# National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020

Legal Aid NSW submission to Senate Economics Legislation Committee

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Legal Aid NEW SOUTH WALES

## About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

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

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited, and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

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# Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee regarding the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (the **NCCP Bill**).[1]

Legal Aid NSW has also previously made a submission to the Treasury consultation on the Draft National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020, the Draft National Consumer Credit Protection Amendment (A New Regulatory Framework for the Provision of Consumer Credit) Regulations 2020 and the Draft National Consumer Credit Protection (Non-ADI Credit Standards) Determination 2020[2] (**2020 Submission to the Treasury**). A copy of this submission is attached, for your information.

The NCCP Bill will amend the *National Consumer Credit Protection Act 2009* (the **NCCP Act**) to limit responsible lending obligations (**RLOs**) to low amount credit contracts under $2,000 (**LACCs**)[3] and consumer leases only. The Explanatory Memorandum to the NCCP Bill explains that this forms part of the Commonwealth Government's consumer credit reforms aimed at improving the flow of credit by reducing the time that it takes consumers and businesses to access credit.[4]

Schedule 1 to the NCCP Bill will amend the NCCP Act to provide the Minister with a power to determine standards, by legislative instrument, specifying requirements for a credit licensee's systems, policies and processes in relation to certain non-Authorised Deposit-taking Institution (**non-ADI**) credit conduct. This creates a new regulatory framework in which ADIs are required to comply with the Australian Prudential Regulation Authority's (**APRA**) prudential standards, and new standards are created for non-ADI lenders.

We consider that the proposed changes in the NCCP Bill should be understood in the context of the National Consumer Credit Protection (Non-ADI Credit Standards) Determination 2020 (the **Non-ADI Standards)**. We are particularly concerned about several aspects of the Non-ADI Standards, including the expanded definition of small business loans, and the lack of avenues for redress for individual consumers (discussed on pages 7-9 of our 2020 Submission to the Treasury).

[1] Legal Aid NSW's submission is based on our case wok experience. Our submission also benefited from Jeannie Marie Paterson and Nicola Howe's paper, *Everyday Consumer Credit Overview of Australian Law Regulating Consumer Home Loans, Credit Cards and Car Loans*, Background paper 4 for the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.*

[2] Available at: https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0010/41995/201120-LANSW-submission-to-Treasury-consumer-credit-reforms.pdf

[3] Small Amount Credit Contracts (SACCS) are current defined in section 5 of National Consumer Credit Protection Act 2009 (CTh) as loans for $2000 and under, for a term of 12 months or less (but longer than 16 days), and where the credit provider is not an authorised deposit taking institution (**non- ADI lender**). The NCCP Bill (Schedule 1, cl 1) expands the definition of SACCs to include newly termed "low limit credit contracts", which are contracts that meet the definition of SACCs, but without the requirement for the credit provider to be an non-ADI lender.

[4] Explanatory Memorandum, National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (Cth).

Legal Aid NSW does not support the NCCP Bill and recommends that it does not proceed in its current form. We do not support limiting RLOs to LACCs and consumer leases, and consider that RLOs should continue to apply to general consumer credit lending. We are concerned that removing RLOs from general consumer credit products will significantly disadvantage many consumers, especially consumers in highly vulnerable circumstances, and increase the risk of financial abuse. In particular, we are concerned that the proposed reduction in RLOs will negatively impact on consumers with cognitive impairment, language or literacy issues, low levels of education, young people, Aboriginal and Torres Strait Islander people, and those experiencing domestic and family violence or elder abuse.

In addition, while we acknowledge that the NCCP Bill does include some additional consumer protections regarding consumer leases and LACCs, we consider that these provisions do not go far enough to address the significant harm caused by these products.

