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Submission in response to the

National Consumer Credit Reform Package

by the

Consumer Credit Legal Centre (NSW) Inc

Consumer Credit Legal Centre (NSW) Inc ("CCLC") is a community-based consumer advice, advocacy and education service specialising in personal credit, debt and banking law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We provide legal advice and representation, financial counselling, information and strategies, and referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 13,000 calls for advice or assistance during the 2007/2008 financial year.

A significant part of CCLC's work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

Thank you for the opportunity to respond to National Consumer Credit Reform Package.

Summary of submissions

Consumer Credit Legal Centre applauds a number of initiatives that form part of, or are associated with, the Exposure Draft Package. Specifically:

- The announcement that the States that currently have 48% interest rate caps were free to retain those caps during the transition period, and pending further consideration of this significantly important issue in Phase 2;
- The introduction of a licensing scheme for those entities conducting credit activities;
- Compulsory membership of ASIC approved external dispute resolution schemes;
- The increase in the monetary threshold for hardship variations to $500,000;
- The extension of the regime to cover loans for residential property development; and
- The introduction of responsible lending conduct provisions (subject to the reservations expressed below).

These are significant developments that we hope will prove extremely useful for consumers by promoting a fair and accountable credit market.

We are disappointed, however, with some of aspects of the reform package, including:

- The failure to target particularly predatory practices more specifically (including the continuing potential for avoidance of the law by determined industry participants);
- The potential for diminished access to the formal justice system in the States which currently have specialist tribunals; and
- The failure to address the hardship processes in the law more comprehensively in the light of current economic conditions;

Detailed Submissions

Failure to effectively target predatory practices

General

The approach taken in the Exposure Draft has been to adopt high level principles. However, if the stated aim is to reduce unsustainable indebtedness through the more responsible use of credit then it is disappointing that there are no measures specifically aimed at predatory lenders and brokers. We believe that there are significant shortcomings in the Bill and that there is a significant risk that in 12 months time there will be criticisms of the legislation by both consumer groups and industry on the basis that it has not mitigated the financial harm caused by these predatory lenders, and that industry has incurred significant costs in becoming registered or licensed, with fringe players now able to hold themselves out as having the same status and Commonwealth imprimatur as more reputable parts of the market.

The draft Finance Broking Bill contained a number of clauses specifically directed at, or particularly likely to address, predatory behaviour. The Exposure Draft by comparison has provisions aimed at lender or broker behaviour more generally but has no equivalents to the following clauses:

- Clause 33(3)(a) – specific provision providing that a declaration by the consumer without supporting evidence cannot be relied upon (that provision was necessarily aimed at brokers because of the ambit of the Bill, but applies even more appropriately to lenders).
- Clause 38(1) – requirement that the broker disclose in writing to the consumer a comparison of costs of benefits of existing and proposed loans when borrower refinancing (this would force predatory brokers to specify in writing why a prima facie unsuitable loan is suitable, while also allowing consumers to make more informed decisions about whether to refinance).
- Clause 38(2) – requirement that a proposed loan must be more suitable (without limiting grounds on which suitability is to be assessed).
- Clause 52(5)(d) - remedy for unjust conduct.
- Clause 52(5)(e) - remedy for excessive fees

- Clause 50 & 51 prohibition on the use of caveats to secure broker fees and the misuse of adverse credit listings
- Clauses 44 & 45 - fees cannot be charged unless certain conditions are met, including disclosure in a compliant broker agreement, compliance by the broker with the relevant provisions of the Bill, and credit having been secured which substantially meets the consumer's requirements.

In contrast to this, the Exposure Draft:

- Does not provide remedies for excessive or inappropriately incurred fees and charges, or the use of caveats to secure them (and the associated potential to blackmail the consumer);
- Does not require a broker agreement;
- Does not require a higher standard of product suitability on refinance, nor any particular disclosures addressing the cost of the proposed credit arrangements compared to the borrower's existing arrangements and the likely costs associated with the change;
- Does not provide a general remedy for unjust conduct;
- Does not expressly limit reliance on borrower declarations in the absence of supporting evidence (the requirement for verification of information may achieve this but this is by no means assured and will depend to a large extent on interpretation by ASIC and, ultimately, the Court).

While we support requirements in relation to assessing capacity to repay we confirm previously expressed reservations about the effectiveness of the approach in the Exposure Draft. A breach of this requirement will be a criminal offence and courts always interpret criminal provisions more narrowly, particularly where the elements of the offence are not spelt out in detail but depend on an interpretation of what is 'reasonable'. We therefore consider it desirable that there be some presumptions or a greater degree of guidance to the courts included in the relevant sections. More detail on this point is included in the Responsible Conduct section below.

Licensing

In relation to licensing the Exposure Draft largely follows the model in the Corporations Act. We understand that very few licence applications were rejected under this model and are concerned that a similar outcome may result under the proposed arrangements. In particular the Draft does not direct a court to take into account factors such as:

- Past predatory lending practices.
- Whether or not the lender took business purpose declarations to exclude the application of the Code where it was on notice of the true purpose of the credit (as in some decisions in cases run by CCLC).
- Whether or not the broker preferred their own interests in charging the borrowers significant fees when placing those consumers in loans they could not afford.

We note that at one of the stakeholder meetings provisions to this effect were considered but this has not been followed through. We consider it is desirable that there is a specific direction to ASIC (and to any court on appeal) to take these matters into account.

There should be a broader range of conduct relevant to both obtaining and retaining a license under the regime.

REM 190 gives the court the power to grant relief from liability from civil penalty provisions of the NCCPB. This is a very broad and largely unfettered discretion and appears to undermine the overall intention of the legislation to drive behavioural change in industry for certain types of conduct. Further, it has the potential to impact on the effectiveness and efficiency of enforcement action commenced by ASIC (where the defence is raised automatically and has the potential to prolong proceedings at best and even render them ultimately fruitless).

While we agree with reducing a person's liability to pay a pecuniary penalty order or serve a sentence in appropriate circumstances, if the offending person's conduct has resulted in otherwise avoidable loss and damage to a consumer, the consumer should be provided with full compensation regardless of whether the offending person acted honestly (as in the case with negligence, tort, restitution laws). If the goal of the new laws is to reform the sector and ensure bona fide, competent and reasonable conduct by financial services providers, financial services providers must be required to ensure they do not cause detriment to consumers and to adhere to the law without being given the leeway to rely on an excessively broad defence based on honesty.

Introducing elements of honesty into a defence leads to more uncertain outcomes in court proceedings both for consumers and ASIC, and tends to discourage ASIC from engaging in prosecutions and individual consumers from pursuing compensation, particularly given the costs implications where small claims procedures do not apply.

It will allow financial services advisors to hide behind any legal advice they may have obtained regarding the lawfulness of their actions, regardless of the quality of that advice or any legal advice to the contrary (given legal profession privilege, predatory lenders could secretly "shop around" until they obtained favourable legal advice). Many of the predatory lenders CCLC has encountered claim to adhere to the letter of written law based on legal advice.

We suggest that there should be a more detailed list of relevant matters for the court to take into account, including specifically whether the breach is isolated or part of a pattern of behaviour, whether the licensee has been found liable for a civil penalty under the Bill previously, and what steps have been taken to rectify the breach including whether adequate compensation has been paid to consumers.

It is not clear whether REM190 applies to civil penalty breaches under the National Credit Code. It does not, as in some other sections, specifically exclude the Code provisions, suggesting that they may be caught. If this is the case, this is completely inappropriate, as section 102 of the Code already sets out a comprehensive list of considerations for the Court to take into account in setting a civil penalty for a breach of the relevant provisions of the Code.

If the defence must be retained, we also question REM 190 which gives a person the ability to apply for relief where no proceedings for a contravention have been initiated. Our concerns are:

1. There are no provisions to ensure that ASIC is notified of the application, or are given sufficient time to investigate and gather evidence regarding the application;
2. There are no provisions to ensure that affected consumers are notified and given sufficient time and opportunity of providing evidence to refute the defence.

EDR schemes will be bound by the court's order, despite any evidence, which may have been provided to the scheme but not the court relating to an individual complainant refuting the defence.

The civil penalty provisions of the National Consumer Credit Code should be explicitly excluded from the operation of REM 190.

The provision should be amended to give more guidance to the Court on the circumstances in which it is appropriate, and inappropriate, to grant relief from the payment of a civil penalty including for example whether the conduct is isolated or systemic, whether appropriate steps have been taken to rectify any breach, whether previous breaches of a similar type have occurred, and whether consumers have been adequately compensated (if relevant).

It should be made explicit that relief from a civil penalty does not affect a consumer's right to compensation, if applicable.

Greater consideration should be given to the right to apply for relief in the absence of proceedings and the rights of any parties that could be prejudiced by such an application.

The NCCPB makes it an offence to deal with unlicensed entities. It also allows the consumer to seek compensation for unlicensed activities from the unlicensed entity. It does not, however, as planned in the National Broker Bill (clause 22) make licensees liable for the conduct of unlicensed entities with which they do business. The purpose of that section was twofold:

- To eliminate unlicensed conduct by providing a strong incentive for licensees to only deal with other licensees – unlike the prohibition on dealing with unlicensed entities contained in the NCCPB, this provision can be enforced by affected consumers in addition to ASIC;
- To provide a remedy for affected consumers. As discussed at the industry meeting on the 18th, the right for consumers to claim from the unlicensed entity itself is of limited value because the entity will not be in EDR, forcing the borrower to use the Court system. Further, the entity may not be able to be contacted or may have left the jurisdiction. Finally, the credit provider may be in the process of enforcing the loan and the consumer will have no rights against the credit provider *per se*, allowing the credit provider to benefit from an activity expressly prohibited by the legislation (dealing with an unlicensed entity).

