues for me?

Ms Lane—I want to start by raising a couple of practical issues before my colleagues wade in. A supposed objective of this legislation is the ability to go to the financial ombudsman service when you have a dispute and have the matter heard. The point-of-sale people do linked credit, and that is described in the credit legislation as linked credit. When you have linked credit, the supplier and the lender have arrangements between themselves. GE and Harvey Norman are completely linked. Esanda and the dealerships are linked as well.

When I as a caseworker am taking action in the tribunal court or going to EDR and have only one party—so the person who made the misrepresentations is not in the same case as the lender—then I do not have a complete case. That is my difficulty. These people are just a species of broker. They arrange credit and even charge for credit. Car dealers actually charge brokerage fees. To put them out is inequitable and ridiculous, but it also seriously affects consumers because they are hampered in their ability to access justice. That is the point I would like to make. I actually think it is out of step.

I understand why we are all going on about shopkeepers, but they are not shopkeepers. This is not a situation where you give money to people; these people are brokers. Just because they are at the point of sale does not make them any less a broker. Brokers arrange finance—that is what they do. Just because they call themselves something else does not make any difference. I think it is artificial to put them out of there yet regulate every other broker. They are arranging credit. They do not have to arrange credit. They could just sell stuff.

Ms Rich—We have a couple of comments about the point-of-sale retailers. I think that was one of the seven points that we made. We do not actually agree with National Legal Aid that ultimately you could fix the problem by essentially deeming them as agents of the lenders', which is really what they are and which Carolyn will mention briefly.

We agree that the current exemption in the regulations is too broad and is going to need to be fixed up in some way. Whether you end up requiring point-of-sale retailers to be licensed or whether you deem that their conduct is essentially attributed to the lender, those are your two different solutions. Just to illustrate the problems, I have put together some case studies of real cases that we have seen where there have been problems in the selling of credit at the retail point of sale. I am happy to table that. There are four case studies here. We have a fact sheet available on our website of motor finance wizard experiences, which is again in the car yard situation, where we have seen selling of credit.

Senator XENOPHON—Could you run through one of those case studies.

Ms Rich—I have a few that are based on real cases. One that I thought was particularly interesting was one that we happened to come across on the Not Good Enough website only a few days ago. It is in the consumer's own words, and that is why I quite like that one. It is quite reflective of other case studies. I can read you that one, if you like. This was posted on 8 April 2009. We found it the other day almost by accident. This consumer says:

So, we bought a laptop that my wife wanted, was going to get it on an interest free terms as we always do but got sweet talked into getting it via Flexirent by a sweet talking and friendly sales assistant. Got on the phone to Flexirent, took all of 10 minutes; answered some questions amidst the loud music and got my approval.

What he has indicated there is that he has actually been sold a different credit product by the retail salesperson at the retail point of sale. I think that is really interesting. He then goes on to talk about what happened when he got home:

After looking at the very fine print, I rang up big reputable store chain on Monday at 0930 to change method of payment; interest free or cash payment instead of Flexirent and was told by the floor manager to expect a callback.

He has been in argy-bargy ever since. He continues:

Now I will end up paying almost twice for a laptop that I will not own at the end of the 24 months and a contract which I cannot get out of unless I pay almost 200% of the ticketed price ...

Senator XENOPHON—Presumably, in relation to that, if the salesperson knew what the full terms were, isn't there an argument about false and misleading statements made by the salesperson to the consumer? Presumably, if they knew what the terms were, the sweet talking does not accord with the actual terms.

Ms Bond—Can I answer that, because I am aware that they do this. It is quite subtle. They are talking people out of getting credit and into getting a lease. Because under a lease you do not have to have an interest rate or know what the interest component is, the stores say to people, 'Get a lease. It is much better because you can upgrade it any time.' They do not tell people what the actual total cost is. If people are looking at getting credit versus a lease it can be very hard to compare.

Senator XENOPHON—That raises two things. Firstly, is that a loophole? Secondly, in the same way that for mortgages you need to give the real rate of interest nowadays, should there be a similar requirement for this arrangement?

Ms Bond—It is a problem with consumer leases, which I think we are looking at in phase 2. Leases are often used in lieu of credit because, among other things, there are fewer disclosure requirements. The other issue there is that it is a Sunday afternoon, you are shopping with your family, there is loud music on and it can be very difficult for people to take in all that, even if they have the full disclosure. They are obviously focusing on what they are buying, and someone in the store is saying, 'This is a much better product.'

Ms Lane—But there is an element of misleading conduct. There is no doubt. I get complaint after complaint about rental contracts which are consumer leases where they were told they would own the goods at the end with one payment and it turns out that that one payment could be anything. It is a common complaint. Consumer leases are a giant problem. We have advocated strongly that they should have been dealt with urgently, but they are being dealt with in phase 2.

Senator XENOPHON—Have the ACCC looked at this at all? Have they taken an interest in it?

Ms Lane—Consumer leases are under ASIC, not the ACCC.

Senator XENOPHON—Sorry, has ASIC looked at it?

Ms Lane—I have made numerous complaints. I know the Consumer Action Law Centre has made as many complaints as I have about this. I think when they get credit done properly they are going to look at it.

Senator XENOPHON—Senator Bushby made the point that it would be the ACCC's jurisdiction because false and misleading statements have been made.

Ms Rich—It is still ASIC.

Ms Lane—It is still ASIC because false and misleading statements come under the ASIC Act as well.

Ms Rich—There is a newer regime in the ASIC Act that reflects all the consumer protection provisions in the Trade Practices Act but only for financial services. Similarly, financial services are carved out of the general Trade Practices Act regime.

Ms Hitter—Just in relation to the point-of-sale issue, I think the problem is the break in the chain. If you set standards for lenders and then somehow break the chain between the responsibility of the lender to the borrower, through an intermediary who happens to be at the point of sale, then the system falls down.