## Legal Aid NSW's consumer law experience

Legal Aid NSW has extensive experience assisting consumers with problems arising from credit products, including assisting some of the most vulnerable consumers in our community, including consumers with cognitive impairment, language or literacy issues, low levels of education, young people, Aboriginal and Torres Strait Islander people, and those experiencing domestic and family violence or elder abuse. We also acknowledge research, which is consistent with the experience of our solicitors, that everyone is likely to experience vulnerable circumstances at some point in their lives, due to common, unavoidable and unpredictable life events such as illness, job loss, financial shocks, the death of a loved one and natural disaster. Life events such as having children, ageing and disability can also contribute to consumer vulnerability.[5] Further, the Consumer Policy Research Centre has found that:

> Some vulnerable circumstances are transient and people will move through them with the right support; other circumstances will necessitate longer-term assistance. Risks of consumer vulnerability will also change over time, as a result of regulatory, business, technological and social changes, and new understandings of consumer needs.[6]

In the 2019/20 financial year, we provided over 1600 legal services to clients on consumer credit matters. Our clients include people experiencing systemic and chronic vulnerability, as well as people who experience sudden and unexpected vulnerability due to, for example, sudden or unforeseen job loss, illness, injury or relationship breakdown. Our casework aligns with National Legal Aid's description, that:

> [t]he consumer experiences of people living in poverty or financial hardship are characterised by: limited consumer choices; an urgent requirement to enter into transactions to provide for their basic needs; participation in markets which other consumers avoid; and a lack of market based solutions to address their needs.[7]

[5] O'Neill, Emma, 'Exploring regulatory approaches to consumer vulnerability: A report for the Australian Energy Regulator', *Consumer Policy Research Centre* (1 November 2019), 7.
[6] Ibid.
[7] As described by National Legal Aid and quoted in Productivity Commission, *Review of Australia's Consumer Policy Framework*, (Inquiry Report No 45, 2008) vol 2, 294.

Our consumer law service is long running, and predates the current consumer protection regime. From this perspective, we have seen the positive impact for many consumers of the introduction of RLOs in 2011 in the NCCP Act.

Prior to the introduction of the NCCP Act, the Productivity Commission undertook a review of Australia's consumer policy framework. It recommended that the Australian Government adopt a common overarching objective for consumer policy:

> …to improve consumer wellbeing by fostering effective competition and enabling the confident participation of consumer in markets in which both consumers and suppliers trade fairly and in good faith.

The Productivity Commission recommended this overarching objective be supported by six operational objectives which should aim to:

- ensure that consumers are sufficiently well-informed to benefit from, and stimulate effective competition
- ensure that goods and services are safe and fit for the purposes for which they were sold
- prevent practices that are unfair or contrary to good faith
- meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage
- provide accessible and timely redress where consumer detriment has occurred, and
- promote proportionate, risk-based enforcement.[8]

We consider that these objectives remain relevant today. However, we are concerned that if enacted, the NCCP Bill will move the credit protection regime further away from realising these objectives.

While access to credit and financial products is often necessary for individuals and families to achieve their economic goals, if it is poorly managed "*credit can be a source of considerable hardship and despair*."[9] The impacts of financial hardship are far reaching, often impacting many other aspects of life including health, education and employment. A regulatory balance is therefore required to allow the provision of credit to enhance the welfare of individuals, families, and businesses, without credit itself being a cause of financial hardship and distress. We are concerned that the NCPP Bill does not appropriately strike this balance.

## Reduction of responsible lending obligations

Legal Aid NSW is significantly concerned about the impact that removing RLOs from consumer credit (except for consumer leases, and LACCs) will have on consumers experiencing wide ranging vulnerability, including, for example, poverty, poor financial literacy, family and domestic violence, job loss, ill health or injury. The current RLOs

[8] Productivity Commission, *Review of Australia's Consumer Policy Framework*, (Inquiry Report No 45, 2008) vol 1, 63.

[9] Jeannie Marie Paterson and Nicola Howe, *Everyday Consumer Credit Overview of Australian Law Regulating Consumer Home Loans, Credit Cards and Car Loans*, Background paper 4 for the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, 1.

provide consumers with valuable protections and assist consumers to make more informed choices regarding accessing credit and using credit effectively. The proposed reduction of RLOs increases the risk of consumers obtaining loans they cannot afford and becoming overindebted.