We do not propose to catch credit providers who have done all that is reasonably required to check that the relevant entity is appropriately licensed and are caught out by timing issues (eg the license was revoked after the register was checked and prior to settlement of the loan).

A new section similar to s22 of the National Finance Broker Bill making licensees responsible to the consumer for the activities of any unlicensed entity with whom they have dealt with in relation to the consumer's loan. Alternatively amend REM 157 to clarify that order obtained under that section can include compensation payable by, and orders

affecting the rights of, a licensee where that licensee has failed to take the required steps to ensure that they do not deal with unlicensed entities.

Responsible Conduct Provisions – detailed comments

Section 260(3) of the NCCP Bill expressly allows a credit provider to rely on the information used in a credit assessment conducted by a credit assistant in certain circumstances. We have grave reservations about this provision and we are concerned that this provision will enable irresponsible and predatory lending to continue. While we appreciate that the intention (encapsulated in section 290) is to place responsibility on the credit provider to conduct the assessment and to rely on broker information only where they "reasonably believe" it, we think that sub-section 260(3) undermines that intention:

1. In our experience, subsection 260(3) is likely to be raised as a defence, and could be interpreted by the Courts and EDR schemes as limiting the credit provider's overarching responsibility to assess loan suitability, including verification, under section 290. This would completely undermine the intention of the legislation.
2. Even if section 290 is sufficient to hold credit providers responsible after the fact, some credit providers may draw false comfort from s260(3) and allow a loan to proceed based on inadequate or inaccurate information provided by a broker. It is far preferable that unsustainable loans are not made than to seek to remedy the situation after the event.
3. Reliance on inaccurate, broker-supplied information is one of the key weaknesses in current lending practice. While credit providers are free under the Bill (even in the absence of section 260(3)) to request brokers to assist in gathering the types of documents and information they deem appropriate for credit assessment purposes, it is unnecessary and inappropriate in light of the objectives of the legislation to elevate the value of information obtained from brokers over any other source. It would be best to let lenders make decisions on case-by -case basis about what information they consider reliable.

Subsection 260(3) should be deleted.

Consideration should be given to deleting the provision that requires credit assistants to also verify information to prevent duplication (R160(c)). The same employer, for example, should not need to be contacted twice or more as part of the same transaction and the most appropriate place for this obligation to rest is with the credit provider.

The Bill does not place any onus on 3rd party credit assistants to supply all relevant information to the credit provider. An obligation to this effect is contained in the MFAA Code of Conduct and the WA regulations. While credit assistants are required to conduct a preliminary assessment of loan suitability under the NCCP Bill, there is no positive obligation on credit assistants to pass all relevant information to the credit provider, part from the general obligation to be honest, fair and efficient. This is one of the most common problems in the industry, with incomplete information in loan applications far outweighing blatantly incorrect information.

Separation of the consumer interface from the entity carrying the credit risk has been a problematic development in the industry and a key contributor to the global economic crisis. Brokers have a strong economic incentive to assist borrowers to get loans approved. As a result, they may counsel borrowers not to include a number of credit accounts in their application, or reduce their number of dependents, for example. In other cases documents are withheld because they contradict information contained within the loan application and the credit provider would have no way of knowing what to request to fill in the gaps because, ostensibly at least, there are no gaps in the application information. Providing a bank statement, which reveals an applicant's "savings" (actually a lump sum settlement from a compensation claim), for instance, but not providing another set of bank statement from another institution showing the receipt of social security payments as the only source of income over an extended period.

While placing the onus clearly on credit providers to assess and verify loan suitability is vital, credit assistants must be required to put forward all relevant information within their knowledge or their possession. Further, while a credit assistant may be held accountable after the event in the above circumstances (for recommending an unsuitable loan), it is far preferable if unsuitable loans are not made, and this is more likely if lenders are apprised of all the relevant information. An express obligation is more likely to generate a change in conduct in this instance.

3rd party credit assistants should be required to pass on any information or documents within their knowledge or possession that a reasonable credit provider would consider relevant to conducting an assessment under R250 of the NCCP Bill. Failure to do so should attract a civil penalty.

Sections R165, R265, and R290 address the circumstances in which a loan must be assessed as unsuitable. All of these sections include the use of the phrase "at the time the contract is proposed to be entered or the credit limit is proposed to be increased". We assume that this has been adapted from the Code section 70(l), however the wording has changed in a subtle way and this, in our view, has altered the meaning significantly.

Section 70(l) says "whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship."

In this context what is relevant is what the credit provider knew, or could have ascertained by reasonable enquiry of the debtor at the time. That is, it may refer to future events provided they were known, or ascertainable, at the time.

In the NCCPB the placement of the phrase about timing has shifted so that it refers to whether the consumer could comply with the contract, or whether the contract met the consumer's requirements and objectives *at the time it was proposed to be entered or the limit increased.* In short, instead of the relevant issue being what was known at the time, it is whether they could actually comply *at the time*, or whether it suited them *at the time*. This could exclude a range of situations we submit should be caught. Further, we were of the view that Treasury also intended to capture these situations:

- Where the consumer can afford the current repayments under the contract but cannot afford the repayments at the conclusion of the honeymoon rate period, or a balloon payment at the conclusion of the contract period;

- Where there is a planned change in the consumer's financial circumstances, such as imminent retirement, and this is known to the credit assistant and/or credit provider;
- Where the consumer's immediate objective is to prevent the repossession of their home or secure funds for some seemingly urgent purpose, but the longer term implications of the contract is that they will lose their home and a considerable amount of equity (their requirement and objective *at the time* is to prevent the repossession of their home or pay the debt collector for example).

We appreciate that the commentary provided in relation to the Bill (which we assume will eventually form the Explanatory Memorandum) clearly specifies that reasonably foreseeable events such as the likely need to refinance an prepaid interest loan at the conclusion of the loan term, or reasonably foreseeable changes in the consumer's financial circumstances are relevant and intended to be caught by the legislation. However, the EM can only be referred to if there is ambiguity on the face of the legislation. We submit that the use of the phrase "at the time" in the legislation is not ambiguous on its face and contradicts the intention stated in the commentary.

Subsection (1) of sections 165 and 265 should be amended to:

"Will be unsuitable for the consumer if, based on the information known to the licensee at the time of the assessment, or on information that would have been known had the licensee made inquiries or verification as required under [section 150 or 260 respectively]:"

The reference "at the time the contract is proposed to be entered or the credit limit is proposed to be increased" should then be removed from the subsequent subsections.

Subsection (2) of section R290 should be similarly amended.

As a casework service, CCLC has first hand contact with thousands of consumers every year, including but not limited to the most disadvantaged members of the community. The vast majority of callers to our service are facing financial difficulties as a result of unmanageable debt. Credit cards are the most common cause of debt problems among callers, followed in recent years by home loans, particularly "low doc" and "no doc" products (of which predatory home loans are a sub-set). We are not confident that the responsible conduct provisions as currently drafted will address either of these problems.

There is considerable reliance in the Exposure Draft on the Explanatory Memorandum in interpreting what is intended by unsuitable contracts. Further, while information is available to the Government in the drafting process about the particularly damaging impacts of some types of contract, this will not necessarily be relevant or available to a court in determining the appropriate outcome in an individual matter. Both these factors increase the risk that the legislation will be ineffective, despite imposing considerable additional prescription on industry in terms of the content and timing of certain processes and disclosures.

We propose that the legislature should give the court clearer direction that the intention is to:

- Address equity stripping by preventing lenders from relying on the borrower's principle residence rather than income except in very narrow circumstances (such as reverse mortgages or bona fide bridging loan as defined by the legislation);

- Address other forms of unsustainable lending by ensuring that consumers have the capacity to repay within a reasonable period. While the NCCPB addresses increasing credit limits without making a proper assessment of the borrower's financial circumstances, it does not address the fact that a borrower's ability to meet a minimum repayment is not evidence of their ability to repay the debt in full. In addition to the current problem with credit card debt, the focus in the responsible conduct provisions on the consumer's ability to meet repayments in the absence of any requirements in relation to the term of the loan, may lead to other contracts being structured to have lower repayments over an unreasonably long term.

There should be provisions to the effect that in considering whether a loan is not unsuitable, without otherwise limiting the generality of the section, the court should specifically have regard to:

- Whether repayment of the loan is largely dependent on either the sale of the borrower's principle residence, or a refinance (except where the loan is a bona fide reverse mortgage or bridging loan as defined by the Act); Alternatively, this could be expressed as a rebuttable presumption – that is a loan is prima facie unsuitable if it is dependent upon sale or refinance;

- Whether the loan will be repaid within a reasonable period, taking into account the purpose of the loan; or where there is no contractual obligation to repay the loan within a specified period (for example continuing credit contracts), whether the borrower has the capacity to repay the loan within a reasonable nominal term.

Borrowers who are refinancing have been recognised in several contexts as being more vulnerable than borrowers entering credit contracts for other purposes. For example: Protecting the Wealth in the Family Home – ASIC Report, Uniform National Broker Bill, UK OFT Debt consolidation report, Plastic Safety Net (US study about the negative effects of consumers refinancing credit card debt into their home loans), Genworth (Lender's Mortgage Insurer) evidence to House of Reps review (refinanced home loans twice as likely to default as initial home loans taken out to purchase or build the home) (references to be added).