Senator BUSHBY—I understand Ms Lane's comments that from a legal caseworker perspective you are trained to represent the rights of the people who have come to you with a problem and it can actually in a practical, legal sense make it harder to prove their case because you have lost that the chain. But under the new laws the ultimate lender, whether it is somebody sitting in the backroom at the car dealership, somebody on the phone or even somebody who receives the internet application if that is how it ends up, is the one who has to satisfy themselves under the responsible lending guidelines. If they are not satisfied that the product is both suitable for the borrower and that they have the ability to repay then they will be liable in the future, I would have thought, under this legislation.

Ms Lane—I have actually run these cases and what happens is that you end up in this giant loop of terror where what happens is that the lender says, 'No, that's the supplier.' You say, 'You're caught under the linked

credit provisions.’ Then the dispute resolution scheme says, ‘But we can’t have the supplier and you really should go to court.’

Senator BUSHBY—But won’t this legislation change that?

Ms Lane—No, because there is an exemption.

Senator BUSHBY—There is an exemption for point of sale, but it theoretically should strengthen the case against the person who has not exercised responsible lending guidelines.

Ms Bond—At the moment if a retailer makes a specific, clear representation about the credit that they are selling, the linked credit provisions mean that the lender is responsible for that. But there is nothing else that resembles agency. A retailer, for example, as they sometimes do, can say ‘Why don’t you just sign this and say it’s for business purposes?’ The lender is not responsible for the conduct of the retailer. Even—and this comes to the issue of how narrow the responsible lending provisions are—if you look at the lease, the consumer may have been very unhappy but he probably could afford it without substantial hardship and it may be very difficult to show that this product is unsuitable for his needs. So in that situation, without the retailer being licensed or being an agent of the lender, I think the consumer would have difficulty. The issue here has been that for the past 20 years or longer lenders have argued very strongly, ‘We don’t want to take responsibility for what car dealers do or what they do in stores.’ We say it is quite simple that lenders should take responsibility for the conduct of the selling of their product in stores—

Senator BUSHBY—The questions that we represented to Treasury on this—and I think we are all pretty united on that—suggested that the intention of this legislation is to put that responsibility onto those lenders. Regardless of the fact that they have been arguing about it and managed to escape it for the last 20 years, certainly the intention here is to try to pin it back on them.

Ms Bond—Nothing we have seen does that. If lenders were to be responsible for what happens at point of sale, I think that would resolve this issue.

Ms Lane—I agree, it is an agency issue. If I went to the dispute resolution scheme they would look at the not unsuitable provision. If I cannot get across the line on that and I really just have a misleading and deceptive conduct case, then they may say, ‘The supplier made the misrepresentations, they can’t be called in as a witness; therefore you have to go to court.’ That is a massive access to justice problem. I do not want to go to court; I want to go to the dispute resolution scheme. The second problem is that, because they cannot take witnesses, it is really difficult to prove the misrepresentation. If the agency is not there for me as a caseworker, even if the government has this intention, it will not work. I know already because I have tried to run it.

CHAIR—I did ask the specific question about where the retail salesperson talks someone in to buying a more expensive product or using a different credit provision and the response was, ‘If that kind of representation is made then the retail assistant is no longer exempt.’

Ms Lane—That is not clear to me from the legislation

Ms Bond—We are not sure where that is.

Ms Lane—It just does not say that, as far as I can tell.

CHAIR—That was around the definition of what a credit assistant or a credit provider is.

Ms Rich—But the regulations exempt point-of-sale retailers from being considered as giving credit assistance.

CHAIR—Only if they do not provide credit advice, is what we were told.

Ms Lane—That is really difficult to prove. Just going back to my being a caseworker, at the end of the day it is all about the access to justice. It is about me having a toolbox to turn up to court and argue stuff. If I do not have any tools and if I just have stuff that will not work in dispute resolution schemes, the legislation is not going to work even if it does say that.

Ms Rich—The regulations exempt them from persons engaging in a credit activity in those situations. A credit activity is credit assistance or acting as an intermediary.

Ms Lane—So that is not just advice.

Ms Rich—Very broad.

Senator BUSHBY—We will look quite closely at the *Hansard* then and raise those issues with Treasury. What you are telling us is very valuable because you are the actual people who have to advocate for these

people and apply the rules that will be coming in. If what you see as the practical ability to use these regulations to advocate on behalf of your clients is not going to give you what you need, despite Treasury thinking that they are, then that certainly needs to be raised.

CHAIR—I will allow a few more questions, but we might try and move on from the retail because it is in phase 2, although we might recommend differently.

Senator XENOPHON—I just have one question in terms of what Ms Rich said, if the point-of-sale people are deemed to be agents of the lenders, that would fix the problem? Is that what you are saying?

Ms Rich—I think we would all agree on that.

CHAIR—That has big consequences for retailers.

Senator BUSHBY—The alternative that you mentioned was that statements they make are treated as being statements on behalf of the lender.

Ms Bond—That is already in the code but it is very narrow.

Senator BUSHBY—What if that was made clearer and strengthened?

Ms Bond—It would need to be conduct, not just statements they made about the credit. Sometimes they are actually suggesting that consumers fill in forms in certain ways. They might have completed the form for the consumers, and in those sorts of ways the lender is not responsible for that form of conduct. It needs to be broader than just making a specific recommendation.

Senator BUSHBY—Certainly in relation to filling in the form. When we had David Jones here we went through what they would do with their point-of-sale people, and they made it quite clear that they would actually fill out the form with the customer but then it would go off to somebody else for assessment, but they would actually assist the customer in filling out the form. According to Treasury that would be exempt, but there may well have been conduct, as you say, over and above the fact of this is the form you need to fill in, here is where you put this, here is where you put that. If they are actually selling something on top of it then that may be relevant.

Ms Bond—Or the car dealer who said to someone who was working at the Melbourne Show for only two weeks, 'Let's just put the salary. We won't bother saying it is for two weeks.' You could say that it is the consumer's fault, but if that is the way the trader is acting it is causing problems and someone needs to take responsibility for that.

Senator BUSHBY—The consumer wants the car and knows they will not be able to get finance for it unless they go on with what is being suggested to them, so they do it.

CHAIR—We will just move on. I want to encourage Mr Brody to jump in because I realise that it is a bit difficult when you are not here.