By removing the RLOs for products other than small amount credit contracts and consumer leases, the NCCP Bill will impose markedly less stringent requirements for lenders to verify the information provided by borrowers.[10] We are concerned that as a result, lenders will not fully understand the real financial position of the borrower and will not be able to be satisfied that a borrower can repay their loan without substantial hardship. This increases the risk of consumers accessing financial products that lead to significant hardship. While Legal Aid NSW acknowledges the importance of borrower responsibility, we consider that it should also be tempered with protections because all consumers can experience vulnerability at different times in their lives.

## Impact on consumers experiencing domestic and family violence

Legal Aid NSW is also concerned that limiting RLOs to LACCS and consumer leases will increase the risk of financial abuse in situations of domestic and family violence.

Without RLOs for most consumer credit products, lenders will potentially be able to undertake less thorough verification of an applicant's financial position and rely on reasonable estimates of a customer's expenses. This risks enabling perpetrators of financial abuse to more easily obtain credit via an on-line application process, either jointly with the victim or in the victim's sole name. The "red flags" that would be raised under the current RLOs regime by the lender's obligation to assess the suitability of the loan, including taking reasonable steps to verify a borrower's financial situation and their requirements and objectives in seeking the loan, may be missed.

This is a regressive step for people at risk of or experiencing family or domestic violence, including elder abuse, who are often burdened with debt that they had little or no benefit from. The proposed reforms would reduce the opportunities to prevent such loans from being issued, and reduce victim/survivor's access to remedies, as they would be unable to rely on breaches of RLOs as an avenue of redress. Instead, victim/survivors may be limited to seeking a remedy under the unjustness provision in the National Credit Code. This is, as it was prior to the 2011 reforms which introduced the RLOs, problematic and evidentiary challenging as the borrower needs to establish that the lender had a level of awareness of duress, coercion or undue influence being exerted over the borrower at the time the loan was entered into. Compliance with the RLOs, including inquiries about the loan's affordability, purpose and suitability, can raise a red flag and demonstrate that the lender was on notice of the financial abuse. This is illustrated by the following case example.

[10] See for example, Explanatory Memorandum, National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (Cth), 4 which states, *"[t]he reforms will reduce the time and cost associated with the provision of credit by removing responsible lending obligations for products other than small amount credit contracts and consumer leases. This will provide greater flexibility to lenders in adhering to principles of 'prudent' lending.*"

***Lucy's story***

Lucy was a nurse. When she was 22, her partner convinced her to apply for a car loan for a sports car. She was renting with her partner and already owned a vehicle (under finance) at the time. She also had three credit cards. Her partner also owned a car. Her partner said he needed the sports car but had a bad credit rating and told Lucy to apply for the car in her name.

Lucy was in an abusive relationship and eventually consented to applying for the car loan out of fear. Lucy never provided documents or information about her financial circumstances to the lender. Her partner attended the car yard and arranged finance for the vehicle by submitting pay slips and information about Lucy's expenses. Her partner did not record her credit cards and other debts in the lending assessment. Lucy attended the car yard on one occasion to sign the loan documents. Lucy's partner then drove the vehicle exclusively. Both parties made payments on the loan.

When Lucy separated from her partner, he kept the vehicle and said he would continue to make payments on the loan but stopped after they separated. Lucy then received default notices regarding the loan, seeking repayments of $15,000. Lucy was able to raise arguments that the loan was unjust and, in the alternative, that the lender had breached the responsible lending provisions because the loan was unsuitable, and she could only comply with the loan with substantial financial hardship.

## Credit Cards

Legal Aid NSW has significant concerns about the impact of removing RLOs in relation to credit cards, as proposed by the NCCP Bill. Credit cards are a highly accessible form of credit for consumers experiencing vulnerability and financial hardship, including consumers with cognitive impairment, language or literacy issues, low levels of education, young people, Aboriginal and Torres Strait Islander people, and those experiencing domestic and family violence or elder abuse. They also typically have high interest rates, and can put some consumers at significant risk of entering a debt spiral that can lead to court debt recovery proceedings, and loss of assets including family homes.

