



Senate Economics References Committee's Inquiry into Credit and Financial Services targeted at Australians at risk of financial hardship

Submissions by Consumer Credit
Legal Service (WA) Inc.

November 2018

1 Introduction

The Consumer Credit Legal Service (WA) Inc. (CCLSWA) takes the opportunity to provide submissions to the Senate Economics References Committee's Inquiry into credit and financial services targeted at Australians at risk of financial hardship (**Senate Inquiry**).

The following organisations have contributed to and endorsed this submission:

- Financial Counselling Network
- Financial Counsellors' Association of Western Australia

Details about each contributing organisation are contained in **Attachment A**.

About CCLSWA

CCLSWA is well placed to provide the Senate Inquiry with insight into, and information on, how Western Australians are impacted by the operations of payday lenders, consumer lease providers, unlicensed financial service providers (including buy now pay later schemes), debt management firms and credit repair agencies (**Credit and Financial Services**).

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

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

CCLSWA also provides:

- (1) assistance to financial counsellors and other consumer advocates who work closely with disadvantaged and low-income individuals for the resolution of their credit and debt related problems;
- (2) community legal education programmes relating to credit and debt issues, including financial literacy programmes to high school students and select groups within the community;
- (3) contributions to relevant policy and law reform initiatives; and
- (4) a training and supervision programme for law students and graduate volunteer paralegals.

In providing these services, CCLSWA aims to create awareness, knowledge and understanding of consumer issues relating to Credit and Financial Services.

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

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

We have incorporated case studies as examples of our experience. In these case studies, we have not named the Credit and Financial Services. We have made these entities

anonymous to protect our clients' confidentiality. We have also made these entities anonymous as some matters are ongoing and others are subject to confidentiality agreements. If the Senate Inquiry would like to know the name of a Credit and Financial Service or further detail on a particular case study, CCLSWA can approach the relevant client and seek his or her permission for those details to be provided.

Summary of key issues and recommendations

No.	Issue	Recommendations
1	Payday (SACC) loans	<ul style="list-style-type: none"> a) Adopt the reforms in the <i>National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018</i> b) Bright Line Test c) Introduction of Database System
2	Consumer Leases	<ul style="list-style-type: none"> a) Adopt the reforms in the <i>National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018</i> b) Stop exploitation of Centrepay
3	Debt management firms	<ul style="list-style-type: none"> a) Ban debt management services b) Member of external dispute resolution scheme c) Licensing and regulatory requirements d) Implement a scale of costs e) Prohibit upfront fees for service f) Mandatory notice to clients of cost free alternatives g) Ban unsolicited sales
4	Unlicensed financial service providers	<ul style="list-style-type: none"> a) Member of external dispute resolution scheme b) Licensing and regulatory requirements
5	Impact on financial counselling services	<ul style="list-style-type: none"> a) Increase funding through industry levy

2 Payday loans

- 2.1 CCLSWA regularly advises, and advocates for disadvantaged consumers who have been provided with unsuitable small amount credit contracts (SACC), also known as payday loans, to their serious detriment. These SACCs are regulated by the *National Consumer Credit Protection Act 2010* (Cth) (NCCPA) and National Credit Code (NCC).

Our experience

- 2.2 CCLSWA's experience suggests that the existing SACC laws have failed to be effective in curbing the growth of the payday lending industry and the frequency of consumers experiencing debt spirals.
- 2.3 The high demand for SACCs is, in most circumstances, driven by members of a low socio-economic background. SACCs appear to have become a necessary evil for many consumers who do not have access to alternative forms of credit. High levels of repeat borrowing appear to be causing financial harm as consumers try to borrow themselves out of debt.
- 2.4 CCLSWA believes that financial literacy is vital in facilitating community awareness of the true nature of SACCs, namely that while a SACC is generally promoted as being a one-off short-term solution, the reality is that SACCs are highly likely to exacerbate a consumer's financial position, as opposed to improving it.
- 2.5 CCLSWA has observed that repeat borrowers are at the greatest risk of debt spiralling and concludes that these consumers are those most vulnerable to mismanagement at the hands of lenders, as evidenced by the case studies below.

Case study – Christina's story

Christina is a 74-year-old Indigenous Australian whose income is derived from a Centrelink pension and a superannuation pension. Christina experiences crippling financial difficulty. Christina has extensive expenses due to her role as guardian to eight grandchildren and three children. She lives in government housing and struggles to manage her living expenses.