In the consultation meetings a higher standard for refinances was discussed. Overseas jurisdictions are considering introducing a "net tangible benefit" requirement for refinances, to prevent churning (pointless refinances aimed at generating broker commissions). It has been argued that it would be inappropriate to require a loan that refinanced a consumer's consumer credit arrangements be "better" or more "affordable" than the previous arrangements, because consumers refinance for a range of reasons, including for example poor service or disenchantment with a particular organisation. Despite this, it was generally agreed among participants in the consultation process that a refinance should, at the very least, not put the borrower in a financially worse position than the credit arrangement refinanced. Treasury have not adopted this approach on the basis that if the new loan is "unsuitable" in so far as the consumer cannot afford it, or it does not meet their "objectives and requirements" then it the consumer will be able to seek compensation.

This is a significant step backwards from the Exposure Draft of the Finance Broking Bill which required both a detailed costs comparison in relation to the old and new credit arrangements (including transaction costs), and that the new credit arrangements be more suitable than the contract(s) being refinanced. The result is that, provided the consumer can afford the new loan, licensees may be able to successfully argue that a loan is "not unsuitable" despite the fact that the consumer has been seriously detrimentally affected by the refinance.

The legislation should include a provision to the effect that where a loan is intended to refinance a previous credit contract (or contracts) then it will be prima facie unsuitable if the new loan is less suitable than the contract(s) refinanced.

Broker Fees and charges – No limits on exploitative charges after 20(?) years of regulation in NSW

EXCESSIVE FEES AND FEES WHERE NO LOAN PROVIDED

Broker fees were limited to 1.5% of the value of the loan in NSW until approximately 2004, when the current provisions of the Consumer Credit Administration Act (NSW) replace the cap with a provision allowing consumers to take action for "excessive fees and charges". A cap of 2% applies in Western Australia. The Finance Broking Bill 2007 allowed consumers to take action against brokers for excessive fees (cl. 52(5)(e)).

The NCCP Bill does not propose to limit broker fees except in so far as they are financed into a loan that then is assessed as unsuitable. Disclosure as part of the Quote for providing credit assistance is all that is required. This is a significant step backwards for consumers.

There are also no provisions covering the situation where the credit assistant does not recommend a loan, presumably because there is no suitable loan, or because the recommendation is that the consumer remains in the same loan, and charges a large fee for the service anyway. Under this legislation there will be no remedy at all because whether the consumer can afford the fee itself is not a relevant consideration, only whether they can afford the loan. The consumer may have accepted the quote for credit assistance stating the amount or maximum amount on the basis that they would be getting a loan.

The Finance Broker Bill 2007 contained not only the capacity to challenge excessive fees, but also a provision to the effect that the fee was not payable unless the broker secured credit of "substantially the same type and amount as the credit specified by the consumer's credit requirements". The only time a consumer was able to be charged in the absence of a loan was where the credit was secured that met their requirements and they declined to take it up, and only if this was consistent with the broker agreement. Those consumers could still fall back on the excessive fees provision if the fee seemed very high compared to the work undertaken on their behalf.

Fees should be required to be clearly and prominently disclosed in a broking agreement. Further, the broker should not be able to claim a fee unless it has been disclosed in a compliant contract, and the broker has secured credit that substantially meets the consumer's objectives and requirements. If fees are permitted to be claimed where no suitable credit contract is found, then there must be a remedy for the consumer if this fee is excessive compared to appropriate industry standards.

CAVEATS & ADVERSE CREDIT REPORT

The Finance Broking Bill prohibited the use of either credit report defaults or caveats over the borrower's property to secure broker fees. This is because of the powerful potential use of these processes for extorting the payment of fees, despite any consumer complaint about adequacy of the service provided. A consumer generally consults a broker because they want or need to secure alternative credit. However, both adverse credit reports and caveats effectively prohibit any dealing with the property or access to alternative credit. This can leave borrowers trapped and unable to mitigate any damage cause by the broker, or more generally to take action to protect their financial position (such as selling or refinancing their property). CCLC has had cases where consumers in severe financial hardship have been unable to sell their property (despite rapidly diminishing equity) as a result of a broker caveat. In other cases borrowers have been unable to refinance out of a very uncompetitive loan, pending proceedings in the CTTT in relation to the loan, as a result of a caveat lodged by the broker who arranged that loan. Had they not been successful in the proceedings their loss in terms of the interest accruing would have been substantial.

Clauses 50 and 51 of the Finance Broking Bill 2007 in relation to credit reports and caveats should be replicated in the NCCP Bill.

LIMITING THE EXTENT TO WHICH BROKER FEES CAN BE FINANCED BY A LOAN

Whereas the majority of brokers obtain their income from commission paid by lenders, some brokers (some of whom are classified as "introducers" by lenders rather than brokers) obtain their income from significant fees charged directly to the consumer and paid upon settlement of the loan out of the funds advanced (this may or may not be in addition to a commission paid by the lender). While we understand that the current squeeze on lender commissions may drive additional broker licensees to charge fees directly to the consumer, as a general rule these amounts are proportional to the work involved in providing the credit assistance. In the worst cases of predatory lending, however, these fees are substantial, exploitative, and could not be paid by the borrowers unless they were financed as part of the loan.

As demonstrated by the following table showing the amounts paid to brokers by actual clients of consumer assistance agencies compared to their loan amount[1], the amounts charged by some brokers bear no relationship to the amounts borrowed and are arguably more an indication of the relevant borrowers' personal disadvantage or desperation (and arguably the risk perceived by the broker in undertaking a "dodgy" transaction).

Brokerage by Loan Size		
Loan amount	Brokerage	Percentage of loan
$122,000	$19,615	16%
$255,000	$19,855	7.7%
$255,000	$8,920	3.4%
$502,000	$16,000	3.1%

[1] Details derived from an unpublished survey conducted by CCLC in May 2005 of legal aid, community legal centre and financial counselling clients who had refinanced their home loan in the previous five years in response to financial difficulty and then found themselves in financial difficulty again. More details are available in the CCLC submission to the Productivity Commission review of the Consumer Protection Framework, Submission 95 available at http://www.pc.gov.au/inquiry/consumer/submissions

$110,000	$2,995	2.7%
$223,750	$5,500	2.4%
$300,000	$4,030	1.3%
$170,000	$1,105	0.65%
$256,000	$300	0.12%

In short, this practice is simply equity stripping – the brokers takes his or her fee at settlement and the lender later recovers the entire amount plus interest and default charges from sale of the security property when the borrower inevitably defaults.

In March 2008 the Australian Securities and Investment Commission **("ASIC")** issued Report 119, Protecting wealth in the family home: An examination of refinancing in response to mortgage stress. As part of the research informing that report, ASIC undertook an independent examination of 10 files covering mortgage transactions conducted by two brokers (5 files from each) who promoted themselves in advertisements as providing refinancing solutions for borrowers in arrears.

That examination found that one broker charged on average 5 times higher than industry standard remuneration and the other 16 times higher on average. The highest fee charged by either was 22 times higher than industry standard remuneration. Fees charged also represented between 4.4% and 30% of the borrowers existing equity in the property. ASIC found that there was no correlation between the fees charged and the amount of the loan, and no apparent relationship between the fees charged and the amount of work undertaken by the broker.

Limiting the amount of brokerage that can be financed as part of a loan is potentially an effective way to limit predatory lending, without direct price control. The worst examples of predatory lending seen by our agencies involve high returns to the broker on individual transactions and this is a key motivation to set up such loans. Taking away the significant profits available in this type of brokerage would go a considerable way to preventing such loans from occurring. This is far preferable than trying to address the damage after the event.

Further, unlike the "not unsuitable" product provisions, this measure could be more easily enforced because the matters to be proven are objective. Unscrupulous brokers, with an eye to their own lucrative commission, will often convince desperate consumers to agree to document false purposes (and no doubt objectives and requirements) and it becomes a case of whose evidence is the most credible in the event of a dispute. This means that the "not unsuitable" provisions may be the *least effective* against the *most reprehensible* conduct in the market.

While some consumers may be complicit in undesirable conduct, from carelessness (signing blank application forms) to varying degrees of fraud, this behaviour is often suggested, normalised and facilitated by the broker who stands to profit considerably from the transaction, and indulges in this conduct systemically (as opposed to in one desperate and ultimately self-damaging act). Further, as demonstrated by the sub-prime crisis in the US, where the terms "*liar loans*" and "*NINJA*[2]" loans originated, complicity or otherwise by borrowers has no effect on the potential for unsustainable loans to wreak havoc on the

[2] No income, no job

economy. A policy measure that decreases the incidence of such loans, without imposing additional obligations on the vast majority of industry participants is well worth considering.

This provision would represent good policy as it removes the economic drivers for brokers to engage in predatory conduct and, if lender reimburses broker indirectly, then they are also actively involved in process and cannot point the finger at the broker and deny responsibility. This would reinforce the intention of the legislation – to reduce irresponsible lending - and would also address predatory lending in particular, which has not been done in any of the other provisions.

Limit the amount of broker fees that can be *financed* under a credit contract (as a dollar amount or a percentage of the loan or a combination of the two). This could be expressed as an amount and/or percentage to be set by the regulations to allow time to consult with industry about an appropriate amount.

Contravention of this provision should result in an automatic order for the loan to be reduced by the amount by which the broker fee exceeds the maximum amount. Any amounts payable to a third party credit assistant, or an associated entity, upon settlement should be presumed to be broker fees unless the contrary is established.