Mr Brody—Thank you, I am fine at the moment.

Mr Moratelli—I was just going to say that there is also a policy issue around the issue of agents. Where you have point-of-sale people basically dealing with one credit provider, they are effectively the agent. The legislation does not recognise it and there is no way to facilitate that in relation to small transactions. The National Legal Aid submission is saying that, where that is happening, it should be recognised and made patently clear in the legislation. In a lot of these situations where you get door-to-door sales, they are selling computer programs and are only dealing with one finance company. A lot of point-of-sales in a retail context are, once again, dealing with one company.

In this context, the credit provider providing their forms, they are obviously receiving a service from the shop assistant in relation to having their particular completed form submitted to them so that they get that business as opposed to another credit provider. There is a fundamental policy issue here, and the question arises: why shouldn't they be treated as agents? The difference is the thing that agency adds that the link credit provisions do not—that is, while under the link credit provisions the credit provider can be liable for the misrepresentations of the supplier, the agency relationship actually deems the principal—in this case, the credit provider—to have knowledge of everything told to the agent, which is the missing link at the moment.

CHAIR—Point taken. Any final points on that retail point-of-sale?

Ms Rich—Can I make a slightly tangential point that came to me as Katherine was talking about the fact that she will be kicked out of the external dispute resolution schemes because they are not able to deal with the sellers of the products or services, but only with the credit providers, who are the members. It just made me

think that one of the reasons why we think access to a small claims procedure that is a low, no-cost court jurisdiction is so important is because the external dispute resolution schemes are not able to hear all types of consumer credit disputes. In the bill, one of the types of actions that is not able to be taken to the small claims procedure at the moment is linked credit actions. So the three different types of link credit actions that you can bring under the current consumer credit code, and soon to be the national credit code, you cannot run those actions in the small claims procedure under the bill. So for Victorians and New South Welshmen in particular, we are going to lose access to a low, no-cost tribunal jurisdiction to bring those actions unless that is fixed. I just thought I would take the opportunity to say that on a more simple level we could fix that problem really easily by just adding linked credit actions into the types of actions that can be brought in a small claims procedure.

Senator BUSHBY—Has that been being specifically excluded?

Ms Rich—It has been specifically not included in the list of actions that you can bring.

Senator BUSHBY—So presumably, when thinking about that, a decision has been made not to include that. It is something that Treasury or the government have decided deliberately to exclude.

Ms Lane—That is right. Nicole has it better than me, but hardship is in. One of the things we argue is that our tribunals did a lot of different things and they were low cost. If we are excluded from dispute resolution for whatever reason—there are plenty of reasons—and if we are excluded from the low-cost court jurisdiction, then we are in the Federal Court. That is a \$600 filing fee and our client gets scared to death. We are facing massive costs from the lender—massive, scary costs that we cannot even begin to contemplate. That is why we treasure these things so seriously. Nicole is right: these are very serious issues for consumers.

Senator BUSHBY—One of the most important aspects, quite apart from the remedies available, is being able to provide access to those remedies in a suitable forum. You and I and others might argue about unfair contracts and things like that, but ultimately when you get to the law you want to be able to let people access it.

CHAIR—Senator Bushby, would you care to go on to the next issue?

Senator BUSHBY—Okay. Section 130(3), we have received quite a bit of evidence about that, and most of it is quite sympathetic to what you are saying. The only thing I can recall that might argue against that, which I will test with you, is the fact that you are going to end up with a doubling up of checking the requirements with the consumer to make sure they meet all the requirements—that is, they are able to repay the loan and that it is suitable for their purpose and so on. That has a potential to deliver additional costs to consumers, but you would say that that is justified in order to minimise the risk for predatory lenders to hide behind brokers?

Ms Lane—Let us just say that the cost at this stage is a stamp or fax costs to send the documents to the lender, who should be sighting them. We are not talking thousands of dollars here; we are talking how much does a fax cost? Twenty cents? We are talking absolutely ridiculously small amounts of money here. First of all, the main principle of lending is that the lender assesses, full stop. They sight all of the information, full stop. If we have any other regime that does not do that, then we have made a mistake.

Senator BUSHBY—So your solution to the problem is to actually require a full assessment by the broker?

Ms Lane—No, the broker does not do anything. The broker does not assess. It is the lender who assesses; the broker passes on the information.

Senator BUSHBY—As I understand it, there is a preliminary assessment that the broker does and that is where the problem is—that is, that information the broker has gathered as part of the preliminary assessment, when passed to the lender, relieves the lender of the obligation to actually check what was in the preliminary—

Ms Lane—Which is what we are absolutely opposed to. I am saying get rid of 130(3)—

Senator BUSHBY—Get rid of the preliminary assessment?

Ms Lane—Kill it, and just make a regulation that says—I made this point when I was in front of Treasury recently: we have been going for years and years and years and years without anything on this; it was just common sense. I know that is bizarre, but we have common sense!

Senator BUSHBY—I agree with you. Common sense is often supplanted by legislation.

Ms Lane—Let us go back to common sense. If we need guidance, that is fine, but let us delete 130(3). It is ridiculous. It gets in the way of making sure the legislation and responsible lending achieves the outcome it needs, which is that lenders must assess. If information has to be passed on, then great: it is 20c for the fax, but

it should be all passed on. If there is any confusion about this, then we need to put in the regs, 'You should pass the information on'. But to have 130(3) is potentially interfering with the purpose of the legislation in responsible lending.

Ms Hitter—I have in my mind the thousands and thousands and thousands of people that we help who have been put in a situation by a broker who has been acting where they have a clear conflict of interest and have signed people up for loans that they were not suitable for, that they did not have the capacity to pay and, really, that assessment should have been made by the lender. You cannot have the fox in charge of the henhouse, basically.

Ms Lane—Or Dracula in charge of the blood bank.