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

Christina made repayments totalling \$13,000 on these SACCs.

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

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

Case study – Ryan’s story

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

Between **May 2015 and September 2017** Ryan obtained at least:

- 43 SACCs, and
- three credit cards

from 10 different lenders in order to fund his addiction.

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

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

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

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

Additionally, CCLSWA has expended a lot of its resources lodging disputes with the lenders IDR departments. In some instances, the lenders have not dealt with the dispute appropriately. See **Attachment B** for a deidentified example of an extremely unprofessional response that CCLSWA received from a particular SACC provider, although the SACC provider did agree to refund Ryan’s fees and charges. CCLSWA received this correspondence on **25 October 2018**, only 2 weeks ago.

Recommendations

Changes to the law

- 2.6 An independent review of the laws regulating payday loans and consumer leases was undertaken in 2015-2016. This resulted in 24 recommendations being made in a final report provided to the Government on 3 March 2016.

Government response

- 2.7 The Government accepted the recommendations in November 2016 and in October 2017 Michael McCormack, the then Minister for Small Business, issued the *National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017* as an exposure draft for comment.
- 2.8 This was followed up in the same month by a statement from the Minister that “*the Government will introduce legislation this year to implement the SACC and consumer*

lease reforms." Four months followed with no clear timeline for legislative implementation.

- 2.9 On 14 February 2018, Tim Hammond MP, Shadow Minister for Consumer Affairs introduced a Bill replicating word-for-word the Government's draft legislation, being the *National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018* (the **Bill**). On 22 October 2018 Cathy McGowan MP re-introduced the Bill following the expiry of Tim Hammond's Bill.
- 2.10 CCLSWA advocates for the introduction of the reforms in the Bill, as they are and without being watered down.
- 2.11 The first version of the Bill was introduced in 2017. Despite the legislative focus on reforms in the industry at the time of Ryan's case, the industry continued with its poor practice even after calls for change. A visual example of this is set out at **Attachment C**, being a timeline of the SACC loans provided to Ryan. Many loans were granted even after the recommendations in the final report in March 2016. As recently as 2 weeks ago, SACC lenders still flagrantly disregard their obligations as is set out in the correspondence at **Attachment B**.
- 2.12 It is clear that these poor industry practices have not and will not change unless the Bill is introduced as it is.

Bright line test

- 2.13 In addition to the reforms in the Bill, CCLSWA further suggests that the rebuttable presumption in section 118(3A) NCCPA be replaced with a bright line test. The bright line test would have the effect that if:
- (1) a consumer is in default under another SACC, or
 - (2) in the 90-day period before the assessment, the consumer has had two or more other SACCs,
- then that consumer is deemed to be only able to comply with their obligations under a SACC with substantial hardship.
- 2.14 A bright line test is a clearly defined standard of what a SACC lender can, and cannot do. This is superior to a rebuttable presumption from a regulatory perspective.
- 2.15 In theory, a bright line test would go significantly toward reducing the number of consumers trapped in debt spirals. However, CCLSWA acknowledges that there remains governance and regulatory compliance concerns that must be dealt with.
- 2.16 Further, many consumers are heavily reliant on a consistent stream of SACCs to fund weekly expenditure. For this class of consumer, a bright line test in place of a rebuttable presumption may have negligible material impact as it relies on the consumer informing the lender about other SACCs.

Database system

- 2.17 CCLSWA strongly believes that SACC laws can be made significantly more effective if they are supplemented by a system of oversight, enforcement and community education. CCLSWA recommends that a SACC database be created to provide a system of supervision for payday lending.
- 2.18 A regulated SACC database has been successfully implemented in numerous jurisdictions in the United States and a regulated SACC database was supported by a number of credit providers, consumer advocate groups, and the Australian Securities and Investments Commission (ASIC).
- 2.19 A regulated database would serve to strictly enforce the proposed bright line test, and provide important governance and oversight to all regulated SACC lenders.
- 2.20 CCLSWA has assisted numerous clients who were and are in severe financial hardship due to debt spirals directly resulting from predatory lending. In the majority of these cases, a SACC database is highly likely to have ensured compliance with responsible lending, where instead the clients were merely asked whether they had two or more SACCs on foot. This behaviour suggests a clear and consistent pattern of avoidance, and exemplifies the ability of credit providers to circumvent responsible lending obligations.
- 2.21 CCLSWA acknowledges the cost to the industry,¹ however CCLSWA avers that the benefits and protections consumers would experience as a result of a regulated database, far outweigh the potential costs to Credit and Financial Services.