Legal Aid NSW is particularly concerned about the proposed two-tier consumer protection system regarding credit cards issued by Authorised Deposit-taking Institutions (**ADIs**) and non-ADIs. The proposed reforms would subject credit cards issued by ADIs to fewer consumer protections than those issued by non-ADIs, by removing the presumption of unsuitability if a consumer could not repay the credit card contract within three years as currently required by ASIC.[11] We consider that the same consumer protections that apply to credit cards issued by non-ADIs should also apply to credit cards issued by ADIs. The following case example illustrates the detrimental impact of credit card debt on vulnerable consumers, in the absence of sufficient consumer protections.

[11] ASIC Credit (Unsuitability- Credit Cards) Instrument 2018/753.

***Susan's story***

Susan is divorced and has no dependent children. Susan purchased a modest home in Western Sydney with her share of the proceeds of her property settlement. The home is her only asset. Susan works intermittently due to poor health.

Susan obtained a credit card from a bank in 2008 [prior to the introduction of RLOs] with a $15,000 limit. No income verification was requested; and the application was approved based on the income and expenditure provided in the application. Susan received an unsolicited offer to increase her credit limit in 2009. Susan accepted the offer and no income verification was requested. Susan applied for and obtained a further credit card from the same bank in 2010 with a $7,000 limit, again no income verification was requested; and the application was approved. Susan's physical and mental health deteriorated, she struggled financially and fell into arrears on her credit cards. Susan applied for and obtained a credit card from a different bank and used the third credit card to make repayments on her outstanding credit card debts. Susan's credit card debts spiralled to over $35,000 and she faced the prospect of losing her home.

## Low limit credit contract and consumer lease protections

Legal Aid NSW acknowledges that the NCCP Bill includes some consumer protections regarding the sale of consumer leases and LACCs, which were previously proposed in the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017 (the **2017 Bill**). However, we are concerned that significant consumer protections for these products included in the 2017 Bill have not been included in the NCCP Bill. In particular, we consider that the NCCP Bill does not provide sufficient limits on the sale and cost of consumer leases and LACCs, which are often detrimental to consumers.

The 2017 Bill was developed in response to a comprehensive consultation and review conducted by a Treasury Review Panel, which found that that a key objective of laws regulating small amount credit contracts should be to facilitate financial inclusion.[12] The Treasury Review Panel stated:

> The Panel does not consider that access to finance, irrespective of the cost, means that a consumer is financially included. Financial inclusion is a broader and more complex concept that takes into account the relationship between high charges and broader social consequences, such as financial hardship, insecurity in housing tenure and adverse impacts on the consumer's health, and is concerned with improvement in the consumer's situation, rather than it deteriorating or remaining unchanged.[13]

We consider these comments to be equally relevant today, and to also apply to laws regulating consumer leases.

In our experience, LACCs and consumer leases are frequently used by people who are financially vulnerable.[14] We have observed that these products are commonly used in regional and remote areas of NSW, frequently by consumers experiencing vulnerability

[12] *Review of Small Amount Credit Contracts* (Final Report, March 2016), 2.
[13] *Review of Small Amount Credit Contracts* (Final Report, March 2016), 3.
[14] Australian Securities and Investment Commission, *Cost of Consumer Leases for Household Goods* (Report 447, September 2015), 11.

and who are at risk of, or who are already experiencing, financial hardship and financial exclusion.

In our view, financial inclusion is not facilitated by permitting consumers to access consumer leases for basic household items such as fridges or washing machines at significantly inflated costs, or by permitting low income consumers to commit a significant proportion of their income to LACCs. This often forces consumers to decide between making payments under LACCs and/or consumer leases, or paying for other essential items such as food and rent. For consumer leases, this problem is exacerbated as many consumers access these products through Centrepay and have their monthly repayments deducted before meeting other essential living expenses.

### *Protected earnings*

The NCCP Bill proposes a protected earnings amount with respect to both LACCs,[15] and consumer lease contracts.[16] The proposed caps would mean that a person who receives 50 per cent or more of their income from Centrelink could not commit more than 10 per cent of their income to a LACC, and a further or separate 10 per cent cap would also apply to consumer leases. Consumers who receive less than 50 per cent of their earnings from Centrelink could commit up to 20 per cent of their income to repayments for a LACC, and a further 20 per cent to consumer lease repayments.