Other measures aimed at Predatory Conduct

Providing or recommending an unsuitable loan attracts a civil penalty under the NCCP Bill and triggers compensation and other appropriate orders where a consumer has suffered loss or damage as a result. This is appropriate. However, we submit that there should be additional provisions addressing more serious conduct, with automatic consequences for the license holder.

For example where a licensee has provided a loan that is unsuitable and:

a) The borrower was particularly vulnerable as a result of their financial circumstances at the time the contract was entered into, or as a result of a special disadvantage; and

b) The credit contract contains:

   i) terms that are more onerous compared to other products available to less vulnerable or disadvantaged borrowers; and

   ii) The application of those terms to the borrower is harsh;

Then the licensee has engaged in predatory lending.

In addition or in the alternative, ASIC should be able to take action to remove or place conditions on a credit license where

1. The license holder provides targets or provides a substantial part of its services to vulnerable consumers; and

2. The license holder does not have in place adequate systems, resources or procedures to prevent it treating those consumers unjustly harshly or oppressively.

OR

3. The license holder does not have in place adequate systems, resources or procedures to prevent it taking advantage of that vulnerability, relative to consumers who are not so vulnerable.

EDR

EDR is enormously important to consumers as a free, independent forum to resolve complaints and we strongly support its inclusion as part of the licensing regime. We note however that there are no teeth in the proposed provisions to ensure that licensees remain members of and abide by the determinations of EDR schemes. We therefore advocate in favour of the following:

1. Placing an obligation on licensees and EDR schemes to notify ASIC of changes to membership;
2. Placing an obligation on licensees and EDR schemes to notify ASIC if a lender fails to comply with an EDR determination, or other direction or request for information, within a reasonable amount of time;
3. Giving consumers and ASIC the power to obtain a court order to enforce an EDR determination that the licensee has failed to comply with within a reasonable amount of time;
4. Giving ASIC the power to immediately suspend licenses if the licensee ceases to be a member of an EDR scheme or fails to comply with an EDR determination.

Avoidance

The UCCC has required a series of amending acts over the years to address loopholes as lenders innovate new ways of avoiding the application of all or part of the legislation. An extensive overview of the way in which lenders have systemically avoided the Code and facilitated predatory lending is provided in Appendix A.

While many of these arrangements have been designed to avoid the 48% cap in states where it has applied, they have not exclusively been used for this purpose. The desire to avoid compliance with disclosure obligations, hardship provisions and notice requirements have also inspired avoidance, in addition to the re-opening provisions of section 70 and 71 of the UCCC. In fact avoidance has also thrived in States without an interest rate cap. The licensing requirements included in this draft, in addition to the responsible conduct provisions we are yet to see, will add greater motivation to operators keen to minimising their obligations.

BUSINESS PURPOSE DECLARATIONS

The business or investment purposes declaration under section 11 of the UCCC has facilitated many instances of predatory lending over the years. We support the amendments proposed by Treasury to address this problem but suggest that those amendments do not go far enough:

1. As a result of the definition of relevant person in s11(4).

   - Where the broker knows the loan is for a Code purpose but does not take the declaration from the debtor. This is a common technique employed by some brokers/lenders in cases run by CCLC, the borrower is usually referred to a solicitor who takes the declaration, who may or may not be associated with the lender, and may or may not have the requisite knowledge to activate s11(3).

   - Where the declaration is taken by the solicitor and the solicitor is associated with the lender, or providing a credit service, but is not caught by s11(4) because of the exemption for certain credit activities carried out by lawyers in the Regulations (NCCPR 2009 6.2).

2. Where the declaration is ineffective for a reason other than 11(3). In these circumstances the lender must rebut the presumption in 11(1). However, the case law arguably sets a lower standard than 11(3) because most interpretations of s6 do not impose an active obligation on lenders to make reasonable enquiries as to purpose.

   - Where a declaration is ineffective because it is taken after the debtor enters the credit contract.

   - Where the declaration is ineffective because it does not comply with the 11(6) (not in the requisite form).

The lower standard referred to in B above may have the unintentional consequence of steering lenders away from taking business purpose declarations, defeating the purpose of the amendments to s11(3). S11(3) does not apply where there is no business purpose declaration and s6 and 11(1) would apply instead.

Section 11 should be further amended so that:

- A relevant person includes a person who provided a credit service through which the credit was obtained, but did not accept the declaration from the debtor. The section should also clarify that otherwise unlicensed activities are caught for the purposes of s11.4.
- It is clear that there are only two ways to rebut the presumption in 11(1)
  1. By establishing that the funds were actually used for a non-Code purpose
  2. By taking an effective business purposes declaration under s11.

Alternatively, the Explanatory Memorandum could clarify that what is intended in s6(1)(b) is the purpose of the borrower, or at the very least, the purpose of the borrower as the lender knew or had reason to believe, or would have known or had reason to believe, after making reasonable enquiries.

IMPLICATIONS OF NOT REGULATING CREDIT ADVICE

To be inserted

CHARGE CARDS

To be inserted

ASIC INTERVENTION – DEEMING POWERS

We submit that there should be a general clause preventing the use of schemes or arrangements, which have the effect of avoiding the intent of the law. This would facilitate timely intervention by regulators as problematic practices emerge, without relying on slow process of legislative amendments.

Many of the above loopholes have been closed via specific amendments. Each amendment, however, has taken a lengthy period to become law, and is usually made redundant within a short time as a new avoidance method emerges.

Quick intervention into new ways of avoiding the Code is crucial to maintaining its effectiveness. Relying on individual consumer complaints and proceedings is a protracted process that is slow in revealing a systemic course of inappropriate conduct. Similarly prosecution and applications for injunctions by ASIC are likely to be time consuming and targeted only at one financial services provider. This allows predatory practices to continue across the sector and reap profits for unscrupulous parties before it is conclusively established in a court that the conduct is illegal.

Cash Converters – Avoidance of the Cap

In early 2009 the Queensland government intervened to stop Cash Converters offering a credit product attempting to avoid the application of the 48% interest rate cap recently introduced in QLD.

Cash Converters was effectively charging 420% pa interest for a loan product that. required consumers to hand over a DVD or CD as collateral. This allegedly recharacterised the loan as a pawnbroking transaction (which are exempt from the application of most provisions of the UCCC, including the cap). Cash Converters agreed to enter into conduct deeds abolishing the products, whilst maintaining that the product is lawful[3].

We recommend that ASIC be empowered with the ability to publically deem particular credit products or practices as "consumer credit" (and ineffective to avoid the operation of consumer credit legislation), and to require that the financial services provider therefore be required to obtain the appropriate licensing to continue operating.

Access to Justice

We have many concerns in relation to access to justice, not least of which is the loss of the many advantages of the specialist tribunals in NSW and Victoria. We are not convinced that

[3] State Attorney-General swoops on dodgy payday lenders, by Patrick Lion, 5 January 2009, http://www.news.com.au/couriermail/story/0,27574,24876097-3102,00.html

the small claims procedure proposed will address those concerns. A Table with the relevant rules and procedures in the CTTT in NSW is included for your information in Appendix B.

It is difficult to see how the small claims proceedings as currently drafted will work in practice. As a solicitor acting for a borrower, it is necessary to plead all matters that have reasonable prospects of success. This will invariably mean that other sections of the law are pleaded at the same time as hardship under 68, for example. A particularly common situation at the moment is that a hardship and stay application will be accompanied by an order seeking to challenge enforcement costs under section 99 on the basis that those costs have not been reasonably incurred (often running at many thousands of dollars). As discussed on previous occasions unjust contracts claims are not as a general rule made by borrowers who can pay their debts and are also usually accompanied by hardship, postponement of enforcement applications, and often challenges to unconscionable fees and charges under s72. Similarly a claim under the responsible conduct provisions is also likely to overlap with these sections in a similar way.

In relation to cases involving the repossession of goods, the borrower may be able to apply for hardship variation, stay or postponement of enforcement but would not have access to the provisions in relation to getting their goods returned, or payment of compensation for repossession in breach of the NCC. These cases will invariably involve fairly small amounts of money.

Cases in which consumers are claiming money are rare and applications usually involve consumers seeking to be relieved from payment of debts. The small claims procedure is clearly aimed at seeking to improve access to justice for consumers but we are concerned that it will be of little practical benefit as currently drafted.

It is unfair and unreasonable for consumers to have to elect between different substantive causes of action based on procedural imbalances. Consumers would be pressured into foregoing causes of action under the NCC (including the right to compensation exceeding the $20,000 threshold), in order to gain the benefits of small claims processes, despite the fact that what is litigated can involve substantially the same course of events. Further, it is often difficult to accurately calculate the ultimate value of a claim in advance where the claim is for compensation under the Act or for relief from an unjust contract. For unrepresented consumers this will be an almost impossible task.

It is imperative that small claims proceedings to be made available to all applications as is currently the case for applications made in the commercial division of the NSW CTTT.

The costs implications of bringing and sustaining proceedings and the ability of the consumer to navigate formal court procedures and evidentiary rules are strong deterrents against court action by consumers. This issue that is fundamental to a consumer's access to justice. The effectiveness of the remedies available for individual consumers is only as strong as a consumer's capacity and willingness to enforce those remedies. Many of the low-income and disadvantaged consumers that are targeted by predatory lenders do not have the resources or willingness to pursue complaints or proceedings against them. This is particularly the case if they still have equity in a property and cannot afford to risk losing that, regardless of the merits of their claim.

It is crucial that the forum for proceedings is structured to most effectively empower consumers to conduct proceedings on their own behalf and without the need for costly legal representation (or further reliance on already overloaded services such as Legal Aid

and community legal centres). We note that lenders can be given costs protection in the event of vexatious or frivolous proceedings, or where a party's unreasonable act or omission (in relation to the proceedings) caused the other party to incur costs.