3 Consumer leases

- 3.1 Consumer leases are agreements for access to domestic goods, for example a fridge or washing machine, where consumers are locked into an agreement to pay off the good over several years, often with an offer to buy the good at the end of this term.
- 3.2 Consumer leases tend to attract a similar demographic to payday loans – low-income earners from low socio-economic backgrounds who are usually the recipients of Centrelink benefits.
- 3.3 Consumer leases target vulnerable Australians and are often marketed as a ‘fair go’ or ‘affordable alternative’. This perception is very problematic as they are often one of the most expensive ways of accessing credit.
- 3.4 Problems with consumer leases (as evidenced by the case study below) include:
- (1) no cap on fees,
 - (2) poor disclosure of costs,
 - (3) irresponsible lending,
 - (4) exploitation of Centrepay (a bill payment service for people receiving Centrelink payments) where many consumer lease providers take their fees automatically from Centrelink payments so that consumer leases are taking priority over essential living expenses; and

¹ Review of the small amount credit contract laws – Final report (March 2016) *The Treasury, Commonwealth of Australia*, p 28-29 https://static.treasury.gov.au/uploads/sites/1/2017/06/C2016-016_SACC-Final-Report.pdf.

- (5) consumers paying on average three times the retail value of basic household goods.

Case study – Christina’s story- refer to case study on page 4

In 2013 Christina entered into a consumer lease with Easy Renters R Us, for the rental of a computer. In 2014 Christina entered into a second consumer lease with Easy Renters R Us for the rental of a television.

At the time of each of the leases, in addition to general living expenses, Christina had a number of other debts, including SACCs and personal loans. Christina was told by representatives from Easy Renters R Us that at the end of the lease period, she could make an extra month’s payment and she would own the goods.

At the time Christina came to CCLSWA she had paid \$2060 for the computer and still owed \$800. For the television, Christina had paid \$900 and still owed \$1400.

CCLSWA advised Christina that even if she paid an extra month she would still not own the goods, unless her offer to purchase the goods was accepted by Easy Renters R Us. CCLSWA also advised Christina that Easy Renters R Us would likely require her to pay an amount higher than one month’s repayment.

CCLSWA was able to negotiate another positive outcome for Christina and she was able to keep the TV and computer at no further cost.

Recommendation

- 3.5 CCLSWA advocates for the introduction of the reforms in the Bill, as they are and without being watered down.
- 3.6 CCLSWA also advocates closing the loophole in the exploitation of the use of the Centrepay scheme by consumer lease providers.

4 Debt management firms

- 4.1 While some debt management firms’ conduct may be captured under the *Australian Securities and Investments Commission Act 2001* (Cth), debt management firms’ behaviour is not specifically regulated.
- 4.2 As debt management firms’ behaviour is unregulated there is a lack of access to justice for aggrieved consumers. The lack of formal alternative dispute resolution pathways reduces consumers’ ability to resolve disputes with debt management firms. The only mechanisms for recourse available to our clients are to:
 - (1) make complaints to the debt management firms (which in our experience is generally ineffective);
 - (2) make complaints to a regulator such as ASIC, the Australian Competition & Consumer Commission (ACCC) or the Department of Mines, Industry Regulation and Safety, Consumer Protection WA division (Consumer Protection WA);

- (3) commence court action; or
 - (4) wait for the debt management firm to bring proceedings for debts due and defend those proceedings.
- 4.3 These mechanisms for recourse are either unlikely to resolve the dispute or are not simple, fast or cost effective.

Our experience

- 4.4 CCLSWA routinely advises clients in relation to debt management firms.

Debt management firms

- 4.5 In May 2017 alone, CCLSWA took instructions from three separate clients who are in dispute with the same debt management firm (the **Firm**). Two of the three clients instructed us that they received letters from numerous debt management firms (including the Firm) around the time the lenders commenced court proceedings against them in the Supreme Court of Western Australia for possession of property.
- 4.6 In the period between 7 May 2014 and 16 November 2017, CCLSWA provided telephone advice and representation services to at least 10 clients in relation to disputes with the Firm.
- 4.7 The Firm purports to assist consumers to stop lenders from repossessing their homes, by assisting them in lodging complaints, negotiating and refinancing.

