

National Consumer Credit
Protection Amendment (Small
Amount Credit Contract and
Consumer Lease Reforms) Bill
2019

Senate Standing Committee on
Economics

February 2020

About NCOSS

The NSW Council of Social Service (NCOSS) works with and for people experiencing poverty and disadvantage to see positive change in our communities.

When rates of poverty and inequality are low, everyone in NSW benefits. With 80 years of knowledge and experience informing our vision, NCOSS is uniquely placed to bring together civil society to work with government and business to ensure communities in NSW are strong for everyone.

As the peak body for health and community services in NSW we support the sector to deliver innovative services that grow and develop as needs and circumstances evolve.

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Introduction

NCOSS welcomes the opportunity to comment on the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No.2) ('the NCCP Amendment Bill').¹

The provisions in the NCCP Amendment Bill provide important safeguards that protect consumers against unfair credit practices that have persisted in the fringe finance industry by consumer lease providers and Small Amount Credit Contracts ('SACCs' also referred to as 'payday lenders').

NCOSS works with and for people experiencing poverty and disadvantage in NSW. People living on lower incomes are especially vulnerable to high interest loans and predatory lending practices because they are more likely to experience financial hardship and have fewer options to access other types of credit. NSW has the second highest number of new payday loans per year in Australia, reaching a total of 405,234 new payday loans in 2018.² There is ample evidence demonstrating the wide-spread consumer harm that payday lending is causing, which leads to financial exclusion and in some cases even bankruptcy.³

It is important to acknowledge that many consumers who access payday loans do so because they feel they have no other choice. In some circumstances, the alternative could mean losing a tenancy and facing homelessness. Situations like this indicate broader systemic issues with how both State and Federal government agencies respond to people living with disadvantage. While this is outside the scope of this submission, we want to acknowledge the importance of providing people who are struggling with the cost of living with alternative financial products that are affordable and can be accessed with dignity. This is a crucial aspect of financial inclusion and is necessary to ensure disadvantaged consumers do not end up further marginalized and in debt.

The NCCP Amendment Bill is a strong attempt at tightening loopholes in the current law which payday lenders and consumer lease providers have persisted in taking advantage of to avoid responsible lending practices. This submission outlines why these reforms are crucial for people living with disadvantage. It also provides feedback on the NCCP Amendment Bill, specifically how key provisions could be further strengthened to ensure vulnerable consumers benefit from the full protection of the law.

We acknowledge the comprehensive consultation process Federal Treasury led with consumer groups and advocates during the Review of the Small Amount Credit Contract Laws in 2016 which has led to the NCCP Amendment Bill. The Review Panel examined the effectiveness of the laws relating to SACCs, including whether the laws applying to SACCs and consumer lease providers were designed in a way that promotes

¹ National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No.2) ('NCCP Amendment Bill').

² Stop the Debt Trap Alliance, *The Debt Trap: how payday lending is costing Australians* (Report, November 2019) 24 ('The Debt Trap').

³ See, eg, Australian Securities and Investment Commission, *Cost of consumer leases for household goods* (Report No 447, September 2015) ('Cost of Consumer Leases').

financial inclusion and protects consumers from descending into financial hardship.⁴ The Review Panel made twenty-four recommendations that address core issues under the current laws, including: affordability, unfair fees and charges, predatory lending and caps on repayments.⁵ The NCCP Amendment Bill incorporates many of these recommendations. NCOSS particularly supports:

- Caps on fees and charges for consumer leases (Sch 1, item 58); and
- 10 % protected earnings cap for consumer leases and payday loans (item 19, 21 and 34).

We call on the Senate Standing Committee on Economics to prioritise the consideration of submissions and recommend that Parliament pass the NCCP Amendment Bill.

The commencement date of the NCCP Amendment Bill is twelve months after Royal Assent. We consider a twelve month transitional period to be excessive in light of the lengthy consultation period the Government has already undertaken with the small amount credit contracts and consumer lease industry. We would suggest that the industry has been on notice since the Government responded to the Review of the Small Amount Credit Contract Laws in November 2016.