While Legal Aid NSW welcomes the introduction of protected earnings amounts, we consider that the 10 per cent repayment cap that the NCCP Bill proposes for people receiving 50 per cent or more of their income from Centrelink should also apply to all low income consumers, such as those receiving a pension from the Department of Veteran Affairs. In our experience, many low-income earners use a large proportion of their income to pay for basic living expenses and can be similarly vulnerable to financial hardship as Centrelink recipients.

### *Restrictions on Unsolicited Communications and Door to door canvassing*

Legal Aid NSW supports the prohibition on unsolicited direct communication offering LACCs proposed in the NCCP Bill,[17] however we are concerned that the ban on unsolicited selling of consumer lease products[18] is too restrictive and should not be limited to a person's place of residence. We agree with the Treasury Review Panel's recommendation that any prohibition should extend beyond a person's residence and should include situations where canvassing is done from vehicles outside or in proximity to a person's residence.

[15] National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (the **NCCP Bill**), schedule 2 clause 10, amending section 133CC(1) into the National Consumer Credit Protection Act 2009 (the **NCCP Act**).
[16] NCCP Bill, schedule 3 division 5, inserting section 156B into the NCCP Act
[17] NCCP Bill, schedule 2 clause 11, inserting section 133CF into the NCCP Act.
[18] NCCP Bill, schedule 3 clause 34, inserting section 179VA into the NCCP Act.

### *Cap on consumer lease charges*

Legal Aid NSW is concerned that the proposed cap on fees and charges for consumer leases[19] is not sufficient. The NCCP Bill would permit fees for delivery and installation to be added to the base price of the goods before the cap is calculated to determine the monthly amount charged,[20] and for a 20 per cent establishment fee to be charged in addition to the capped amount. These additional fees add significantly to the cost of consumer leases, and were not permitted under the model recommended by the Treasury Review Panel.[21] We suggest that the cap on consumer lease should be strengthened by excluding additional fees for delivery, installation, and establishment, in line with the Treasury Review Panel's recommendation.

## Conclusion

The reforms proposed in the NCCP Bill mark a shift away from a complementary system of individual consumer protection and prudential regulation, in favour of a far more significant focus on prudential regulation. Legal Aid NSW is concerned that this will result in significant harm to vulnerable consumers and their families.

The stated rationale for the consumer credit reforms is to reduce barriers to the provision of credit. However, we refer to Commissioner's Hayne's statement in Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry:

> Treasury indicated that '[t]here is little evidence to suggest that the recent tightening in credit standards, including through APRA's prudential measures or the actions taken by ASIC in respect of [responsible lending obligations], has materially affected the overall availability of credit'.[22]

Legal Aid NSW does not support winding back consumer protection and limiting RLOs to consumer leases and LACCs as outlined in the NCCP Bill, particularly when there appears to be little evidence that the flow of credit is currently restricted.

While Legal Aid NSW acknowledges that the NCCP Bill proposes to introduce some additional protections in relation to LACCs and consumer leases, we consider these protections are not sufficient to genuinely facilitate financial inclusion or address harm caused by the sale of unsuitable products.

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[19] NCCP Bill, schedule 3 clause 31, inserting section 175AA into the NCCP Act.
[20] NCCP Bill, schedule 3, clause 31, inserting section 175AA into the NCCP Act, sets out the cap is calculated by adding together the base price of the item with a delivery fee and an establishment fee, and then multiplying the total by: - for fixed term leases, 0.04 for each month of the consumer lease up to a maximum of 48 months,– for consumer leases for an indefinite period, 1.92.
21 The Treasury Expert Panel recommended that the cap should be a multiple of the Base Price of the goods, determined by adding 4 per cent of the Base Price for each whole month of the lease term to the amount of the Base Price. For a lease with a term of greater than 48 months, the term should be deemed to be 48 months for the purposes of the calculation of the cap. Recommendation 11, viii.
[22] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019), vol 1, 57.