Case study – Sophia’s story

Sophia took out a home loan with a lender. The loan was secured by a mortgage over Sophia’s property. Sophia defaulted under her home loan and mortgage and the lender commenced proceedings against her in the Supreme Court of Western Australia for possession of her home. Sophia was under financial stress. Sophia was approached by the Firm and signed a cost agreement with it on 13 April 2016 for the provision of services. The services were intended to stop repossession of Sophia’s home.

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

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

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

The Firm registered an absolute caveat on the certificate of title of Sophia’s property. The Firm continues to hold an absolute caveat on the certificate of title of Sophia’s property.

- 4.8 CCLSWA lodged complaints in relation to the Firm's conduct with ASIC, the Supreme Court of Western Australia regarding access to writs, the Legal Practice Board of Western Australia and Consumer Protection WA.
- 4.9 CCLSWA considers that the Firm's actions are predatory, misleading and deceptive.
- 4.10 The Firm approached our clients at a highly stressful time. The Firm misrepresented the outcomes that it could achieve. It misrepresented our clients' ability to manage the dispute themselves or utilize free services to obtain the same outcome. Further, the Firm did not supply the services set out in the agreements, and yet still invoiced our clients.
- 4.11 When CCLSWA requested documents from the Firm the responses were incomplete and delayed (if a response was received at all). When CCLSWA wrote to the Firm with disputes in relation to their conduct towards our clients CCLSWA did not receive any response. There is no mechanism by which to force a response from debt management firms.
- 4.12 CCLSWA informs our clients of their ability to lodge a dispute with ASIC or the ACCC if disputes are not resolved directly with the debt management firm.
- 4.13 In our experience, misconduct reports to ASIC and the ACCC do not result in outcomes for individual consumers, but assist consumers as a group.
- 4.14 When CCLSWA lodges reports to regulators it is generally because no other outcome is available, other than through court proceedings.
- 4.15 After CCLSWA lodges reports on behalf of clients we usually informed that the regulator has allocated an investigating officer to the report.
- 4.16 Where the regulator appoints an investigating officer, due to the confidential nature of the regulator's investigations, we often do not receive further correspondence from the regulator.
- 4.17 Based on CCLSWA's experience and information from stakeholders we understand that when regulators note a particular trend in reports, the regulators then look into companies or industries. It is at this stage that CCLSWA is often contacted and asked for further information in relation to the report.
- 4.18 CCLSWA acknowledges the importance of lodging reports and the resource limitations of the regulators. While misconduct reports do not often assist in solving the consumers' individual problem, often consumers seek to file reports so that other consumers do not have to go through the same issue that they went through.

Credit file "cleaners"

- 4.19 CCLSWA also advises clients who are approached by debt management firms who claim to be in the business of credit file "cleaning".
- 4.20 CCLSWA's view is that credit file cleaning firms cannot provide consumers with any services that the consumers cannot perform for themselves or obtain free assistance from a community service.

Case study – Hugh and Rebecca’s story

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

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

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

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

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

CFC did not remove the listings from Hugh and Rebecca’s credit files. The services under the service contracts were not provided.

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

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

Recommendations

Banning debt management services

- 4.21 CCLSWA suggests that companies purporting to offer services to consumers in relation to managing their debts, where the consumers are able to take steps to manage their debts themselves or with free assistance, be prohibited.
- 4.22 Debt management firms purport to provide services that consumers are able to do themselves free of cost or are able to obtain assistance in doing so from free community services. The harm that is done by debt management firms is vastly outweighed by any potential utility the services may provide.

Subject to restrictions and mandatory members of External Dispute Resolution Scheme (EDR)

- 4.23 Alternatively, CCLSWA suggests that if debt management firms are to remain that they be subject to a strict regulatory framework including:
- (1) Membership of the Australian Financial Complaints Authority, giving clients access to an EDR scheme;
 - (2) Strict licensing or authorisation by ASIC;
 - (3) Prohibition of upfront fees for service;
 - (4) Prescribed scale of costs;
 - (5) Mandatory notice to clients that cost free services are available through financial counsellors, the National Debt Helpline and a lender's hardship team; and
 - (6) Banning unsolicited sales.