Ms Bond—Another issue here is that the term 'reasonable steps' is used throughout here, and there may be certain cases where a lender might be able to argue that it was reasonable not to go and have a look at those documents again, for example. The problem is that this basically says that as long as this preliminary assessment is done, you do not have to. The case we gave was where a loan application went in for a 73-year-old pensioner who was a self-employed electronic engineer. There might be some 73-year-olds who are self-employed electronic engineers, but you would think that it would be reasonable for a lender, when they see that from a broker, to say, 'Hey, I think we need to verify something here.' What 130(3) says is, 'Even if you have that in front of you, you've got it, you don't have to verify.' It allows lenders, even in the most extreme circumstances, to just say, 'I can take that information verbatim.'

Senator BUSHBY—Okay, just an aside because you have just made me think of a similar sort of thing, and I asked this question of Treasury: should lenders be responsible when they are lied to, if they are told things that are not true and they lend on that basis? Who should wear that if the consumer has misled the lender into believing they meet the responsible lending requirements?

Mr Moratelli—It really depends on the context of what is 'reasonable steps'.

Senator BUSHBY—So if they do not take reasonable steps to verify it, you think that ultimately they should wear the consequences?

Mr Moratelli—We have situations where we have litigation that we run for people signing false business purpose declarations, which could be taken to be a lie on one hand, although, usually our clients do not read them. A gain and again we get people signing documents saying, 'This is for a business purpose', but accompanying those documents are applications which show that the person has no business assets. The 100 points identification might show the person is on a pension or some social security benefit, and so on and so on. So it is not enough, just because you have—

Senator BUSHBY—It would be reasonable that there would be flags to them that there is an issue here.

Mr Moratelli—Yes.

Senator BUSHBY—But somebody who manufactures pay slips or—

Ms Lane—If it is just out-and-out fraud then the lender should not be responsible. Unfortunately, with predatory lending there are a lot of situations where the solicitor, the broker and the lender are all complicit in manufacturing one giant lie. Yes, the consumer is complicit, but they are usually desperate, vulnerable and disadvantaged, and they are told, 'You have to do this.'

Senator BUSHBY—If the lender and broker are contributing then obviously it is not the same situation as out-and-out fraud.

Ms Lane—Yes. They are really quite different when they come to you.

Ms Bond—The other issue that we deal with is where we see lenders who happily turn a blind eye. They tend to be the fringe lenders where there is a mortgage involved, and I suggest that perhaps, regarding this self-employed, 73-year-old pensioner, the lender probably suspected that things were not quite right. But the lender could see that there was a lot of equity in a home and, as far they were concerned: 'The broker's told us this. That's fine. This person's employed. We're very happy to give out that loan.' We need to make sure that we do not allow lenders to—

Senator BUSHBY—give them a loophole—

Ms Bond—because some of them want to be lied to.

Senator BUSHBY—Because of the predatory aspect, yes.

Ms Lane—They are giant ostriches. They are the see-no-evil, hear-no-evil monkeys. They do not want to know. The information is usually in front of them and they ignore it. The one that drives me most insane is the declaration of income form. I had three cases of predatory lending. In one the broker had put the income in. With the second one the client had crossed it out and the broker had changed it again. The third one just said, 'I earn such and such.' There was no verification; there was nothing. They were all pensioners and the broker manufactured that they were self-employed. One made toy boxes for the local fair and the broker put him down on the application as a self-employed toymaker running a toy business. He made boxes every now and then.

Senator BUSHBY—A very positive spin on his activities!

Ms Lane—Very positive spin.

Ms Rich—To clarify, I had a quick look at the actual drafting. Section 130(3) does not say that a lender does not have to make an assessment. What it says is that the lender does not have to verify information provided by the broker in making their assessment. That is the problem of section 130(3). It is not that it says lenders do not have to make assessments; it is that they can base those assessments on information that even a reasonable person would suspect they should verify. At the moment good law and places like the Financial Ombudsman Service would find that they should have verified. What this section will do is change all of that. It will say they do not have to verify.

Senator XENOPHON—So it will go backwards?

Ms Rich—Exactly. We think this will undermine one of the core tenets of the legislation, which is to improve lending practices. It is sort of ironic. Most lenders would do the right thing; if they had a suspicion about an application like that, they would verify. But this legislation will put those lenders in a worse position than lenders who say, 'We'd better not take any steps to verify, because this will protect us.' It will encourage lenders to ensure brokers are inserted in the transaction.

Ms Lane—It promotes predatory lending. That is as simple as it gets. It promotes irresponsible and predatory lending; given that that is the one thing we want absolutely sorted out through this, we have to get rid of it.

Senator BUSHBY—And you can guarantee that the one thing they would verify is that there are assets there at the end of it.

Ms Lane—Yes. John and I have had cases where the only thing they are interested in is valuation. They do not care who you are. All they want to know is when you want to repossess the house and what the valuation is.

Senator XENOPHON—So, perversely, once you go down the path of attempting to verify, you are in a worse position than someone who does not verify.

Ms Lane—Yes. The whole purpose of the responsible lending legislation is—I would like to think—to get verification and reasonable and responsible lending in so we do not have what happened in the US. We want it finished; this low-doc, no-doc ninja stuff we want gone from our lending.

Senator XENOPHON—I do not know about ninja. What does that mean?

Ms Lane—'No income, no job, and no assets': ninja. It comes straight out of the US.

Senator XENOPHON—Like Teenage Mutant Ninja Turtles! To rectify, though, would we want to have a checklist in regulations saying to have minimum standards of verification that can easily be checked off. Would that be an ideal situation so you could minimise litigation?

Ms Lane—I am really worried. I am thinking about this for the ASIC guidelines at the moment. Lenders are desperate to check a box. They go: 'Have I done X? Have I done X? Have I done X?' But the thing that has become clear to me through all the cases I have run is that it is the whole circumstance of the case. So if you go to court they are going to look at the whole thing. They are not going to go, 'You ticked the boxes.' The problem is that if you give the lenders a box to tick they will find some way to get every box ticked but we will still end up with this unsatisfactory, irresponsible loan—which I know sounds bizarre. The bigger picture is that in the US at the moment they are talking about whole-of-market regulation. You can have a situation—I think this applies to the micro as well as the macro—when everything everybody is doing is legal but it still causes enormous problems. It is the same with responsible lending. You could have checkboxes till the cows come home. It is about making sure that the whole of the lending is responsible; otherwise, you get these perverse outcomes sometimes.