We note that EDR enhances access to justice considerably. However, it is vital to the robustness of the EDR process that some cases are taken to the courts to develop and clarify the law, and that consumers are given realistic alternatives. It is also vital that consumers are given access to the law after legal proceedings have commenced, with COSL statistics for example, revealing that 90% of consumers approach the scheme after a default notice has been issued, and 50% after legal proceedings have been commenced. For EDR to provide meaningful access to justice, they must be able to consider the full range of issues under the law after legal proceedings have commenced. This is currently not the case and unless this situation changes, the courts will be the only option of many consumers at the point they are most likely to seek advice and assistance.

The small claims procedure should at least be available for claims under s70, 71, 72, 98, 99 and 99A-C.

Consideration should be given to dramatically broadening access to the small claims procedure in terms of both the types of claims and the monetary value of claims to more closely align with the current positions under the State specialist tribunals, with a graduated introduction of costs, and a presumption against costs for unrepresented parties.

Ambiguity surrounding the interaction between the new jurisdiction, including the small claims procedure, and matters where the lender commences enforcement action in a State Court

There appears to be no presumption that matters can be moved from a State Court to the relevant part of the Fed Ct (small claims for hardship). The new Federal Court jurisdiction should be a jurisdiction of specialist expertise. Consumers should have access to the small claims procedure in appropriate cases, even those involving home loans that will be commenced in the State Supreme Courts. This procedure appears to only apply to the magistrates court and the Federal Magistrates Court, meaning that hardship applications on home loans that are brought after the commencement of the proceedings may need to be pleaded as a cross-claim. If it is intended that these applications can be brought in the Federal Magistrates Court after legal action has commenced in a State Court, then it needs to be made clear that an order of the Federal Magistrates Court will be recognised by the Supreme Court and procedures put in place to ensure that the Supreme Court is made aware of relevant orders. We understand that the Federal Court also has exclusive jurisdiction over civil penalties under the NCC and there will be cases in which a civil penalty (in the form of relief from payment of interest) is pleaded as part of overall case for relief or compensation. This should be done in the same jurisdiction.

We would appreciate the opportunity to make further submissions regarding the technical aspects of jurisdiction in the future.

The legislation should clarify the interaction between the State and Federal jurisdictions to ensure that the Federal jurisdiction is the forum of choice and to enable consumers to transfer matters where appropriate, or commence proceedings in the Federal jurisdiction

after enforcement proceedings have been commenced in a State jurisdiction with appropriate procedures to ensure that this is workable in practice.

Legal representation - Exemption for lawyer who are employees or officers

We are extremely concerned by the exemption created under C100(7) allowing a party whose lawyer is an employee or officer of the party to bypass the need to apply for the court's leave to be legally represented in small claims proceedings.

If a financial services provider is represented by a legally trained and qualified person, an unrepresented consumer's interests are likely to be prejudiced regardless of any superfluous distinction based on the employment status of the representative.

We note that clause 5.28 of the explanatory notes demonstrates as example that if a company is represented by a legally qualified employee, it may be appropriate for the court to give leave for another party to be represented. However this assumes the consumer has the ability to afford a solicitor when, by its very essence, applications regarding hardship and unsuitability of a loan will centre around a consumer's incapacity to afford even regular repayments on their debts. It then places the onus on consumers who did manage to obtain representation to apply for the court's leave for any representation they manage to obtain – just to put themselves be on an even footing with the represented party.

The existence of the exemption would also serve as an incentive for financial services providers to shift their legal advice 'in-house' in order to obtain procedural advantages which serve to further disadvantage consumers.

We recommend that the exemption be removed. A court should be required to weigh assess each party's application to be represented against any unfair disadvantage caused to any other parties, without exemptions.

Appropriate jurisdiction

We support the approach taken in the commentary in relation to the appropriate jurisdiction to commence proceedings. We are concerned however that this will be insufficient to protect the rights of consumers who are sued in an inappropriate jurisdiction.

There should be a penalty for non-compliance with this requirement.

There should be a simple process for consumers to object to jurisdiction and for licensees to be required to withdraw the proceedings at their own expense and recommence in the appropriate jurisdiction.

Financial Hardship

Hardship statistics

Research by Datamoniter shows that mortgage stress continues to affect more than 1.3 million households nationwide as of May 2009, despite the RBA's rapid reduction of interest

rates by 4.25% since September last year[4]. More conservative figures from Fujitsu Consulting show that the number of households in mortgage stress have fallen from a peak of 900,000 in August 2008 to 568,000 in April 2009[5], but with another 460,000 on the edge of falling into mortgage stress, Fujitsu is also predicting that more than 1.2 million households will be in mortgage stress by December 2009 if unemployment rises to 7.5%[6].

The number of households facing foreclosure or sale increased 3% in the month to April 2009[7], and at least 101,000 households are still at risk of foreclosure or sale due to higher unemployment[8]. The RBA estimates that in December 2008 approximately 20,000 mortgage holders were in arrears for more than 90 days[9]. Defaults on non-conforming, low-doc loans that are over 30 days overdue hit a record high of 19.73% in March 2009[10]. In NSW alone, more than 300 writs a month have been issued by the Supreme Court since January – the same number of writs being issued when interest rates were still increasing in early 2008[11].

First home buyers, many of whom have been attracted to the housing market by the government's first home buyer grant boost are especially vulnerable, with Fujitsu Consulting predicting up to a third of the 125,000 first home buyers who purchased in the last year falling into mortgage stress if unemployment rises to 7.5% by December 2009[12].

Western Sydney suburbs are already facing the brunt of unemployment. The percentage of consumers in western Sydney who are late on their loan repayments by at least 90 days is triple the national average[13], as the unemployment rate around Liverpool and Fairfield rose to 10.5%[14]. Sheriffs in Bankstown were reporting an average of 15 houses being repossessed each week – triple the numbers from three years ago[15].

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[4] Mortgage stress affects one in four, AAP, May 10, 2009, http://www.news.com.au/business/money/story/0,28323,25456921-5013951,00.html

[5] Mortgage Stress-O-Meter Update, April 2009, Fujitsu Consulting, https://www-s.fujitsu.com/au/whitepapers/april_2009_mortgage_stress_report.html

[6] Low interest rates help ease mortgage stresses, Turi Condon, Property editor | April 01, 2009, http://www.theaustralian.news.com.au/business/story/0,28124,25272561-20501,00.html

[7] Mortgage Stress-O-Meter Update, April 2009, Fujitsu Consulting, https://www-s.fujitsu.com/au/whitepapers/april_2009_mortgage_stress_report.html

[8] Mortgage Stress-O-Meter Update, April 2009, Fujitsu Consulting, https://www-s.fujitsu.com/au/whitepapers/april_2009_mortgage_stress_report.html

[9] Thousands living on borrowed time, Jacob Saulwick, April 29, 2009, http://business.smh.com.au/business/thousands-living-on-borrowed-time-20090428-am0w.html

[10] Mortgage delinquencies rise, March 31, 2009, http://www.theaustralian.news.com.au/business/story/0,28124,25268991-36418,00.html

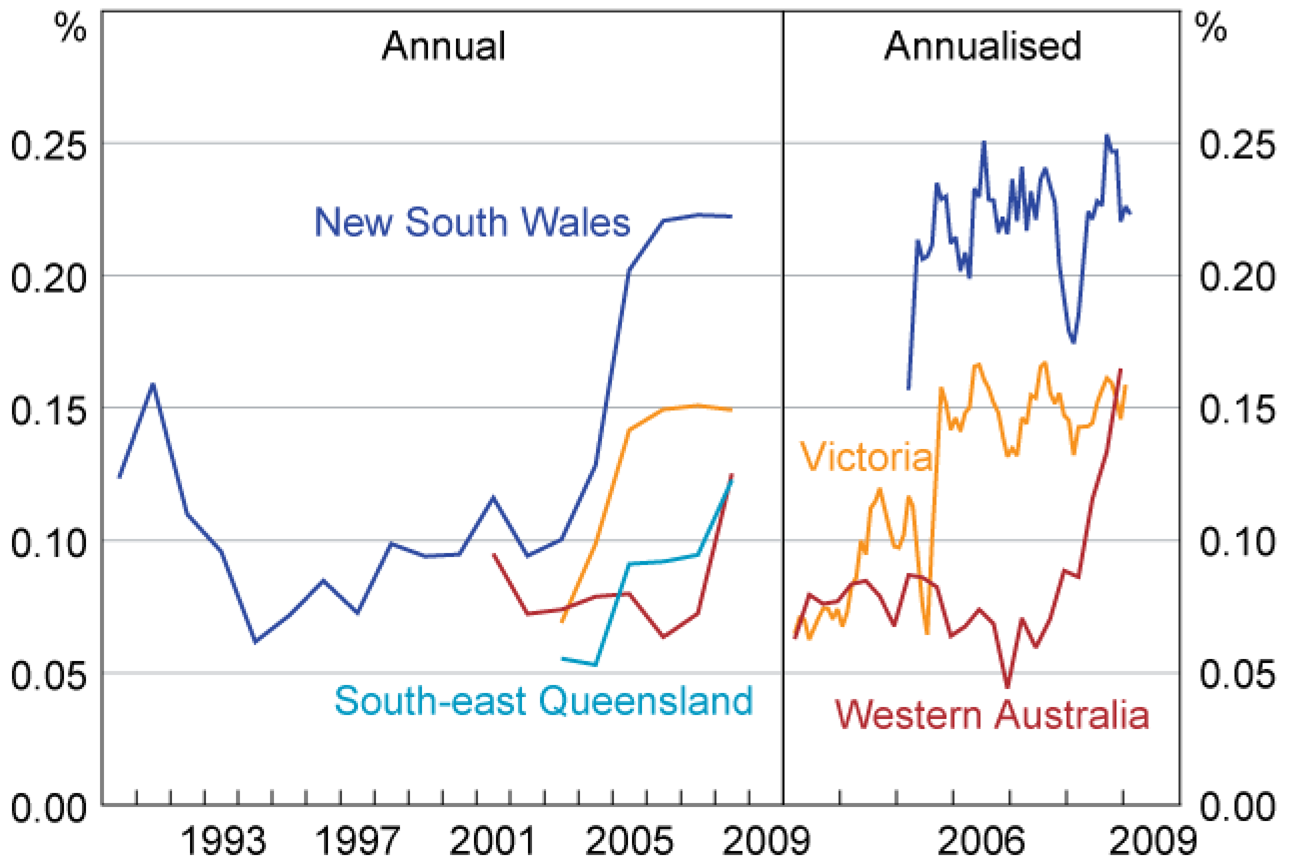
[11] Thousands living on borrowed time, Jacob Saulwick, April 29, 2009, http://business.smh.com.au/business/thousands-living-on-borrowed-time-20090428-am0w.html