5 Unlicensed financial service providers

- 5.1 CCLSWA has had a number of clients who have had issues with a particular unlicensed helper service (the **"Helper Service"**). The Helper Service provides assistance for consumers in securing short term loans. The loans are then processed through an affiliated credit provider.
- 5.2 The NCCPA and the NCC define a credit contract as a contract under which credit is or may be provided, being the provision of credit to which the NCC applies. Specifically the NCC does not apply to the provision of credit, if under the contract:
- (1) the provision of credit is limited to a total period that does not exceed 62 days;
 - (2) the maximum amount of fees and charges that may be imposed or provided does not exceed 5% of the amount of credit; and
 - (3) the maximum amount of interest charges that may be imposed or provided for does not exceed an amount equal to the amount payable if the annual percentage rate were 24% per annum.
- 5.3 Accordingly, the protections offered by the NCCPA and the NCC are not available in respect to the services provided by the Helper Service or the affiliated credit provider.

Case study- Naomi's story

Naomi took out a \$350 loan from the Helper Service in early 2018. The loan was to pay for an event she was going to. Naomi then had to take time off work due to surgery.

Naomi had made one repayment of \$208 but has since defaulted on the loan multiple times, with fees added to the loan each time she defaults.

Currently the total outstanding amount on the loans is approximately \$1,200. The Helper Service sent Naomi an aggressive letter which stated:

"This is your last opportunity to remedy the default and prevent further action against you. You need to comply with your contract, and contact us within 14 days to confirm the above payment or to make an arrangement that is suitable to you.

Failure to do so will lead to:

- *an internal investigation and verification of all the information provided when you entered into the recorded contract – discrepancies will be evaluated and if considered fraudulent, will be reported to the police and possibly also to AUSTRAC if deemed necessary*
- *the possibility of you being sued for the total amount outstanding under your contract*
- *seeking of a judgement against you in the Courts and pursuing you for the amount of judgment either by way of an examination of your means in Court or a garnishee of income or bank account. "*

Naomi was shocked and concerned to receive such a letter. She was then contacted by a debt collection firm saying that they acted on behalf of the Helper Service. Naomi then entered into a payment arrangement for \$150 per fortnight with the debt collection firm, and contacted CCLSWA for advice.

CCLSWA sent a request for documents to the debt collectors and received an incomplete response. CCLSWA sent a follow up document request which received an identical response to the initial document request.

CCLSWA made several telephone calls to the Helper Service representatives in which we raised our concerns that the matter was not being dealt with appropriately. However, the Helper Service still failed to provide us with information as requested.

- 5.4 With Naomi's story, the Helper Service is not bound by the disclosure obligations under the NCCPA and NCC and demonstrates that there is no easy avenue for recourse if a document request is not complied with. The Helper Service is also not a member for a free external dispute resolution scheme. The only avenue of complaint is to lodge a misconduct report with ASIC and the ACCC, which does not necessarily provide the client with an outcome that directly benefits them.

Small business lenders

- 5.5 CCLSWA has had a number of experiences where lenders avoid being captured by the NCC and NCCPA by ensuring that the consumer signs a 'business purpose declaration' despite the real purpose of the credit being a consumer purpose.

5.6

Case study - Colin's story

Colin was a recovering drug addict and was unemployed. Colin got a loan from a small business lender to buy illegal drugs. At the time Colin applied for the loan, he was servicing many SACCs with seven lenders.

The application with the small business lender revealed a number of inconsistencies and issues such as an incomplete ABN provided by Colin, the ABN did not match the business name, and the small business lender only looked at Colin's personal bank statements and did not obtain a business bank statement.

Colin also signed a business purpose declaration when he signed the loan contract with the small business lender.

As the small business lender was not a member of an EDR scheme Colin's remedies were limited. CCLSWA lodged an ASIC complaint on behalf of Colin in relation to potential breaches by the small business lender of the NCCPA and NCC on the basis the loan was not for business purposes but was for personal use.

The small business lender sold its debt to another entity which settled the debt with Colin.

- 5.7 Colin's story is illustrative of how small business lenders use the business purpose declaration to provide unsuitable credit with limited avenues of recourse for the consumer.
- 5.8 It is our view that all small business lending should be captured by the same guidelines or legislation as those that govern the provision of consumer credit in order to ensure that the practices detailed in the case study are stopped.
- 5.9 As a minimum, small business lenders should be required to be a member of an EDR scheme and to hold an Australian Credit Licence before being able to provide credit to small business borrowers.

'Buy now, pay later' schemes

- 5.10 CCLSWA has a number of concerns with 'buy now pay later' schemes such as Afterpay. Buy now pay later companies are exploiting a loophole in the law which means they are not regulated like other credit providers. They do not need to comply with important consumer protections like responsible lending, EDR membership and hardship.
- 5.11 CCLSWA is concerned that one of the key branding messages for Afterpay is that it approves a consumer's purchase 'instantly', in direct disregard to responsible lending. Also of concern is that Afterpay's income from late fees surged 365% to 28.4 million
- 5.12 CCLSWA is further concerned that consumers are making payments to buy now pay later schemes from their credit cards, adding even more financial difficulty to their situation with interest accruing on these so called 'interest free' purchases.

