Senate Inquiry – Credit and financial services targeted at Australians at risk of financial hardship

Submission by Legal Aid Queensland

TRIM no 2018/0898667

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

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Senate inquiry into credit and financial services targeted at Australians at risk of financial hardship.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Consumer Protection Unit lawyers and First Advice Contact team lawyers have extensive experience providing specialist advice and representation to financially disadvantaged clients in relation to small amount loans and consumer leases, insurance, consumer law, mortgage stress and housing repossession, loans and other debts, contracts including telecommunications contracts and unsolicited consumer agreements. This submission is informed by that knowledge and experience. LAQ has only responded to the questions that it has direct experience of.

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Credit and financial services targeted at Australians at risk of financial hardship, with particular reference to:

(a) the impact on individuals, communities, and the broader financial system of the operations of:

(i) payday lenders and consumer lease providers,

LAQ has extensive experience assisting Australians at risk of financial hardship who have experienced problems with payday lenders and consumer lease providers. The problems that people in financial hardship have experienced with payday lenders include:

(a) Payday lenders target consumers in vulnerable circumstances who are on low incomes and/or are receiving Centrelink benefits and who are excluded from the mainstream credit market.

(b) Payday lenders fail to meet their responsible lending requirements to assess whether consumers can afford to repay a loan. By not meeting their responsible lending requirements consumers in vulnerable circumstances are placed at risk of further financial hardship. This failure is caused by the following internal processes and conduct of payday lenders:
   - (i) The use of benchmarks to assess the expenses of consumers. This approach under-estimates the actual expenses of a consumer.
   - (ii) Where a benchmark for expenses is not used, there is a failure by the lender to take into account all the different expenses that a consumer incurs. Many payday lenders use set categories of expenses that do not take into account all of the existing discretionary expenses of a consumer.
   - (iii) A failure to properly analyse the three months bank statements that a lender is required to obtain from a consumer. This failure leads to the lender using incorrect income and expense figures in deciding whether the loan is affordable.
   - (iv) A failure to check the accuracy of the income and expense figures provided to them by a consumer.
   - (v) A failure to assess the needs and objectives of the consumer and then assess whether those needs and objectives are achievable given the consumer's income and expenses.
   - (vi) The provision of more than two payday loans in a 90 day period without consideration of whether the consumer's circumstances as such as to show they are able to pay the additional loans.

(c) The provision of payday loans that are rolled over one after another so that a consumer will have 30 or more successive payday loans over many years. This creates a spiral of debt that a consumer in financial hardship finds it almost impossible to escape. This debt spiral forces the consumer to rely on charitable, social and government services in order to survive.

(d) The provision of medium amount loans that are secured by a car that is worth substantially less than the value of the loan. Typically, these cars are worth less than $1500 and are needed by the consumer to get to work or medical appointments. This type of security is effectively used as a form of coercive security to ensure that repayment of the loan is given priority by consumers in vulnerable circumstances.

(e) The use of direct debits that deduct payments from a consumer's account immediately after their Centrelink payments are placed in their account. This practice leaves the consumer with little or no income for the rest of the fortnight and will often force the consumer to rely on handouts from emergency relief or charity in order to survive the fortnight.

(f) The provision of loans for basic expenses such as food, rent or utilities bills. If a consumer is unable to afford to pay their rent or buy food they are extremely unlikely to be able to afford to make repayments on a loan.

(g) Some lenders attempt to avoid the current regulation by designing products that fall outside the scope of the National Consumer Credit Protection Act and National Credit Code. For example, by incorrectly classifying a personal loan as a business loan.

LAQ also assists clients experiencing financial hardship as a result of consumer leases. consumer leases:

(a) are an expensive product that result in a consumer pay between 3-5 times the actual value of the goods with no guarantee that the consumer will own the product at the end of the contract.

(b) are not well explained at the point of sale. LAQ regularly talks to consumers with consumer lease products who believed they were buying the product like a layby and not leasing it.

(c) have no legislative cap on costs, unlike payday loans.