Senator XENOPHON—Maybe another way of looking at it, though, is that you would tick off some boxes but those boxes would not be all-inclusive. They would be indicative of the loan. In other words, if you do not tick one of those boxes then you should not go ahead with it.

Mr Moratelli—Prima facie.

Senator XENOPHON—Yes.

Mr Moratelli—To some extent that is allowed for, because there is provision under 131(e) to make any steps prescribable by regulations. You could prescribe certain steps to verify any matter. I agree with the general view that reasonable steps are much better than a checklist. I think the legislation at the moment allows for some minimum verification standards to be set but sets the general standard as reasonable verification, which I think is the appropriate standard, because circumstances change so much and what might be reasonable in one situation—

Senator XENOPHON—Could you have a hybrid with certain standards but still requiring a look at the reasonableness of the overall transaction?

Ms Lane—Yes, it is the overarching concept. There are small loans that are enormously detrimental. One of the things you have is a scalability issue. You have a whole heap of products in the market and what is responsible lending for one is different for another. The concepts you need to think about include consumer detriment. You can have a tiny loan—which Gerard, I am sure, would be able to comment on—that can cause enormous consumer detriment if it is lent irresponsibly. A home loan, of course, is going to cause detriment, but there are a whole heap of things that are not as obvious, and that is why you have to have the overarching concept.

CHAIR—I would like to move on to the topic of financial hardship, which I think a couple of people have mentioned. National Legal Aid talk about the financial hardship provisions on page 4 of their submission. I am particularly concerned about where the submission says:

There is no requirement for credit providers to supply reasons if a request for hardship assistance is rejected ...

Can you talk a bit more about the difficulties involved with that?

Ms Hitter—I am happy to start off with that. The value of having reasons is that—particularly if the remedy for a consumer, if a hardship application has been rejected, is going to the Financial Ombudsman Service—having reasons will allow the consumer some ability to challenge that reason in a more comprehensive way. If they know the reasons why the lender is saying, ‘No, you’re not eligible for a hardship variation,’ then they can address the arguments put to them. If they have no idea—if the lender just says, ‘No, we’re not going to give you a hardship variation,’—then they have to start from scratch at the Financial Ombudsman Service to prove their point.

CHAIR—In practice, do lenders provide reasons or do they mostly not provide reasons?

Ms Hitter—I understand they mostly do not.

Mr Moratelli—Occasionally they do, and it is very helpful when they do, because it enables the applicant to then address the issues the lender has raised. Otherwise, the applicant is left in a vacuum, particularly in situations like EDR, where they will generally be unrepresented. It should be somewhere they can represent themselves. Similarly, in the small claims division—and hardship is one of the types of issues that is dealt with under the small claims procedure—they will normally be unrepresented. Getting some feedback from the lender about why the lender does not want to vary the loan enables them to respond in a focused way rather than simply to be ambushed.

CHAIR—Any other comments?

Ms Lane—If I may I will make a quick comment on hardship, because it is my favourite topic. The thing that worries me at the moment is that the legislation now falls behind some of the codes of practice that are drifting around and are voluntary, like the Mortgage and Finance Association of Australia code of practice but not the code of banking practice, unfortunately, because they are still way behind. The mutual codes of practice for credit unions and building societies have better hardship provisions in them than are in legislation. It worries me that there are now going to be some people who have access to codes of practice and other people who do not. I really think that all the rights that mainstream lenders have agreed to should be in the legislation. It worries me that we have not addressed this issue at a time when repossessions are at a huge high. It continues to worry me, and even if it is not going to be addressed now it still needs to be addressed at some

stage because hardship is a fact of life. If you have a loan for 25 years you are going to have some troubles in amongst all of those years.

Senator XENOPHON—I refer to the whole issue of access to remedies and access to justice. I know that many years ago when I was practising law people would be scared off if there were a commercial claim. Even if it involved \$10,000, \$20,000 or \$30,000, the claim could be outweighed by the cost even in our local court. How do you get around that? Do you have mandatory mediation as a process? What can we do, short of a full-blown court case where the lender can afford to go through a process of discovery? I do not know if you can still do interrogatories here in New South Wales. It is so you do not have all of those pre-trial procedures that people get caught up in where they have to retain a lawyer and it is just not economic for them.

Ms Rich—I will make a point about the access to justice issues because we concentrate on those in our submission. One of the first points that we made in our submission was that we were concerned that the legislation had not gone through any stress testing process. This is a really good example of that. I think that this legislation does not understand what actually goes on in practice when there is a dispute or when a lender is chasing a consumer for payment under a credit product. What tends to happen is that most of these sorts of cases are initiated by the lender, not by the consumer. So the first thing that we all need to understand and that the legislation needs to better understand is that most things first go to an ordinary court jurisdiction because it is the lender that actually initiates court action, so we really need to start from the assumption that most of these sorts of cases will start there, and they include hardship variation cases. A lot of these cases actually start because the consumer is sued for repossession or for default under their mortgage and they seek help at that point. That is when it suddenly becomes apparent that they have got a right to request a hardship variation or maybe they have got a right to assert that the contract was unjust or that there was an unconscionable fee charged or some such thing. Then in practice what occurs is that that consumer will either go to an external dispute resolution scheme—or will try to—or try to go to a small claims procedure or a lower cost jurisdiction. So what we need to do with this legislation is ensure that that can occur. There are a couple of things that the legislation could do to improve that to enable that to occur. One of the really simple things, which I think the legislation does do, is require consumers to be told of the existence of external dispute resolution at points at which they actually need to be told that.

Ms Lane—Although that has been put back to July 2010, and that worries me.