It is a matter of urgency to implement the NCCP Amendment Bill. Every day the NCCP Amendment Bill is delayed more vulnerable households take out unaffordable and unfair loans, leaving them in debilitating debt. Findings from The Debt Trap report reveal that over a five-year period, around 15% of payday loan borrowers fall into a debt spiral. From 2016 to 2019 the number of financially stressed and distressed Australian households with loans had risen by 310,913.⁶ On average 36,320 households take out a new payday loan every month in NSW.⁷ It is essential that consumers have the full protection of the law as soon as is feasibly possible.

Summary of recommendations

NCOSS recommends:

- The commencement date for the NCCP Amendment Bill be brought forward to no more than three months after Royal Assent
- Remove the fault element in item 22 to reduce the evidential burden placed on consumers to prove the licensee knew they were a customer
- Remove the words “except by prior arrangement” onwards from item 179VA so that there are no circumstances where door to door sales of consumer leases are permitted
- Amend the definition of ‘Consumer Lease’ to include motor vehicles
- The permitted cap be calculated by reference to the cash price of the goods as defined under section 204 of the National Credit Code

⁴ The Australian Government the Treasury, *Review of the Small Amount Credit Contract Laws* (Report, March 2016).

⁵ *Ibid* vii.

⁶ *The Debt Trap* (n 2) 9.

⁷ *The Debt Trap* (n 2) 25.

- Remove section 6 (1) and 9 of the *National Credit Code* ('the Code') which exempts short term credit and pawnbrokers from the Code
- Future proof the Code by creating provisions that address the rise of FinTech and the booming 'buy now, pay later' products and services

Managing the cost of living and debt

Poverty and disadvantage have a profound impact on social and emotional wellness. It can impact physical and mental health and the ability to create a stable and safe home environment. Research undertaken by NCOSS into rates of disadvantage in NSW reveal that more than 880,000 people in NSW live with significant economic disadvantage – living below the poverty line – which is 13.3% of the total NSW population.⁸

When people are feeling cost of living pressures, such as falling behind on their rent, or the inability to pay their electricity bill, people turn to payday loans. Sadly, it rarely goes well and people find themselves having to forgo essentials, such as food or clothing to keep up with the repayments. It does not take long for the debt to spiral out of control, leaving people in crippling debt.

Stop the Debt Trap Alliance undertook a comparative analysis of loan costs and total repayments across payday loans, credit cards and a bank loan.⁹

Table 1: Loan Cost and Total Repayments in Comparison

	Payday loan	Credit card	Bank
Sum borrowed	\$600	\$600	\$600
Length of loan	3 month	3 months	3 months
Total fees and equivalent interest charges¹⁰	\$192	\$19.07	\$13.04

This comparison reveals a staggering difference between the cost of credit for people who are eligible for bank loans and people on low incomes. It clearly illustrates that the current system is structured to support a booming payday loan industry at the expense of exploiting people who are poor.

The payday loans are high cost because there are often a number of significant fees. The loans are generally for a very short time making it more difficult to repay. In cases where the consumer does repay the loan before the loan is due to expire, they can incur an 'unexpired permitted monthly fee'.

⁸ NCOSS, *Mapping Economic Disadvantage in New South Wales* (Report, October 2019) 9.

⁹ *The Debt Trap* (n 2) 7.

¹⁰ *The Debt Trap* (n 2). Payday loan cost charged at the statutory cap; credit card cost charged at 18.97% APR (average platinum card rate); bank loan cost charged at 12.99% APR (typical bank rate).

The NCCP Amendment Bill includes a number of promising provisions that will even out the playing field by increasing protections for consumers. Under the current law, consumers who receive 50% of their income as payments under the *Social Security Act 1991* have a protected earnings amount of 20% of their net income. The NCCP Amendment Bill removes the current protected earning provision which is limited to a 'class of persons' with the intention to clear the way for amendments to the National Consumer Credit Protection Regulations 2010 that will implement a protected earnings amount for all consumers.