(d) have a wide variety of different products that have different terms and conditions creating unnecessary confusion for consumers.

(e) include high termination fees for ending a consumer lease contract early, sometimes well in excess of $1,000, which are prohibitively expensive for consumers in financial hardship trying to exit a contract.

(f) are targeted to consumers on low incomes and those receiving Centrelink benefits and typically entrenches the consumer's financial hardship.

The impact of payday loans and consumer leases on consumers, the community and the financial system is:

(a) They put consumers in financial hardship in a worse financial position.

(b) Consumers with these products will often meet the repayments under the contracts by relying on charitable services for essentials such as food, rent or essential services.

(c) Some consumers are reluctant to raise a problem with the payday lender or consumer lease company because they believe that these expensive products are the only financial products that are available to them.

(d) The community ends up supporting consumers with these products through the extra assistance that the government and charitable and social services provide to them.

(e) The use of any of a person's Centrelink income to make repayments on these loans will often leave the consumer unable to meet their basic expenses.

The case studies set out below reflect the experience of LAQ seeing clients attempting to deal with payday lending and consumer lease companies.

Small Amount and Payday Lending

Case Study 1

LAQ's client was an elderly woman on an aged pension with English as a second language. Four to five years ago she started to take out loans with a payday lender when she and her husband began struggling to meet basic expenses. Over the subsequent period she obtained nearly 30 loans from the same payday lender that were rolled as each loan was repaid. The client sought assistance from LAQ when she was unable to buy daily necessities in order to pay the loan. LAQ assisted the client to negotiate with the payday lender. The lender agreed to resolve the matter and release the client from all debts, on the condition the lender made no admission of liability.

Case Study 2

LAQ's client was a single mother receiving Centrelink benefits. The client first approached a payday lender when she left a relationship. The Client applied for and received 58 payday loans over a six year period despite not having the capacity to repay any of the loans. The client also applied for small amount loans with other lenders during this time. The effect on the client was that she experienced several defaults and her bank account was overdrawn several times each month. The client was unable to provide for her family and buy daily necessities during this time. LAQ assisted the client's case and negotiated with the payday lender. The lender agreed to refund of some of the interest and fees the client had paid on the loan on the condition the lender made no admission of liability.

Case Study 3

LAQ's client was a young disability pensioner with a number of children in care and her husband in jail. Struggling to make ends meet she instructed LAQ that she had asked a payday lender for a small payday loan to assist paying basic living expenses. The client approached LAQ for assistance when she couldn't afford the repayments of $58.15 per fortnight. Following the lodgment of a complaint with the Ombudsman, the lender agreed that that the client only pay the principal amount of the loan owing and not, any interest, fees or charges on the loan. The lender also agreed that the client could make smaller more affordable repayments.

Case Study 4

LAQ's client was a pensioner who had learning impairments and a number of children taken into care. As she had no money to pay for basic living expenses, she approached a payday lender for a loan of $200 to pay bills. The loan was approved despite the fact that she had no capacity to pay. The client was unable to make the repayments on the loan and defaulted. The client then sought assistance from LAQ and financial counselors. The lender agreed to waive the remaining balance owing on the loan.

Case Study 5

LAQ's client was a young woman in receipt of a Centrelink Pension. To pay for basic living expenses, she approached a payday lender for a loan. Despite not working at the time and having a number of existing expenses, she was granted a loan of $600. LAQ's client was unable to afford to make the repayments on the loan and had made no repayments on the loan when she approached LAQ. Following negotiation, the lender agreed that the client was only liable to repay the principle amount of money borrowed and not liable to pay any interest, fees or charges under the loan.

Case Study 6

LAQ's client suffered from health problems and has an intellectual disability. He entered into a contract to borrow $600 from two related companies. After paying a loan establishment fee of $120.00 to the first company (the broker) he was then lent $480.00 by the second company (the lender). After making repayments for nearly six months he remained indebted to the lender for an amount close to the original sum borrowed of $600.00.