Ms Rich—Yes, it is a transitional thing. As for one of the things that it is trying to fix, it is saying that when you have been sent a default notice you actually get told that you have got the option. That has been a classic issue. That has been a very simple thing that we should have fixed a while ago, and at least it will finally get fixed although we cannot understand why you would put it back six months. There are other things that could be done. The legislation has a whole range of provisions around transferring proceedings but all of them assume that you are transferring one proceeding from a court to another court. They do not deal with the common situation, which is that you are trying to stay one proceeding because you need to have a related but different proceeding heard in a lower cost jurisdiction, whether it be an external dispute resolution scheme or a tribunal/low-cost court. So the bill needs to deal with that, and we talked about that in our submission. The bill needs to provide a mechanism for the consumer to go to the financial ombudsman's service or the credit ombudsman's service or to go through the courts, through the small claims procedure, and so it needs to enable a stay on the lender action.

Senator XENOPHON—You are talking about almost a form of election?

Ms Lane—Yes. If they are taking possession of your home, they commence proceedings in the Supreme Court. The Supreme Court is a scary court at the best of times.

Senator XENOPHON—It scared me.

Ms Lane—And it scares me. I have been there a lot and it is pretty serious. At the moment, Consumer Credit Legal Centre has had to set up a duty roster scheme in the Supreme Court of New South Wales because they are so many unrepresented people—with Legal Aid, of course—fronting the court at the moment trying to save their house, and they may have access to hardship. So being able to elect to move it to low cost is a massive issue for access to justice.

Senator XENOPHON—Do you have suggestions on how you would redraft it?

Ms Rich—Yes. They are in our submission. For a start, there needs to be some sort of a presumption built in that the most appropriate jurisdiction is the lower cost jurisdiction. Secondly, there need to be things built into the legislation so that it currently works in states that have these low-cost forums. Essentially it is the low-

cost forums that have the jurisdiction to hear those sorts of consumer disputes. The way the bill works, even with the small claims procedure being available, does not mean that the Supreme Court of a state or territory does not have jurisdiction over that matter. So a Supreme Court could quite reasonably say—and we think they will say—‘We can handle all of the matters relating to this proceeding and, given that we have already got the case, we are going to hear it.’ That is a really big problem. Certainly the solicitors in our legal practice have been talking to me about that a lot. They are very concerned about that. So there are some very practical things that can be done. There are some more specifics in our submission, but essentially you can insert drafting to ensure that, firstly, there is broader access to the small claims procedure and, secondly, that there are presumptions built in that that procedure or the EDR scheme will be preferred to the higher cost jurisdictions.

Senator XENOPHON—If there was alternative dispute resolution mediation or whatever, rather than a full-blown trial, what percentage of disputes do you think could be resolved? How much court time and costs could we save?

Ms Lane—Heaps.

Senator XENOPHON—Could you quantify that.

Ms Lane—When I was speaking to the chair of the Consumer, Trader and Tenancy Tribunal about this—and I might add that our tribunal was not consulted by the government at all about low-cost jurisdiction—I said, ‘What works best here?’ She said, ‘Mandatory conciliation’. And I know it is exactly the same with VCAT. Both tribunal have mandatory conciliation and it settles a vast amount of cases. People get variations negotiated on the grounds of hardship and they get to keep their house. I cannot quantify it, but there are a lot of cases. Of course, the Supreme Court does not have that.

Senator XENOPHON—Could you give the committee something more about that on notice. I would find that quite useful.

Ms Lane—Yes, we can collaborate on something.

Ms Rich—The cases do not take up a lot of the courts time. Most of them are undefended and go through to summary judgment because the consumers do not realise they have another option.

Ms Lane—Yes, they get struck out.

Ms Rich—The legislation could enable a lot more of these cases to be dealt with through external dispute resolution schemes or the lower cost tribunal. I do not think it would increase court costs, but it would increase access to justice. These are slightly separate issues.

Senator XENOPHON—Yes, but if there was a requirement that these matters go through a system of mandatory conciliation before they bounce back into the Supreme Court, for instance, that would make a big difference.

Ms Lane—The writing is on the wall. The tribunal chairperson said to me that the reason the tribunal was so effective was because of conciliation, which got rid of lots and lots of cases. I am just using the tribunal as an example of that.

Ms Rich—I do not think you need to create some new mandatory conciliation procedure.

Ms Lane—No, I do not want that. I just want to get down to small claims.

Ms Rich—You just need to get the cases into the lower cost jurisdiction, the external dispute resolution scheme, which is a conciliation scheme—that is what they are. One of the things this new regime is going to do, which is a real positive coming out of this scheme, is expand access to external dispute resolution. That is a conciliation scheme. You do not need to create a new procedure; you just need to get the cases in there. It is the same with a small claims procedure. Yes, it is a contested procedure, but most of those courts will have some kind of mediation process that you will go through first. So you just need to get the cases into that jurisdiction. Again, I do not think we need to create a new mediation procedure; we just need to make sure that we get to the cases that are already there.

Mr Moratelli—There is a notice in the draft regulations in relation to informing consumers of their rights to go to EDR. But what is not there—and I think Nicole has touched on this—is that, if somebody commences action against you and you seek hardship through EDR, with the changes in the terms of reference you cannot get a stay on the court proceedings. If the court proceedings carry on and there is a decision, the EDR becomes irrelevant. So you need to have a provision, particularly in relation to hardship, where you can actually go to EDR and get the court proceedings stayed until the hardship application is dealt with in EDR. I think that is

the way all the people around this table would like the access to justice issue in relation to hardship applications to be dealt with. What is missing in the current legislation is a provision to get a stay on court proceedings while the matter is dealt with in EDR.

Ms Bond—In New South Wales and Victoria we do that now. When people are sued we get the matter stayed and then we can go to our tribunals and deal with the hardship application. That is a process that Victoria and New South Wales would lose under the new regime.

Mr Moratelli—We do that now, too. If there is action commenced in the Supreme Court we will make an application for a hardship variation in the Consumer, Trader and Tenancy Tribunal in New South Wales and apply to get the Supreme Court proceedings stayed until the procedure is dealt with. But the CTTT in New South Wales is going to lose its jurisdiction, and this is why are suggesting that the EDR schemes take over this role and we get a stay at that level.

Ms Lane—It is not always possible to get into dispute resolution, for various reasons, so we need to be able to elect to either go to dispute resolution or transfer to a low-cost jurisdiction.