[12] Low interest rates help ease mortgage stresses, Turi Condon, Property editor | April 01, 2009, http://www.theaustralian.news.com.au/business/story/0,28124,25272561-20501,00.html

[13] *Mortgage suffering: the suburbs on the edge*, Jessica Irvine, Sydney Morning Herald, September 26, 2008

[14] New South Wales tops mortgage default list, Joe Hildebrand & Vikki Campion, The Daily Telegraph April 28, 2009, http://www.news.com.au/business/money/story/0,28323,25397470-5013951,00.html

[15] *When pain persists, they arrive,* by Jonathan Dart and Jessica Irvine, Sydney Morning Herald, March 28, 2008



As demonstrated by the above graph from the Reserve Bank of Australia March 2009 Financial Stability Review, and the statistics above, NSW consumers are already facing record repossession levels. Disturbingly, CCLC's anecdotal experience based on advising borrowers suggests that the real impact of the downturn in the economy is yet to hit these statistics, with many borrowers currently in the late stages of the repossession process being in that position for reasons other than fairly recent unemployment, including for example

- Arrears dating back to the period of high interest rates last year;
- High current interest rates charged by non-bank lenders who have not lowered their rates in line with the remainder of the industry as a result of funding problems;
- Enforcement of other debts (such as garnishees), neglected during the period of high interest rates, now impacting on their ability to repay the home loan;
- Perennial reasons such as family breakdown
- General over-indebtedness.

These figures are clearly set to worsen with the IMF predicting that unemployment in Australia will rise to 7.8% by 2010[16].

These financial difficulties are not restricted to mortgage holders, with 29 per cent of all consumers predicting difficulties paying their bills over the next 12 months[17].

Hardship Issues

Hardship is an area that lenders are not adequately addressing. The number of hardship complaints handled by the Credit Ombudsman Service has shot to 20% as a proportion of all complaints, compared to an average of 5%[18].

ASIC has also identified hardship provisions as an area concern and recently released a report "*Helping home borrowers in financial hardship*" in May 2009[19]. This report identified several key deficits in the practices of the 15 lenders surveyed[20] in dealing with hardship variations, including:

1. introducing additional and sometimes arbitrary criteria for assessing financial hardship applications, such as the age of the loan or the number of days past due;
2. bias towards providing short-term assistance such as moratoriums, in preference to of looking at a repayment arrangement to suit the needs of the borrower;
3. reliance on collections officers to identify customers experiencing financial hardship;
4. providing information about financial hardship options when they have already begun to experience financial difficulties;
5. failure to provide information to help consumers understand their options and make informed choices;
6. suggestions for consumers to apply for an early access to superannuation, where this would only result in a temporary delay to a foreclosure.

These findings accord with CCLC's casework experience, including short-term moratoriums that are contrary to the borrower's best interests and the failure to consider a second hardship application when a poorly tailored solution has failed.

Why the Principles released by the Treasurer are not enough – CCLC's experience

To be drafted

Changes required

Whilst we applaud the increase of the hardship threshold to $500,000 and the introduction of s66(2A) into the Code, we are disappointed that further strengthening of the law relating

[16] Swan admits jobless could top 10pc and refuses to rule out raising taxes, Christian Kerr | April 23, 2009, http://www.theaustralian.news.com.au/story/0,25197,25373834-601,00.html
[17] Mortgage stress affects one in four, AAP, May 10, 2009, http://www.news.com.au/business/money/story/0,28323,25456921-5013951,00.html
[18] Thousands living on borrowed time, Jacob Saulwick, April 29, 2009, http://business.smh.com.au/business/thousands-living-on-borrowed-time-20090428-am0w.html
[19] Helping home borrowers in financial hardship, ASIC Report, May 2009, No 152
[20] 7 banks, 4 credit unions and friendly societies and 4 non-banks

to financial hardship has not eventuated. Even in the absence of the economic conditions locally and globally, financial hardship is a critical issue. For consumers suffering temporary financial difficulties, short-term financial hardship provisions can save a home from foreclosure, personal belongings from being repossessed, or a person from bankruptcy.

We advocate for further strengthening of the hardship provisions of the Code as a key priority. We propose the following changes to the hardship provisions of the Code, which are discussed below in further detail:

1. Accountability and good faith
2. Automatic stay of enforcement action
3. Jurisdiction of External Dispute Resolution Schemes
4. More flexible variation options
5. Suspension of default fees and charges
6. Time to provide further information

Accountability and good faith

In the absence of any legislated obligations for lenders to consent to a request for a hardship variation, lenders should be placed under a positive duty to consider hardship applications in good faith and provide written reasons for rejections in the requisite s66(2A) NCC notice. This is to ensure procedural fairness and accountability in the decision making process. We note that similar duties of good faith and the requirement for written reasons exist in insurance laws to insure that consumers are not unfairly prejudiced by the insurer's inherent conflict of interest in determining payouts.

Providing written reasons within the proposed s66(2A) notice will also help streamline the evidentiary process for consumers wishing to escalate their complaint to a court or an EDR scheme [noting however that no EDR scheme currently makes determinations about putting a hardship variation in place].
It also assists the consumer to understand the lender's position and to specifically address any legitimate concerns of the lender in their negotiations.

The fact a borrower has not applied for an early access of their superannuation benefits should be prohibited as a reason for rejecting a hardship variation. Superannuation benefits are protected from creditors even in bankruptcy and should not be viewed by credit providers as another asset they access to recover a debt. On the other hand, where the borrower has indicated that they intend to access their super, and there are good reasons to suggest that the borrower will be successful in sustaining repayments over the longer term, then the lender should work with the borrower to ensure there are no unreasonable barriers to the success of this course of action, including entering a hardship variation while the application is pending.

Automatic stay of enforcement action

Consumers in financial hardship are already struggling with repayments. For enforcement action to continue while a hardship application is considered will only trap a consumer into further debt as credit provider pass on enforcement costs.

We propose that no further action should be able to be taken by the lender while the application for a hardship variation is being considered, regardless of whether legal action

has been commenced prior to the application being received. Further, an automatic stay should apply in all circumstances until 30 days after the borrower has received the lender's written response (unless a longer notice period is required by law), to give the borrower time to consult a financial counsellor and consider other options such as applying for an early access of superannuation, refinancing or selling property themselves.

We note that in recent weeks, the UK government has brokered a deal with the UK Credit Services Association (representing over 300 members who are debt collectors) that if the borrower has been referred to an accredited debt adviser, this will initiate a 30 day hold on accounts, which is extendable by a further 30 days[21].

Appropriate limitations could be considered to prevent abuse of this process.

Ability of External Dispute Resolution Schemes to consider Disputes over Hardship

EDR schemes currently do not make determinations about what is an appropriate repayment arrangement. FOS does not consider s66 of the UCCC within its terms of reference, and will only consider whether the member has conducted a reasonable process under s25.2 of the Code of Banking Practice. In similar terms, COSL review whether the credit provider has responded appropriately to a request for a hardship variation under the UCCC. Changes to this position are being considered by both schemes and we consider these developments absolutely crucial.

The current situation effectively deprives consumers of an alternative dispute resolution process in resolving their complaint, leaving as the only recourse an application to the court (once the tribunals lose jurisdiction).

Whilst we applaud efforts to streamline court processes for hardship applications via small claims procedures, this does not diminish the importance of having EDR processes available to consider all consumer credit disputes. Many consumers, particularly disadvantaged and low-income consumers are intimidated by the suggestion of court proceedings, not to mention the additional deterrents of stress, time, risk and cost.

External dispute resolution schemes must have the power to make a decision to grant or refuse a hardship application, taking into account the submissions of both parties.

This power should extend to situations where a lender has issued a statement of claim and a hold placed on the proceedings until hardship application has been determined. We note that COSL is prepared to consider hardship disputes following the issue of a statement of claim. Consumers in NSW may also lodge in the CTTT for orders regarding hardship and a postponement of enforcement action under a statement of claim[22].

Further, it is unclear whether small claims procedures will be available where the hardship application is made as a cross-claim in response to enforcement action by the credit provider.