The loan was structured to maximise the fees the lender could charge by making the term of the loan longer than was necessary. For the lender to achieve this the borrower was asked to make bigger payments in the first six months with the fortnightly payments that the borrower was required to pay reducing to a third of the original loan payment in the second six months. This allowed the lender to continue to charge a monthly fee calculated and based on the original loan amount of $600 and extended the loan. If the borrower had continued to make the original payments required for the first 6 months, the loan would have been paid out a number of months earlier.

The client also entered into a series of payday loans with the lender. The loans appeared breached the National Consumer Credit Protection Act 2009 and National Credit Code because the client received more than 2 payday loans in a 90 day period. LAQ negotiated with the lenders who agreed to release the client from any further liability.

Consumer Leases

Case Study 7

LAQ's client had an acquired brain injury and was in receipt of a Disability Support Pension from Centrelink. She entered into a consumer lease to obtain a computer. She did not fully understand the consumer lease contract. After struggling to make a total of $3800 worth of repayments on the lease she still owed a considerable amount of money and she fell into arrears. The company informed her that if she did not make payments of over $1000 the company would repossess her computer. She approached LAQ for assistance. LAQ negotiated with the consumer lease company. The company agreed to assign ownership of the computer to the client and waive the balance outstanding under the lease.

Case Study 8

LAQ's client originally sought advice from a criminal law duty lawyer after being charged with fraud. The lawyer assisted the client to obtain an adjournment and referred the client to LAQ's Civil Justice Services Unit. The client had leased some household white goods and then fallen into financial hardship which resulted in him being unable to make repayments. Negotiations between the client and the company over a hardship repayment arrangement broke down. The company then referred the matter to the police alleging that the client had engaged in fraud and retained goods he was not entitled to hold. LAQ assisted the client to lodge a complaint with the Ombudsman about the company's conduct. This Ombudsman complaint saw the criminal charges withdrawn and the client successfully enter into a repayment arrangement to pay off the debt which he owed.

Case Study 9

LAQ's client originally sought advice from a criminal law duty lawyer. The police had charged him with stealing after a complaint from a consumer lease company. The client had entered into a consumer lease for certain household goods and then found he was unable to meet the repayments on the lease. The company refused his request to reduce the payments whilst he was in hardship. Subsequently the client was charged with stealing. The duty lawyer assisted the client to obtain an adjournment and referred him to the LAQ's Civil Justice Services. LAQ assisted the client to lodge a complaint with the Ombudsman on the grounds that the consumer lease company had not properly considered his application for hardship. The charges were subsequently withdrawn. LAQ assisted the client to negotiate with consumer lease company, through the Ombudsman, a repayment plan that he could afford.

Case Study 10:

LAQ's client sought assistance regarding a rental agreement for a refrigerator with consumer lease company. The client had been making rental payments for a number of years and was concerned that in order to become the owner of the fridge she had to pay an additional ownership fee amounting to hundreds of dollars. Also, she had been charged default fees for missing payments when her husband was very ill and they were in financial hardship. The client had applied to the consumer lease company to enter into hardship arrangements but it had been refused. LAQ assisted the client to negotiate with consumer lease company and it was agreed that the company would transfer ownership of the refrigerator to the client and refund the additional ownership fee and the default fees.

Case Study 11

LAQ's client was a disability support pensioner who had moved into accommodation on his own. He was unable to afford to purchase basic household furniture and goods for his home and obtained what he needed through a consumer lease. Shortly after, he fell into arrears and attempted to return the goods. The company informed him that he could only do this if he paid a $3500 termination fee. At this time he was approximately $800 behind in his repayments. LAQ assisted the client to negotiate with consumer lease company and it was agreed that the company would waive the termination fee upon the client returning the goods and paying the amount due as arrears. The company also accepted that the client could pay the arrears installments of $10 per week.

Case Study 12

At the time of leasing a laptop computer, LAQ's client was in a relationship that broke down due to family violence. She also lost her job. The client originally tried to negotiate with the consumer lease company to return the goods but was unsuccessful. LAQ assisted the client to negotiate with consumer lease company and it was subsequently that the company would release the client from the contract upon her returning the goods.