NCOSS strongly supports the proposed protected earnings amount for payday loans and consumer leases which caps repayments at 10% of a person's net income.¹¹ This would ensure that people can still afford to pay for essentials, such as school lunches, electricity and rent, rather than spending their entire income repaying payday loan debt. These changes will ensure that people who use a payday loan or consumer lease will not be able to overcommit their income and will have money for cost of living expenses.

The protected earnings provisions apply to anyone who accesses a consumer lease or payday loan, which is essential as cost of living pressures do not just impact social security benefit recipients. Recent research undertaken by NCOSS revealed that employment does not necessarily guarantee economic security with poverty rates for people in full-time and part-time work across the state at 5.0% and 7.0% respectively.¹² The scarcity of affordable housing coupled with low wage growth is hurting a growing number of workers, particularly those on low to moderate incomes.¹³

Fair and transparent contracts

In 2015 Australian Securities and Investments Commission ('ASIC') found evidence that some consumer lease providers were charging up to an equivalent interest rate of 884% 'for basic household goods'.¹⁴ ASIC found large price variations both across different lessors and within individual lessors for different consumer segments. In both cases the consumers that were more likely to be charged higher amounts were social security benefit recipients, indicating the predatory nature of the consumer lease industry. ASIC's inquiry also found that consumer leases can cost as much as five times the maximum amount permitted under a payday loan, where a cap on cost applies.

The NCCP Amendment Bill introduces a cap on costs for all consumer leases,¹⁵ which is calculated on the base price of the goods plus 4% per month for a maximum of 48 months. NCOSS strongly supports this provision, however we would oppose any higher cap on costs as it would most likely cause significant detriment to low income consumers. While in support of this provision, we believe it could be simplified by aligning it with the 48% annual cost rate cap that applies to goods leases regarded as sale by instalments.

¹¹ NCCP Amendment Bill (n 1) item 19, 21, 34.

¹² NCOSS, (n 4).

¹³ Lowe, P. 'Monetary Policy Decision' (Media Release, Reserve Bank of Australia, 2 July 2019).

¹⁴ *Cost of consumer leases*, (n 3).

¹⁵ NCCP Amendment Bill (n 1) item 58.

Having separate definitions for 'base price' and 'cash price', which apply to consumer lease contracts and relate to the value of leased goods is confusing for consumers and providers.

Other reforms NCOSS strongly support, include:

- Disclosure of total cost and base price for household goods (item 55); and
- Prohibition of 'unexpired permitted monthly fee' (item 42, 45 and 66).

Recommendation: NCOSS recommends:

The permitted cap on costs for consumer leases be calculated by reference to the cash price of the goods as defined under section 204 of the *National Credit Code*

Prohibition on predatory lending practices

Payday lenders market themselves as non-judgmental companies 'ready to be here for you while others hesitate to extend a helping hand.'¹⁶ This narrative positions the payday lender as the preferred lender for people experiencing disadvantage, rather than lender of last resort after consumers have been denied credit from other financial institutions that are regulated by the *National Credit Code* ('the Code').¹⁷ In practice the majority of payday lenders are exploiting financially vulnerable people with hidden fees and high interest rates which can have the equivalent annual interest rates of anywhere between 112.1% up to as high as 407.6%.¹⁸ Referring to short term lending providers, the Australian Financial Complaints Authority (AFCA) went as far as to say:

Often these products appear not only to have been targeted at Australians in financial hardship – they seem to have been designed to take advantage of them. It is difficult to escape the conclusion that many providers' business models depend on vulnerable consumers who have limited awareness of other product options, limited negotiating power and limited propensity to complain about improper or illegal behavior.¹⁹

Misconduct reports lodged with ASIC against short term credit contracts were overwhelmingly made by vulnerable consumers, including people experiencing unemployment, sole parents, consumers with intellectual disabilities, mental and physical illness, social security benefit recipients, consumers with substance or addiction issues, Aboriginal and Torres Strait Islander consumers, including those with low levels of financial and English literacy, young consumers and elderly consumers.²⁰ Anecdotal evidence from NCOSS members tell us that vulnerable groups access these products because they have not been able to

¹⁶ 'Payday loans online' (webpage, 16 February 2020) <<https://www.paydayloansonline.promo/>>.