- 5.13 The buy now pay later field being largely unregulated means that it is not subject to the same licencing and regulatory requirements that other credit providers are subject to. CCLSWA advocates for a more level playing field for all providers operating in the finance sector so that buy now pay later businesses do not have an unfair advantage over other regulated businesses. These kinds of companies need to be properly regulated. CCLSWA calls on the Government to close the buy now pay later loophole in our national credit laws.

6 Impact on the financial counselling sector

- 6.1 At CCLSWA approximately 80% of the calls we receive result in a referral to a financial counsellor.
- 6.2 At the moment there is a 2-4 week waiting period for an appointment with a financial counsellor. In CCLSWA's experience, those wait times are only going to increase with the increased volume and complexity of complaints being received.
- 6.3 The joint National Association of Community Legal Centres and Financial Counselling Australia submission in response the Royal Commission's Interim Report called for a levy of \$157 million per annum sourced from the financial services industry to fund the National Debt Helpline (\$1M), financial counselling (\$130M) and community legal centres (\$26M).²
- 6.4 CCLSWA recognises that there is precedent for fines imposed on Credit and Financial Services to be directed to financial counselling and community organisations.
- 6.5 One such example is the Cash Converters remediation scheme which ended 6 November 2017, whereby Cash Converters undertook to refund eligible consumers' fees charged for loans that had been provided that did not comply with responsible lending obligations under the NCC. Cash Converters agreed that any amounts that were not able to be refunded would be donated to financial literacy programs.
- 6.6 Whilst providers of financial counselling benefitted from the remediation, such funding only occurs on an ad hoc basis.
- 6.7 Introducing a mandatory bank levy would provide a guaranteed source of funding for community legal centres and financial counselling to assist consumers with issues in regards to Credit and Financial services.
- 6.8 CCLSWA supports the need for increased funding to the financial counselling sector, by way of an industry levy, to help manage the overwhelming increase in demand for this service.

²<http://www.nacclc.org.au/resources/20181026%20NACLC%20and%20FCA%20Banking%20RC%20Submission.pdf>

7 Conclusion

CCLSWA is grateful for the opportunity to provide input to the Senate Inquiry.

CCLSWA would be happy to be of assistance in providing further information or detail on CCLSWA's position or in relation to a case study.

If you have any questions or would like to discuss these submissions further, please contact Gemma Mitchell on [REDACTED]

Yours faithfully

Consumer Credit Legal Service (WA) Inc.

Gemma Mitchell
Managing Solicitor
Consumer Credit Legal Service (WA) Inc.

Bev Jowle
Executive Officer
**Financial Counsellors' Association of
Western Australia**

Celia Dufall
Principal Officer
Financial Counselling Network

Attachment A

Consumer Credit Legal Service (WA) Inc.

Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) is a specialist community legal in Western Australia. In the 2017/2018 financial year, CCLSWA provided advice to 907 new clients, opened 121 case files, and closed 63 files. Of the 63 files closed:

- 98% were experiencing financial difficulty
- 53% were over 65
- 22% required a translator as the main language spoken at home was not English
- 22% had a disability or mental illness

Financial Counsellors' Association of Western Australia

The Financial Counsellors' Association of WA (**FCAWA**) represents financial counsellors who are practicing in WA, and we have a current membership of over 150 people. FCAWA also manages the National Debt Helpline, a 1800 number for people experiencing financial hardship in WA. All services provided by the Helpline and financial counsellors are free and independent and managed by a variety of not for profit organisations. FCAWA provides training, support, policy and advocacy advice to the financial counselling sector, government, key stakeholders and consumers.

Financial Counselling Network

The Financial Counselling Network (**FCN**) is a unique collaboration of 15 member organisations and provides a range of integrated and person centred services with the aim of reducing the drivers and impacts of financial hardship in the WA community. Member organisations of the FCN include community legal centres, family and domestic violence (FDV) centres, large not for profits, community service organisations and local government. This collaboration provides access to comprehensive referral pathways and expert knowledge whilst leveraging local expertise and relationships.

Attachment B: Correspondence from SACC Lender in Ryan's Case Study

25 October 2018

Dear [CCLSWA]

Re: [Client]

Before we deal with the specific issues you have presented, it would be useful to place the whole matter in context.