Case Study 13

LAQ's client was a young woman suffering from post-traumatic stress disorder. She entered into a consumer lease to purchase a number of household goods including a refrigerator. She quickly became unable to meet repayments and fell into arrears. The company terminated the lease and charged her a termination fee in addition to the arrears on the lease. After negotiation by LAQ with the company it was agreed that the client was not liable to pay the termination fee but would still be liable to pay the arrears owing under the lease. Also, the client was not required to make payment under the lease for six months to enable her to buy a refrigerator by accessing a No Interest Loan Scheme (NILS) loan. After the refrigerator had been purchased the client recommenced making loan repayments under the consumer lease.

Case Study 14

LAQ's client was a young single mother who to establish herself in her new accommodation, leased furniture and white goods from a consumer lease company. After losing her job the client fell into arrears with her lease payments. As a result the consumer lease company repossessed most of the goods under the lease. When the client asked how much it would take to payout the lease contract she was quoted varying figures between $3000 and $7000 to end the contract. The client had already paid a substantial amount of money under the lease. LAQ assisted the client to negotiate with the consumer lease company and the company agreed not to charge termination fees to the client. The company also agreed to assist the client by ceasing interest calculations and allowing her to enter into an affordable repayment arrangement for the balance of outstanding.

Case Study 15

LAQ's client was an aged pensioner who thought he was buying a computer over a three year period. When he arrived home and read the contract carefully he discovered he was renting/leasing the computer. He returned the computer within one week. The company sought to charge him a $1400 termination fee. Being on a pension and with health problems the client could not afford the fee. LAQ assisted the client to negotiate with consumer lease company. LAQ argued that the clause enabling a large termination fee to be charged was unfair because it was not a genuine pre-estimate of the loss suffered by the company given the lease was being terminated within a week. Without making an admission of liability, the company agreed that they would release LAQ's client from the termination fee on the grounds of his difficult financial circumstances and the fact the computer had already been re-rented.

Case Study 16

LAQ's client had an intellectual disability and was in receipt of a Disability Support Pension. The client sought assistance from LAQ because a consumer lease company he had entered into a contract with was pursuing him for arrears of payments which he had not made due to illness and unexpected expenses. He had spent a number of months trying to unsuccessfully negotiate a hardship arrangement with the company. The company kept proposing arrangements that he could not meet. LAQ assisted the client to negotiate a repayment arrangement that he could afford.

Case Study 17

LAQ's client had an intellectual disability and was receiving a Disability Support Pension. The client was referred to LAQ by a No Interest Loan Scheme (NILS) provider who was assisting him. The client had been entered into two separate consumer lease/rent to buy contracts with a lease company. The goods that were leased included a refrigerator, bunk beds and two pillows. The client did not understand the contracts that he had entered into. LAQ assisted the client to negotiate with consumer lease company. The consumer lease company, agreed to a significantly reduce the payout figure which would enable the client to retain ownership of the goods. The negotiated pay out figures matched figures those which the NILS provider had assessed were affordable for the client under a NILS loan. The leases were paid out after a NILS loan was granted to the client.

Case Study 18

LAQ's client was a pensioner who entered into a contract for a new washing machine and fridge from a consumer lease company. The client understood that she was purchasing the goods over time. Before granting the lease, the company made no inquiries as to the client's on-going expenses. The client defaulted on the repayments early into the lease and soon after discovered that even if she made the payments totaling $1550 she would never own the goods. The client was also informed that she would be liable for all of the lease payments across the term of the lease even if she terminated the lease early. LAQ assisted the client to negotiate with consumer lease company and the company agreed that it would not pursue the client for the balance of any lease payments if she returned the goods.

Credit and financial services targeted at Australians at risk of financial hardship, with particular reference to:

(a) the impact on individuals, communities, and the broader financial system of the operations of:

(ii) unlicensed financial service providers including 'buy now, pay later' providers and short term credit providers, and

LAQ has assisted a number of consumers who have experienced problems with unlicensed financial services providers.