¹⁷ *National Credit Code 2009* (Cth).

¹⁸ *The Debt Trap* (n 2) 6.

¹⁹ Australian Financial Complaints Authority, Submission No CP 316 to ASIC, *Product Intervention Order- Short Term Credit* (2019) ('Product Intervention Order').

²⁰ See *Ibid*, 7.

secure a loan elsewhere, they do not understand how the fees and charges work and the true cost of the loan, or they are unaware of, are not eligible for, or have had difficulty accessing no-interest loans.

NCOSS strongly supports the provisions in the NCCP Amendment Bill that address predatory lending practices, specifically prohibiting unsolicited SACC invitations²¹ and canvassing consumer leases at home.²²

A common story we hear from people living with disadvantage is the temptation they feel to take out another payday loan when they receive unsolicited emails from payday lenders. NCOSS welcomes item 10 and 22 of the NCCP Amendment Bill prohibiting a credit licensee from making an unsolicited SACC invitation to a current customer or past customer from the last two years.

NCOSS questions the two year limitation period which was not recommended by the Review Panel. The ease with which organisations hold onto large amounts of data removes any unreasonable burden on the licensee creditor to keep records of customers longer than a two-year period. Further, the two year limitation period is arguably inconsistent with the total prohibition of unsolicited selling of financial products pursuant to the *Corporations Act 2001*.²³ NCOSS is further concerned that the evidential burden placed on the consumer to prove the licensee knew they were a customer is too high. Item 22 is a strict liability offence which should not require proof of fault, rather only proof of the act itself. NCOSS recommends reducing the evidential burden placed on the consumer by removing the fault element in item 22.

The NCCP Amendment Bill also provides protection against a lessor visiting places of residence for the purpose of inducing a person who resides there to apply for or obtain a consumer lease.²⁴ NCOSS supports prohibiting this predatory practice, however is concerned that the protection is limited to household goods only. The NCCP Amendment Bill has introduced a new concept; 'consumer lease for household goods', defined as 'a consumer lease where any of the goods hired under the lease are household goods.' This definition excludes motor vehicles.

While the cap on costs and anti-avoidance provisions applies to all consumer leases, there is concern that the remaining consumer lease reforms, such as the disclosure of the cost of credit and protections against aggressive marketing and sales (such as door-to-door sales) will not apply to motor vehicle consumer lease providers. Excluding motor vehicle consumer lease providers is concerning in light of the high number of complaints filed against motor vehicle finance providers. According to the Credit and Investment Ombudsman ('CIO') Annual Report in 2017, the second largest number of complaints received concerned motor vehicle finance providers (748 complaints or 11.9% of all complaints received).²⁵ In comparison,

²¹ NCCP Amendment Bill (n 1) item 10, 22.

²² NCCP Amendment Bill (n 1) item 179VA.

²³ *Corporations Act 2001* (Cth) s 992 A.

²⁴ NCCP Amendment Bill (n 1) item 62.

²⁵ Credit and Investment Ombudsman ('CIO'), *Annual Report* (Report, 2017-2018) 6
<<https://www.cio.org.au/assets/36897397/ARO2018.pdf>>.

small and medium amount loan providers received 374 or 5.9% of all complaints received and consumer lease providers received 277 or 4.4% of complaints.²⁶

The ban on canvassing of consumer leases at home is also limited by an exception of prior arrangement.²⁷ This exception can too easily be navigated by consumer lease providers and will leave vulnerable communities open to persistent predatory lending practices. NCOSS recommends removing the exception in item 179VA.