1. [Lender] makes no secret of the fact that it is in business to lend money.
2. The Corporations Act demands that all companies must trade only while solvent. In fact, it is a criminal offence, with substantial penalties imposed on company directors, if a company trades while insolvent (see Sections including 133, 141 and 347A).
3. The key to a money lender's solvency is that the lender is repaid the loans it advances to consumers.
4. Without such repayments, [Lender] could not pay its bills when due and payable.
5. [Lender] operates in a very competitive market, with your client free to choose from numerous lenders.
6. Your client is over 18, legally entitled to vote, marry, have a family and seek and obtain employment.
7. Even the Hon. Kelly O'Dwyer, then Minister for Finance, Minister responsible for non-bank lending and strongly pro-consumer - has commented that consumers have to take some personal responsibility for their lending decisions.
8. [Lender] does not automatically lend to every loan applicant. In fact, the company's average rejection rate is 72% of all applications.
9. [Lender] was thoroughly investigated by ASIC in 2017 and found to be compliant in its lending practices.
10. [Lender] has always adopted a policy of compassion when approached by consumers claiming financial hardship after acquiring their loan. However, while that frequently involves [Lender] waiving all future fees and charges, it is not and cannot be a policy of giving money away. The issue of remaining solvent and avoiding criminal charges for our directors and loss of employment for all our staff, demands at least seeking payment of the principal outstanding.
11. Our loan application assessment process involves lending money with relatively limited gross profit margins and we set out to achieve the then Minister's expectation that we obtain "*a reasonable understanding of the consumer's ability to meet all the repayments*" (see the National Consumer Credit Protection Act's Explanatory Memorandum, 2009, at paragraphs 3.69 and 3.139).

As ASIC determined in 2017 (and there has been absolutely no change to the process since), we fulfil ASIC's requirements as detailed in ASIC Regulatory Guide 209 at paragraphs RG 209.18(b) and 209.19 - we "*determine whether the consumer has the capacity to meet their payment obligations... to a reasonable standard*".

That assessment of capacity includes recognising that, after living expenses and meeting the loan repayment obligations, there should be a buffer or surplus amount, in

accordance with ASIC's expectations in Regulatory Guide 209, at paragraph RG 29.99(a).

Assessing that capacity does not include taking responsibility for the consumer's money management. If, after making the repayments, the customer chooses to spend all their discretionary income or buffer, calculated by [Lender], and leave only small credit amounts or no credit amounts in their bank account, that is not [Lender] responsibility.

12. [Lender] also satisfies all statutory requirements included in the National Consumer Credit Protection Act 2009 and the National Consumer Credit Protection Regulations 2010. In particular, Sections 129 and 130 in regard to assessment, including reasonable enquires, establishing requirements and objectives and seeking an appropriate level of verification in accordance with Section 130(1A).
13. However, this determination of affordability is not simply because the Commonwealth law demands it, it occurs because it is good business practice. [Lender] cannot afford to lend loans that, from the outset, are never going to be repaid.
14. Our assessments are reasonable and are scaled, as ASIC permits, to reflect the type of simple loan we offer (in accordance with ASIC Regulatory Guide 209, at paragraph RG 209.25). They consider suitability over the loan term in accordance with Section 129 and, in accordance with Section 131, [Lender] carefully considers whether or not "*it is likely that... the consumer will be unable to comply with the consumer's financial obligations under the contract...*". We set out to determine:
 - a. if there is "*a real chance of a person being able to comply*", in accordance with the standards laid down by Justice Davies in *ASIC v The Cash Store* 2014; and
 - b. "*to determine whether the consumer would have the capacity to meet their payment obligations*" (ASIC Regulatory Guide 209 at paragraphs 209.18(b) and 209.61).
15. As indicated above, to achieve this determination we obey the then Minister's Explanatory Memorandum, "*...to ascertain a reasonable understanding of the consumer's ability to meet all the repayments, fees, charges and transaction costs associated with the loan*".