Typically, these products are not regulated by the *National Consumer Credit Protection Act 1999* (NCCP) and *National Credit Code* (NCC) because they have been structured to avoid these consumer protections.

This regulation is avoided by structuring products that:

(a) do not charge interest; and

(b) instead charge a service, administration or late fee as part of the product.

The problems experienced by consumers in financial hardship with unlicensed financial products are:

(a) The products are not subject to responsible lending requirements. This means that consumers enter into contracts requiring them to make payments that they cannot afford and the company is not required to make appropriate inquiries and responsible lending assessments.

(b) Consumers inappropriately entered into these products find it harder to meet their repayments on other debts.

(c) These companies have no legal obligations to consider a consumer's financial hardship.

(d) The protection offered to consumers is significantly less than the protection that consumers have with other financial products.

(e) Some of these products target young people and see them entered into products that they do not understand and cannot afford.

(f) Companies offering these products are not required to be members of AFCA.

Credit and financial services targeted at Australians at risk of financial hardship, with particular reference to:

(a) the impact on individuals, communities, and the broader financial system of the operations of:

(iii) debt management firms, debt negotiators, credit repair agencies and personal budgeting services;

LAQ has assisted a number of clients in financial hardship that have experienced problems with these firms.

The problems experienced by consumers in financial hardship with debt management companies, debt negotiators and personal budgeting companies are:

(a) These companies charge consumers in financial hardship significant fees for managing their money and negotiating with creditors.

(b) Consumers in financial hardship do not have the capacity to pay these fees.

(c) The legal and financial position of consumers is often worsened by the intervention of these companies.

(d) These companies offer a paid service for doing tasks that a consumer, financial counsellor or Legal Aid Commission and Community Legal Centre lawyer can perform for free.

(e) Clients do not understand they are entering into debt agreements and not a debt consolidation loan.

In LAQ's experience, credit repair agencies do not assist consumers or improve their credit reports or financial position.

Typically, credit repair agencies advertise the ability (for a significant fee) to:

(a) clear defaults from a consumer's credit report; or

(b) provide the consumer with a step by step guide that will allow them to successfully clear defaults from a person's credit report.

What these companies fail to tell consumers is that there are only very limited circumstances when a credit default can be legally removed from a credit report.

These circumstances are where:

(a) the default is listed against the wrong person.

(b) the default is listed for the wrong amount.

(c) the process for listing the default was not correctly followed.

Wrongly listed defaults can be disputed for free by a consumer directly with the credit provider or the credit reporting agency. Credit Repair Agencies do not inform consumers of this free alternative to their services.

There are rare occasions where a consumer has been able to remove a validly listed default from a consumer's credit report with the agreement of the creditor. However, in these circumstances all that removing a validly listed default has done is give the rest of the financial services industry an incorrect view of that consumer's credit worthiness.

In LAQ's experience, consumers in financial hardship rarely receive any substantive benefits from paying money to debt management firms, debt negotiators, credit repair agencies and personal budgeting services.

The case studies set out below reflect the experience of Legal Aid clients in dealing with credit repair, budgeting and debt management firms:

Case Study 19

LAQ's client was a recovering alcoholic and had obsessive compulsive disorder. She convinced her landlord/friend, who had a mental Illness and depression, to attend a budgeting service believing that they would be able to provide her with an easy way of managing her money and controlling her spending. The client and her friend signed the contract at the meeting without the fees and obligations under the contract being properly explained. These fees included a $45 charge to move their own money from the company's account back into their own accounts when they requested money for things such as paying car registration. The client was of the view that she and her friend had been pressured into signing a contract to purchase a product of no or little value to them. When she tried to withdraw from the contract, the budgeting service informed her that she was liable for a large establishment fee. LAQ negotiated with the budgeting service which agreed not to pursue the client or her friend for the establishment fee.