Recommendation: NCOSS supports the provisions aimed at protecting consumers against predatory lending. We recommend strengthening the protections by:

- Removing the fault element in item 22 to reduce the evidential burden placed on consumers to prove the licensee knew they were a customer
- Removing the words “except by prior arrangement” onwards from item 179VA so that there are no circumstances where door-to-door sales of consumer leases are permitted
- Amending the definition of ‘Consumer Lease’ to include motor vehicles

Unregulated financial services

The NCCP Amendment Bill is a big step towards protecting vulnerable consumers of fringe financial products. However, we are concerned that there are a number of financial products and services that are not captured by the regulations which will leave many people without access to the protections and remedies afforded under the *National Consumer Credit Protection Act* (*‘NCCP Act’*). Some of the more significant rights and protections that already exist under the *NCCP Act* are:

- All credit providers must be registered or licensed with ASIC, or appointed as credit representatives by another licensee, and be members of an External Dispute Resolution scheme;
- Provide a responsible lending assessment about whether the amount is affordable for the consumer; and
- Not charge more than an establishment fee of up to 20% of the credit amount, and a monthly fee of up to 4% of the credit amount.

The NCCP Amendment Bill would be strengthened significantly if short term credit,²⁸ pawnbrokers and buy now, pay later FinTech products were regulated by the Code.²⁹

²⁶ Ibid.

²⁷ NCCP Amendment Bill (n 1) item 179VA.

²⁸ Although short term credit providers fall within the definition of credit under the Code, the Code does not apply to the provision of credit if the lifetime of the loan does not exceed 62 days.

²⁹ *National Credit Code* s 6.

The harm caused by short term credit contracts is well documented.³⁰ ASIC recorded 209 reports of misconduct against one short term credit provider from 1 July 2016 to 31 August 2019.³¹ The majority of complaints (86%) were regarding excessive fees, charges and interest rates. The large number of complaints resulted in ASIC using its product intervention power in September 2019 to ban a model of lending in the short term credit industry.³²

Pawnbrokers are also exempt from the Code and are regulated at the state level. In NSW, pawnbrokers are regulated by the Pawnbrokers and Second-hand Dealers Regulation 2015 ('Pawnbroker Regulations'). The Pawnbroker Regulation has limited disclosure requirements and overall limited protections for consumers.

The NCCP Amendment Bill comes at a time when we are seeing a rapid rise in FinTech. Emerging FinTech products have raised concern among the social and community service sector because 'buy now, pay later' services are completely unregulated and easy to access, especially for young people. The rise of FinTech innovation poses potential opportunities for those on low incomes that are locked out of traditional banking and finance products, but they also pose considerable risk. While there is a great deal of excitement about what possibilities FinTech can bring for disadvantaged communities, we ask Government to remain cautious and to investigate how regulations can be future-proofed to keep up with innovation in this space. Consumer rights and protections need to be paramount in emerging technologies and business. Disappointingly, the discussion on FinTech to-date has centered on ensuring appropriate infrastructure for innovation, rather than regulatory infrastructure to protect consumer rights, particularly those in low income households that may be vulnerable.³³

NCOSS believes it is a missed opportunity to not address this gap and bring short term credit contracts, pawnbrokers and 'buy now, pay later' services under the Code. NCOSS recommends amending the Code to address this significant gap and provide consumers with proper protections against predatory lending.

Recommendation: NCOSS recommends:

- Remove section 6 (1) and 9 of the National Credit Code ('the Code') which exempts short term credit and pawnbrokers from the Code
- Future proof the Code by creating provisions that address the rise of FinTech and the booming 'buy now, pay later' services

We would welcome the opportunity to discuss the issues raised in this submission. For further information please do not hesitate to contact Director of Policy & Research Anna Bacik on [REDACTED] or via email at [REDACTED]

³⁰ See, eg, *Product Intervention Order* (n 19).

³¹ Ibid 6.

³² *Product Intervention Order* (n 19) 6.

³³ See Senate Select Committee on Financial Technology and Regulatory Technology, *Inquiry into Financial Technology and Regulatory Technology* (2019).