It is to be noted that the Minister did not present the standard as being a "perfect understanding" or even a "comprehensive understanding". If the Minister did not expect such, then no consumer or consumer representative has the right to attempt to implement such a standard, claiming support under the Commonwealth regulatory regime.
16. You will note that neither the legislation, nor the Federal Court, attempt to prescribe certainty.
17. To this end, it is important to note that Section 128 demands an assessment up to 90 days before the credit day (when the loan is issued) and Section 130(1A) demands bank statements for the period of 90 days, prior to the credit day, be examined during the assessment process. Further, the assessment is not prescribed in the legislation to cover any other time other than "*the period in which the credit day occurs*" [Section 128(c)], "*the period the assessment covers*" (the loan term), as specified by the credit provider [Section 129(a)], and via the bank statement analysis of "*the immediately preceding period of 90 days*".

We note that ASIC has indicated that an examination of bank statements to determine a consumer's regular expenses is acceptable - "*In general, we consider that transactions*

listings for accounts may be sufficient to meet this requirement" (see Regulatory Guide 209 at paragraph RG 209.70).

18. ASIC also emphasises the importance of the assessment on credit day. Credit providers are expected to "...*find out about the particular consumer's current situation...*" (see ASIC Regulatory Guide 209 at paragraph RG 209.30).
19. [Lender] identifies the period the assessment covers to be the term of the loan being applied for. No retrospective application, or application beyond the loan term, is ever stated or implied.
20. Given this statutory and company procedures environment, on compliance and legal professional advice, [Lender] will not accept attempts to merge into one assessment a number of different assessments, for different loans, over an extended period.
21. The National Consumer Credit Protection Act is prescriptive. Sections 131(3) and 132(1)(a) demand that the consumer be able to comply with their financial obligations under their credit contracts, without suffering "*substantial financial hardship*". This is defined as being unable to comply without selling their principal place of residence.

We note that ASIC expands this test by including the sale of "*other assets*" (see Regulatory Guide 209 at paragraph RG 209.107). [Lender] does not accept that simply "hardship" constitutes "*substantial hardship*", nor does the Commonwealth Parliament and nor does ASIC [see ASIC Regulatory Guide 209 at paragraph RG 209(101)].
22. [Lender] maintains that, if a consumer is able to meet their obligations and has not felt compelled to seek hardship relief, given the invitation to do so in their [Lender] credit contract and in their copy of the Form 5 Information Statement, then this history supports the company's claim that an adequate assessment has been undertaken and that any claim of substantial hardship, post-complete repayment of the loan, has no validity.
23. Our assessments recognise there is always the possibility that circumstances may adversely change financially for the consumer during the term of the loan. We ask if any changes are expected. The test is "*reasonably foreseeable*" - not that you must assume such will occur [see ASIC Regulatory Guide 209 at paragraph RG 209.33(f)].
24. However, we are not in the position of fortune telling whether or not unexpected adverse financial circumstances will occur for the consumer on credit day - at the time the loan is taken out. ASIC recognises this challenge by determining that the assessment is made at the time of the application - it is a "*current*" assessment, as ASIC prescribes [see ASIC Regulatory Guide 209, paragraph RG 209.32(b)].
25. As discussed above, the legislation demands that the applicable time for the assessment must be no longer than 90 days before the credit day. [Lender] makes its lending determination on the information that is available during the assessment process. There is no prescription that [Lender] has to undertake multiple assessments during the loan term, to determine if circumstances have changed (see Section 128).

Specific detail concerning the [Client] matter

1. The age of the client indicates a mature adult.
2. The financial history of the client indicates a financially aware borrower. We note he has had experience borrowing from other credit providers. That in only 2 of the loans granted did the loan term go past the original end date due to a failed payment.
3. We note that [Client] borrowed for various reasons including vehicle expenses, medical expenses, moving costs and home repairs/maintenance.

4. That the affordability for all loans offered to [Client] by [Lender] was within his budget even after including discretionary expenses, other loans and a Standard Buffer that is applied to all of the loans that we approve.
5. [Client] applied 2 more times after finalising his last loan in September 2017, but both applications were declined, and he has been blacklisted from applying again since.

The [Lender] offer

Our offer is presented after seeking compliance and legal professional advice and carefully reviewing Consumer Credit Legal Services request, industry best practice, and all the circumstances of [Client] situation.

[Lender] has made financial decision to refund [Client] \$1690 to an account nominated by him.

Please understand that this is not an admission of guilt, but purely because of the policies of the AFCA.

If this matter should be escalated to the ombudsman, then the investigations they would undertake, not matter what the outcome, would be financially unviable.

Please contact me if you have any further concerns or to forward us [Client] account details.

Yours faithfully,

Attachment C: Timeline of SACC's in Ryan's Case Study (see next page)

Credit and financial services targeted at Australians at risk of financial hardship
Submission 20