Case Study 20

LAQ's client had an $18,000 credit card debt. He sought assistance from a debt negotiator who told him that for a fee they would be able to get him released from the debt due to a legal deficiency in the contract operating in his favour. Three years later the creditor sued him for a greatly increased amount of money. Over a three year period, for the sum of $4000, the debt negotiator had been providing the client with precedent letters, defences and amended defences which alleged in summary that the creditor had no right to recover on the debt as they could not show a signed contract for the credit card. This argument did not have a legal basis.

LAQ provided advice that the defence had no legal validity and that the client was liable for the credit card debt because he applied for the credit card, accepted the card and then used it. After he realised he had no case against the credit card company the client instructed us that he had went bankrupt as he had more than this debt and no ability to pay all of his debts. The client needed the permission of his bankruptcy trustee to bring an action against the debt negotiator company.

Case Study 21

LAQ's client sought advice prior to her release from prison. Before being imprisoned she had heard a Company R advertisement on the radio. The company was offering to repair credit ratings and obtain credit reports for a fee. Having been in financial difficulty for some time the client entered into a contract with Company R and agreed to pay the company an amount of $990 for them to look at her credit report and a further $990 for each credit default Company R was able to remove or alter on her credit report. The client was informed that she could pay a small amount off her debt and when her credit rating had improved she could obtain a loan to repay the balance. The client made initial payments towards Company R of what she believed to be in the amount of $2500. However, as she was on Centrelink she soon missed payments and fell into arrears.

She was imprisoned for an unrelated matter and had no capacity to make any repayment. She subsequently received a letter from Company R that included a demand notice and draft statement of claim. The letter stated that court proceedings would be commenced in NSW unless payments were resumed. Company R's statement of claim stated an amount in excess of $11,000 was owed by the client. The client sought assistance from LAQ on the basis she believed that she had not been provided with a service because she did not believe her credit rating had been improved. With LAQ's assistance, complaints were lodged with the Ombudsman about the company's conduct. Company R made an offer to resolve the complaint on the basis that the client had nothing further to pay to Company R. This offer was accepted.

Credit and financial services targeted at Australians at risk of financial hardship, with particular reference to:

(b) whether current regulation of these service providers meets community standards and expectations and whether reform is needed to address harm being caused to consumers;

In LAQ's submission, the current regulation of these service providers is inadequate and does not meet community standards and expectations.

LAQ's view is that further regulation as outlined below should be introduced:

(a) Payday lenders and consumer lease outcomes –

LAQ supports the recommendations of the 2016 Review of Small Amount Credit Contract laws conducted by Treasury. These recommendations should be legislatively implemented as a means of protecting vulnerable consumers.

LAQ also supports the proposals contained in the National Consumer Credit Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017 and the National Consumer Credit Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018 which proposed to implement a number of these recommendations.

(b) Unlicensed financial service providers –

These organisations should be required to:

(i) meet the licensing requirements of the NCCP and NCC.

(ii) be subject to the same responsible lending and other obligations as other financial service providers under the NCCP and NCC.

(iii) be members of the Australian Financial Complaints Authority (AFCA).

(c) Debt management firms, debt negotiators, credit repair agencies and personal budgeting firms –

These organisations should be required to:

(i) meet the licensing requirements of the NCCP and NCC.

(ii) be subject to the same obligations as other financial service providers under the NCCP and NCC.

(iii) be members of the Australian Financial Complaints Authority (AFCA).

Credit and financial services targeted at Australians at risk of financial hardship, with particular reference to:

(c) the present capacity and capability of the financial counselling sector to provide financial counselling services to financially stressed and distressed members of the community; and

Legal Aid Queensland's Civil Justice Service works extensively with financial counsellors to assist clients in financial hardship with legal issues arising from interactions with financial services firms. In LAQ's experience there is unmet legal and financial counselling need that could be addressed through the provision of further funding for legal assistance services and financial counselling services.

Credit and financial services targeted at Australians at risk of financial hardship, with particular reference to:

(d) Any other matters

Issues such as those demonstrated by the above case studies could at least in part be avoided by an expansion of alternative financial services for financially disadvantaged people such as the No Interest Loans Schemes operated by a number of charitable institutions.