[21] http://www.telegraph.co.uk/finance/personalfinance/borrowing/5114063/Struggling-borrowers-to-get-30-day-breathing-space.html

[22] Auckett, Ryan and Saunders (unreported)

More flexible variation options

The proposed Code allows only for three limited options for assisting debtors in financial hardship. While borrowers are able to negotiate outside of this limited range in negotiations, problems arise where the lender acts unreasonably. If a borrower must resort to court proceedings or EDR, the court is bound by the limited range of options contained in the legislation.

In CCLC's experience, some lenders (including major banks) have further restricted the hardship options they have offered. Case study? – KL – 3mths moratorium or 6mths?

The core purpose of a temporary reprieve is to assist the borrower overcome short-term difficulties. Each borrower will have a different capacity to make repayments which should be considered on a case-by-case basis. We call for a more flexible approach and propose that further options be offered, including:

- extending the term of the loan;
- changing the type of loan;
- deferring payment of interest due under the mortgage; or
- capitalising the arrears;
- reducing repayments, with increased repayments payable at a later date;
- granting a period time in which the borrower may attempt to refinance or sell the property, with reduced repayments payable in the interim period;
- allowing reduced repayments for a period of time followed by increased repayments for a specified period of time to cover the resultant arrears;
- interest only repayments for a specified period of time;
- waiving fees;
- temporarily reductions in the applicable interest rate; and
- any other variation the court considers appropriate in all the circumstances.

Suspension of default fees and charges

If the hardship application is granted, all default and enforcement fees should be waived from the date of the application and no further default or enforcement fees should apply or default credit listings made while the variation is on foot.

The lender must be prohibited from refusing to grant a hardship variation solely on the basis that a borrower has not yet fallen into arrears. Borrowers should not have to default and incur any default charges and credit listings before lenders assess an application for hardship.

The definition of financial hardship is that a borrower will struggle with their regular repayments, and should not be pulled into a further debt trap via fees, charges and default listings (restricting their ability to refinance on reasonable terms).

Lenders should also be required to consider repayment arrangements where a person has been in financial hardship and accumulated significant arrears, but has returned (or is shortly about to return) to a position where they will able to return to their regular repayments and pay back the loan if default fees and default rates of interest cease being charged. Borrowers should not lose their homes purely as a result of enforcement costs and default interest when they are in genuine financial hardship.

[case study]

Time to provide further information

If the lender requires the borrower to provide additional information before it considers whether to grant the application, the request must be reasonable having regard to the nature of the variation sought, and the borrower should be given at least 14 days in which to comply with the request, during which time all enforcement action is stayed.

Summary of Changes required to hardship laws

- Offer a more flexible list of loan variation options including:
  - Reducing repayments under the contract and extending the term of the contract;
  - Postponing repayments due under the contract, and extending the term of the contract if necessary;
  - Capitalising arrears and extending the contract if necessary;
  - Allowing reduced repayments for a period of time followed by increased repayments for a specified period of time to cover the resultant arrears;
  - Interest only repayments for a specified period of time;
  - Waiving fees;
  - Temporary reductions in the applicable interest rate;
  - Reducing repayments and capitalising the arrears during a specified period during which the borrower may attempt to sell the property.

- Require lenders to consider the application for a hardship variation reasonably and in good faith - solutions must be tailored to the individual's circumstances

- The NCCCP Bill will require lenders to respond in writing within a specified period including, whether the hardship variation has been granted, details of the variation where it has been granted, and details of the lenders external dispute resolution scheme (such as the Financial Ombudsman Scheme), where the variation has not been granted. It does require the lender to give their *reasons for rejecting the application*. This should be required.

- Where a lender requires the borrower to provide additional information before it will consider whether to grant the application, then

- That request for information must be reasonable, having regard to the nature of the variation sought; and
- The borrower should given 14 days in which to comply with the request.

- No further action should be able to be taken by the lender while the application for a hardship variation is being considered, regardless of whether legal action has been commenced prior to the application being received. An automatic stay should apply in all circumstances until 14 days after the borrower has received the lender's written response (unless a longer notice period is required by law). Measures could be put in place to ensure that this process is not abused.

- If the application is granted, all default and enforcement fees should be waived from the date of the application and no further default or enforcement fees should apply while the variation is on foot.

- Lenders should not be permitted to suggest that borrower's apply to access their super without first considering an application for a hardship variation in good faith.

Appendix A

Avoidance practices over the years

The UCCC has a long history of being avoided. There have been a series of amending acts required to address these loopholes. This seems a very inefficient way of keeping up with a very creative industry. No sooner has one hole been closed and another appears.

- The use of short-term contracts (rolled over repeatedly);
- Interest expressed as fees to avoid interest rate caps and obfuscate the cost of credit;
- Split entities charging brokerage to inflate cost, avoid caps and the minimum credit charge to be caught by the UCCC;
- "Cheque cashing fees" and other means of avoiding minimum credit charge to be caught by the UCCC;
- False business or investment purposes declarations to facilitate predatory and exploitative asset-based lending;
- Promissory Notes;
- Bills of Exchange;
- Vendor terms contracts;
- "interest-free" lending , where the price of the goods is inflated to conceal the cost of credit;
- Goods rental contracts with "nudge, nudge, wink, wink" arrangements that the consumer can keep the goods which are not reflected in the written agreement;
- Exploitation of the pawn broking exemption; and
- Using "on demand", line of credit, home loan contracts to claim that default notice (s80) and hardship variation provisions (s66-68) do not apply.

More detail and examples are included below. Many of these case studies date back some years because the particular loophole has been closed. Where the case is recent this is stated.

Short-term contracts (rolled over repeatedly)

Prior to amendment of the UCCC in 2001 to introduce a maximum charge for short-term loans in order for them to fall outside the Code, the "less than 62 days exemption" was used by short-term ("payday") lenders to avoid the Code entirely. Despite some suggestion that the law might deem rollover contracts to be covered by the Code under various other provisions, this was not tested and rollovers were common. The Wesley Community Legal

Centre had a case in the CTTT only a few years ago where the loan was rolled over 11 times.

Interest expressed as fees to avoid interest rate caps and obfuscate the cost of credit

This has been addressed in NSW by a comprehensive cap on the cost of credit. Consideration of this issue has been delayed until Phase 2 of the Commonwealth government process. Unless these provisions of this nature, or another equally effective solution is introduced by the Commonwealth government, loans of the following type will once again proliferate.

How much?

Ms A needed to borrow $2,500 urgently and responded to an advertisement in the local paper that said "Easy Loans No Credit Checks". Ms A told the lender she was in receipt of Centrelink benefits as her only source of income. The loan she was given was $3,550, and included a flat fee of $1,050. A caveat was also taken over her home and lodged the next day. The loan was for 1 month and a default rate of interest of 10% per month applied if she did not pay the entire amount back within that time. Ms A was unable to pay on time and was threatened with bankruptcy shortly afterwards.

Split entities charging brokerage to inflate cost and avoid cap

Some lender have introduced a "brokerage charge", usually payable to a related entity which the borrower has nothing to do with and probably doesn't even know exists. This enables the lender to both avoid the comprehensive interest rate cap in NSW but also, in some cases to avoid the Code altogether for very short term loans. There were provisions aimed at addressing this issue in the Credit Code Amendment Bill 2007.

Brokers introduce borrowers to lenders – don't they? (recent)

Mr A needed a $500 loan to pay for basic necessities such as food and clothing. His sole source of income is the disability support pension, he is illiterate and has a heart condition. Mr A approached a small amount lender for a loan. The lender was aware at all times that Mr A was illiterate, but did not explain any of the terms and conditions of the loan. Mr A believed he was obtaining a $500 loan. Instead, he was put into a loan for $700 loan for 32 weeks at an interest rate of 48% per annum. $500 of the proceeds went to Mr A, however, unknown to him, a further $200 of the proceeds was paid to a brokerage company which Mr A did not deal with taking the actual cost of the loan well above the disclosed interest rate. The broker appears to have played no role in the transaction apart from enabling the overall cost of the loan to exceed the 48% cap on interest, fees and charges applicable in NSW. The lender also incorporated a bill of sale into the loan contract, so that it can take possession over Mr A's fridge and living room furniture in the event of default.

Mr A has fallen behind on his repayments. He is extremely concerned that the lender will repossess his household items, and that the stress may have a negative impact on his heart condition.

"Cheque cashing fees" and other means of avoiding minimum credit charge to be caught by the UCCC

This scheme applies the same principle as the brokerage fee above. The charge for credit under the contract may be less than the cap or the amount required under 7 to be caught by the Code, but the borrower is charged a separate "cheque cashing fee" if they want cash immediately. Of course, it is in the nature of this type of lending that all borrowers need the cash immediately. There were provisions aimed at addressing this issue in the Credit Code Amendment Bill 2007.

Whoops! The loans costs this much but if you actually want your money...........
Ms B has an intellectual disability and mental health problems. Her sole source of income was Centrelink disability benefits. Ms B borrowed $200 from a lender for a period of 7 days. The total credit fees and charges were about $80 and a significant proportion of these fees were made up of a "cheque cashing fee", and a membership fee, which were purportedly not credit charges for the purposes of the Consumer Credit Code. The lender did not explain any of the charges or the terms of the contract. Ms B did not understand that she had to repay the entire loan and charges in just 7 days.

False business or investment purposes declarations to facilitate predatory and exploitative asset-based lending

This is the most common way of avoiding the law in mortgage lending and facilitates the worst examples of predatory lending or equity stripping. Finance broker legislation in both NSW and Victoria is also dependent on attracting the jurisdiction of the Code and is therefore also avoided in the same manner.