Senator BUSHBY—This has raised a lot of issues in relation to how the bill may work in terms of access to justice and also broader issues. What I am about to say should not be taken as a criticism of this bill. The coalition is very supportive of the principles behind this bill and, in fact, kicked off this process. If this bill were not in place but you had better access to justice in terms of what you are talking about, would that in itself improve the ability to defend people—in Victoria and New South Wales at least?

Ms Rich—To some extent we are fighting to retain access to the justice provisions that we currently have in Victoria and New South Wales which this bill is removing because of the way it has been drafted. Other states and territories want to get the same access to justice provisions.

Senator BUSHBY—Presumably even in Victoria and New South Wales a simpler process could be introduced which would enable these things to be dealt with in a lower cost forum.

Ms Rich—Our lower cost tribunals work quite well at the moment. One of the big positives of this bill is that there will be expanded access to external dispute resolution. We do not pretend anything else. Most cases would go there and that is appropriate. What this bill will do is require all credit providers and brokers and so on to be licensed and to join an EDR scheme, so access to EDR will be expanded. As part of this whole process, the EDR schemes have gone through a process of expanding their terms of reference, so more cases are going to be able to go there. That is a really big improvement that this whole process has pushed through that we really strongly support. But, in terms of the tribunal/small claims procedure, we are fighting to retain what we have got in Victoria and New South Wales and ensure that all Australians have the same access to justice.

Senator BUSHBY—Although there are new provisions in this bill, in a lot of ways it is really just grabbing what already exists and putting it into a national context. Although it does take some steps forward, if it takes some steps backward it is not an ideal situation.

Ms Rich—That is correct.

Senator BUSHBY—One of the things that concerns me about the whole process is that, as you would all be aware, a lot of people do not really understand what they are getting into when they sign these contracts. The process has a number of steps where they have to be sent statements, credit guides and all sorts of things. It seems to me that the reality is that, with most people, the more pieces of paper you give them the less likely they are to read them. Do you think there is a better way of ensuring that when people sign up to these contracts they understand what they are actually signing up to? Somebody suggested there were seven things they might receive in terms of disclosure statements. Would it be better if they got one simple one?

Ms Lane—Yes. Gerard might want to comment on that.

Mr Brody—As I mentioned in my opening statement, our research suggests that the precontractual disclosure documents confuse people and in no way help them to understand their rights under the consumer contract. The bill proposes new disclosure requirements. The recommendation from our research was that regulators should reduce their reliance on disclosure as a consumer protection measure and ensure that the language and length of any contractual document is tailored to the capacities and needs of consumers. The new proposal is to have a credit guide for any type of broker or intermediary and a credit guide for a lender. This means there will be numerous extra bits of paper that people have to read. I definitely agree that we need to look at streamlining that process. We are aware that there is work going on in Treasury to improve disclosure

documents for financial products and services through the Financial Services Working Group. We would say that that process or a similar process needs to be established to ensure that consumer credit disclosures documents are simple, readable and concise. For credit products, disclosure needs to focus on the cost of the product as well as the key rights, responsibilities and protections.

Senator BUSHBY—Under financial services licensing, people who are involved in lending as well as financial advising have to provide statements with similar information to that which they will have to provide under this legislation. Do you see some advantages in streamlining that as well?

Mr Brody—I do. I am not sure that if it the credit is related to some other financial services product they would have to double up—

Senator BUSHBY—Apparently they believe they do.

Mr Brody—In both instances there is a work program going on to streamline the disclosure documents in financial services, and the same should apply to credit. In that process all the documentation really needs to be consumer tested out in the market. They should be giving examples of the documentation to people who purchase consumer credit products in all the different situations—whether it be a Cash Converters office, a car yard, a bank or online—to see whether the document helps them to understand their rights or not.

Senator BUSHBY—That make sense.

Ms Lane—At the moment I am facing 12 months without disclosure for broker fees because it has been put back. The reason why this is so alarming to me—and this is why this disclosure stuff is so useful to me—is that, as a caseworker, I need that stuff to prove my case.

Senator BUSHBY—That is a completely different aspect but it is very relevant.

Ms Lane—It is a completely different and tangential point. Evidence is required to prove cases. If brokers do not need to disclose fees then, when they do fail to disclose, I do not have a case on failure to disclose. If brokers do not have to tell you why they have put the loan together then I do not have a case if they have just done the wrong thing. The difficulty for consumers is when they have no evidence to prove their case. Disclosure is supposed to tell you what is going on, but people have to read the documents. So, yes, we should be streamlining the disclosure documents—and I agree with Gerard about consumer testing them. But the flipside of this—and I know it is irritating for everyone—is that the people trying to run the case have to have evidence.

Senator BUSHBY—Yes, the more information you have the better. I understand that too.

CHAIR—Are there any other key issues that people want to discuss?

Ms Bond—We have a couple. We want to talk about the avoidance issue and the narrowness of the responsible lending provisions. There are some problems with the enforcement and remedies powers.

Ms Rich—I can deal with the enforcement and remedies powers very quickly. The committee is dealing with a bill that was introduced into parliament apart from these bills. It is going to improve enforcement and remedies powers for the ACCC and ASIC. We do not understand why the same regime would not apply to ASIC in terms of its ability to deal with the consumer credit legislation. We are not talking about substantive provisions; we are just talking about the ability to seek remedies or enforce compliance with consumer protection laws. We just do not understand why you would not bring the enforcement and remedies powers in this bill up to the same standard as we are going to have for the general consumer protection laws. It is a simple point.

Senator XENOPHON—Why is there that dichotomy between ASIC and the ACCC?

Ms Rich—There is no dichotomy in terms of the general consumer protection laws. One of the perverse outcomes is that ASIC will have better ability to enforce misleading and deceptive conduct in relation to consumer credit products than to enforce irresponsible lending conduct.

Senator XENOPHON—Yes, I meant in that context.

Ms Rich—So ASIC will have different sets of powers available depending on whether the conduct is a breach of the general consumer protection laws relating to financial services and consumer credit under the ASIC Act or whether it is a breach of the national consumer credit protection legislation. To be honest, it is ludicrous.

Ms Bond—We think it is probably an oversight. We do not know that there is any justification for it.

CHAIR—Ms Bond, you wanted to talk about the avoidance issue.

Ms Bond—We have been working with the Credit Code from many years. An ongoing problem is businesses trying to avoid provisions of the code or, in many cases, making sure their loans stay outside the code. There is a range of ways by which they have done that. The most extreme one at the moment is a company that is selling diamonds. They sell diamonds to you and then you buy them back from someone else next door and all of that. So it is a sort of loan, but it is not really a loan—you have bought diamonds. There are a lot of other different ways. We have seen the use of promissory notes where it takes some years—and the loopholes have been shut off. We have seen rent to buy type plans that are not credit—and then that is shut off. Our concern is to have a look at this new regime. We assume that there is going to be attempts at avoidance, so we should stress test the regime. We almost need computer hackers to come in to test the computer system to see how people are going to try to avoid it.

We were already concerned by the fact that, if you just give general credit advice, you are exempt; if you just refer someone to a lender, without giving any advice, you are exempt. In Victoria we have actually seen businesses trying to avoid our broker provisions by dividing up their roles. They are not necessarily related body corporates. Someone's brother might own one business and the brother in law owns the other one and they basically operate from the same office. They are totally separate businesses. One gives general advice and charges a fee, and the other one refers them to the broker. The consumer does not even know they have been to two places.

That is just one example where we are concerned about avoidance. We think there might be some other areas as well, but we have not found them yet. We are proposing that there should be some sort of anti-avoidance provision and that the regulators should be able to take action where something like that is set up to avoid the legislation and there is no licensing. The regulator needs to have some powers to try and address activity that is designed to avoid licensing and to avoid the code.

Mr Moratelli—In her opening speech, Monique raised the ongoing concerns about avoidance. We raised that in National Legal Aid's first submission in relation to the misuse of business purpose declarations to avoid the code. I think it would be fair to say that we still have some of those concerns. The business purpose declarations loophole has not been sufficiently closed—and I have just referred to the matters that we raised in the annexure to our first submission. It is a very important point. If that mechanism is able to be used it means people can avoid the need to be licensed. The whole structure of the legislation turns on the old definitions of credit under the Uniform Consumer Credit Code. If a broker is able to take themselves outside the code by the use of uniform business purpose declarations, they will not be subject to any of the regulation under this scheme.

Senator BUSHBY—I am not quite sure how you envisage that working. Are you suggesting the regulator has the power to effectively promulgate regulations outside of the purview of parliament?

Ms Rich—There are a range of different ways you could do it. I know that National Legal Aid have come up with suggestions about some sort of court procedure. There is an anti-avoidance regime in Australian law—it is in the tax act—and it basically deems that a scheme or arrangement that is intentionally set up to avoid the tax laws is covered by the tax laws. Obviously that is not exactly what you need to do with the consumer credit laws, but we do envisage it would be possible to draft some anti-avoidance provisions whereby, for example, you deem some sort of product, activity or service to be covered by the legislation or by certain provisions of the legislation where it is intentionally structured to avoid those provisions of the legislation or the legislation as a whole.

Senator XENOPHON—Is that in your submission?

Ms Rich—Yes, it is.

Ms Lane—And the regulator could have that power.

Ms Rich—The regulator would then be able to act under those anti-avoidance provisions to perhaps run an action against a company or a person who was engaging in what they allege to be avoidance.

Ms Lane—Or issue a notice that they are trading without a licence and that they have to be licensed. It could trigger all those things.

Senator BUSHBY—Yes. There are ways of doing it without actually infringing on parliament's right to look at what is happening.

Ms Lane—That is exactly right.

Ms Hitter—You can also do it through enhancing ASIC's ability to revoke, cancel or vary a licence where they can see quite clearly—

Senator BUSHBY—Where they have reasonable grounds for suspecting that avoidance activities are occurring.

Ms Hitter—Exactly. And that is before damage has been done, which I think is the crucial point. If you have to wait for damage—

Senator BUSHBY—If you have to wait for parliament you could be waiting a long time!

Ms Lane—We do not want to wait—we really do not!

Senator BUSHBY—Ms Hitter, I think you commented that you are not sure that the legal services you represent would be able to use the bill's remedies effectively. Is that because of the way the bill is drafted, or is it because of a lack of resources—or is it both? I am not really sure what you meant.

Ms Hitter—I think it is both. We have covered today some aspects of the legislation that we think will impinge upon access to justice. In addition to that, we are also concerned that the capacity of the legal services sector, particularly at a national level, to support consumer access to the protections that this framework is going to give them is also limited.

Senator BUSHBY—Presumably this will provide a remedy to more people, and that may well lead to an increased call on your services.

Ms Hitter—I think it is fair to say that we have already experienced a huge increase in demand for our services.

Senator BUSHBY—You are getting them anyway; it is just that you cannot provide them with a remedy.

Ms Hitter—We are getting them anyway. I think the wash-up from the global financial crisis is still flushing its way through the system and we are going to continue to get more people seeking assistance. Our concern is that we are not going to be able to meet the demand.

CHAIR—Are there any other issues?

Ms Bond—I have one final one. What we have recommended in our submission is that chapter 3 does not limit a licensee's obligation to engage in credit activities efficiently, honestly and fairly. What we have some concerns about is the responsible lending obligations. You should not be able to sell a lending product that is unsuitable, and that includes a product that the person cannot pay without substantial hardship. However, we can envisage circumstances where perhaps the lending practices are not that extreme but there is repeatedly poor conduct. We have some concerns that the licensees have an obligation to act efficiently, honestly and fairly. We would be concerned if the responsible lending obligations narrowed their obligations so that certain lending practices that might not be seen as fair are excused because they do not quite fit into the definition of irresponsible lending. So what we are suggesting is that there should be something to say that just because you are not lending irresponsibly does not mean you are automatically lending fairly.

CHAIR—Thank you all for coming in today and sharing your expertise with us.

Committee adjourned at 5.00 pm