The illusory mortgage stress solution (in CTTT 2008)

In Early 2006 Mr K lost his job in a flour mill. He was given a redundancy package and, as a result, he was excluded from Centrelink for a period of time. Mrs K was reliant on a partial Disability Support Pension. They had a mortgage with a bank over their home. Mr K found seasonal casual employment but this was disrupted during the floods and bushfires in NSW and Vic in late 2006. They fell behind in their mortgage to the bank and a default notice was issued. Mr K and Mrs K saw an advertisement on regional television offering "Bad Credit Mortgages". They were offered short term finance of $15,000, which included $10,000 to rectify their mortgage arrears and pay their water and land rates, $3,000 brokerage, $1,500 "prepaid" interest and $500 additional set up costs. They were told to sign a business purpose declaration and were assured this was just a "formality". A caveat was placed over the home.

The short-term credit was on the following terms **10% per month** interest, and **15% per month** in the event of default, the monthly repayments were approximately $1,500. They were told that this loan was only a stopgap measure and that a refinance of their entire home loan on better terms would be arranged. The refinance never eventuated and Mr and Mrs K were unable to meet the payments on the short-term finance or on their mortgage to the bank. Further, Consumer Credit Legal Centre has several clients who have used the

same broker and lender and the modus operandi is always the same – there is always a business purpose declaration and the promised refinance never occurs.

Narrow escape (recent)

Mr C is 70 years old. He has prostate cancer. He owns his home outright. He had a $30,000 credit card debt. He was using the whole of his pension to pay the minimum monthly repayments. His wife also pawned her jewellery to pay the credit card. He decided that he would obtain a mortgage secured over his property to pay out the credit card debt and to reduce the payments. He wanted additional credit so he could travel (probably for the last time) and take his three children to meet his wife's parents. He saw an advertisement on local television for "bad credit mortgages". Because of his large credit card bill he had fallen behind in his telephone and other debts. The broker said he could arrange a loan to consolidate his debts in a mortgage for $95,000. The broker said they could arrange a loan immediately for $50,000 if they sent the deed to the house.

Mr C sent the deeds and received a bundle of documents including a letter of offer to provide finance of $62,573. $50,000 to be paid to Mr C, the terms included **8% per month** interest, **10% per month** in the event of default. The loan included "prepaid" interest of $4,620 and **brokerage fee of $7,000**. The interest only repayments were $5,005 per month, well in excess of Mr C's income, and Mr C was told he had to sign a business purpose declaration. Mrs C was a registered nurse and during the course of her telephone conversations with the lender she was told that she had to state that loan funds were for the purpose of her being a sole trading registered nurse. Mrs C stated she had no intention of starting a business.

Signing a business purpose declaration not only takes the loan outside the jurisdiction of the Consumer Credit Code, but also relieves the broker of any obligations under applicable legislation in NSW and Victoria. Fortunately, Mr C went to see his solicitor, who told him not to go ahead. Mr C's solicitor got the deeds returned, and a mortgage was found for Mr and Mrs C that suited for their purposes.

Small loan, large cost

CCLC was approached by Ms. A, who had received a Statement of Claim (Equity Division of the Supreme Court) filed by a small fringe lender seeking possession of her home. Ms A was from a non-English speaking background and suffered from clinical depression at the time of seeking assistance. She had taken out a small loan of $5,000 to pay strata fees on her home unit. In fact the amount borrowed was for about $3,500 with the remaining $1,500 representing fees and charges added at settlement. The interest rate was 5% per month. The lender had taken a second unregistered mortgage over her home unit. The loan was described as being for business purposes even though it was for personal purposes. A first mortgage was held by a major bank. That loan was not in default. Ms A could not pay in accordance with the terms of the loan and the lender's first claim in order to stop the Supreme Court proceedings was for an amount in excess of $20,000.

CCLC filed a defence and a notice of appearance claiming that the loan was covered by the Consumer Credit Code. The matter was eventually settled to our client's satisfaction.

Promissory Notes

This commonly used loophole was closed by amending legislation in late 2007.

Home at risk (2007)

Borrower 3 is a male who suffers from schizophrenia. He borrowed $1000 under a promissory note secured by a bill of sale over his home unit. The amount repayable over 12 months is $2,476, an effective interest rate of almost 150%. The contract also disclosed a number of possible penalty charges including $48 for a dishonoured direct debit ($35-50 may also be payable to the borrower's bank for this dishonour), $20 for the reschedule of a payment, and a penalty service charge of 48% per annum payable on the remaining balance for any period during which the borrower is one or more repayments in arrears. Clearly Borrower 3's home unit is at serious risk for a $1,000 loan.

Hey big spender! (2007)

Borrower 68 year old woman on the Disability Support Pension. She has three loans from two different lenders, all taken out in late 2006 in order to simply survive. All three loans disclosed the purpose of the loan was to purchase white goods. Two of the three loans avoid the UCCC by using a Promissory Note and a Bill of Exchange arrangement. Two of the loans were secured over basic household necessities. The interest rates were approximately 163%, 224% and 44% respectively. The cheapest loan was UCCC compliant. The others were not. The client could not pay any of the loans as they fell due and the interest and charges began to accumulate.

Bills of Exchange

This commonly used loophole was closed by amending legislation in late 2007.

Set up to fail (2007)

Borrower 1 is 45 years of age. She has been on the Disability Support Pension for 3 years. She suffers from serious depression.

Borrower 1 pays rent of $180 per week, which is 69% of her pension payment. She fell into arrears with the repayment of her rent and was threatened with eviction if her rental arrears were not brought up to date.

Desperate to keep a roof over her head, she successfully applied to a specialist small amount lender for a $2000 loan. The loan was not regulated by the UCCC because it was extended under a bill of exchange. The amount payable 32 weeks after the date of the contract was $2,753. The majority of the borrower's necessary household items, including a fridge, microwave, lounge, dining table, washing machine, cloth dryer and a television, were mortgaged to secure the contract.

The contract does not disclose the amount of weekly or fortnightly repayments. If she was to repay the loan fortnightly, she would have to pay $172.06 per fortnight. Borrower 1's fortnightly pension is $525. She would have a shortfall of approximately seven dollars per

fortnight just paying her rent and this loan. She would have no money at all with which to pay food, electricity, phone, transport or medication for example.

Not surprisingly, Borrower 1 has not been making any weekly or fortnightly payments and will not be able to repay the $2,753 on the termination date.

"Interest-free" lending, where the price of the goods is inflated to conceal the cost of credit

Amending legislation to address this loophole passed the Queensland parliament in the latter half of 2008.

Costly purchase (recent)

Ms D attended a car dealership in Western Sydney to purchase a car. She traded in a Gemini for approximately $1000 and entered into a contract to purchase a 1995 Commodore Holden Sedan with 270,000 km on the odometer for $14,385. The trade in of the Gemini was not taken off the price of the car. The repayments were 65 repayments of $220 per fortnight. She was also forced to take out an Extended Warranty

Ms D tried to get the car insured, but was informed the car was valued at only $4,500 – $5, 000.

Ms D changed the tyres and put in a new stereo. The car had a number of mechanical problems; she tried to use the Extended Warranty and was told that the problems were not covered. The cost of the repairs was $2000.

Ms D was no longer able keep up with the repayments and make repairs to the car. The car was repossessed. Ms D was happy to see the back of the car but the day after the repossession she attended the car dealership and demanded the return of the additional features she had installed at her own expense. This request was refused. The police were called. Mrs D attended the Local Court and got a Notice of Demand, returned to the dealership with the police and retrieved her goods.

Exploiting disadvantage (recent)

Mr J suffers from depression and schizophrenia and his sole source of income is a Disability Support Pension. He has a wife and three children. He has limited English language skills. In December 2006 he attended a car dealership and entered into an agreement to purchase a car for $14,985. The car was a 1990 Mitsubishi Wagon and had 276,638 kilometres on the clock. Mr J also traded in another vehicle but this is not noted on the contract or accounted for in any way apparent from the paperwork. The repayments were $220 per fortnight for 68 months. Subsequent valuations have indicated the car is worth only $3,000.

Exploitation of the pawn broking exemption

Amending legislation to address part of this problem was included in the Credit Code Amendment Bill 2007. Specifically that legislation proposed to limit the pawn broking

exemption to contracts where the only recourse of the lender is to retain and sell the goods pawned. This would effectively prevent the sham transactions referred to in the press article below where articles worth less than a couple of dollars are "pawned" to avoid the UCCC. These amendments would not address the issue demonstrated in the case study below, whereby the arrangement involves an item worth considerably more than the amount of the loan.

Queensland loan laws fail most vulnerable

August 18, 2008 12:00am
http://www.news.com.au/couriermail/story/0,23739,24195915-13360,00.html

"Laws recently announced by Attorney-General Kerry Shine and effective from July 31 were designed to close down the cruellest of loan sharks known to charge up to 1600 per cent interest on short-term "payday" loans. The new laws emerged after years of complaints from victims of an unsavoury industry, yet the legislation still appears soft. With money lenders free to charge a still exorbitant 48 per cent interest rate, we wonder if this is lending or usury.

The Courier-Mail has exposed how some Queensland lenders apparently feel even this rate is unprofitable, with a few of the more familiar lending firms skirting the new law by offering loans as pawnbroker transactions. Companies such as Cash Converters and Fast Access Finance, for example, exploit legal loopholes – and their most vulnerable customers – by lending cash through the "sale" of diamonds or accepting CDs as collateral."

Pawning the car (2008)

In May 20007, Ms M borrowed $2,000 from a pawnbroker to cover rent arrears. She was unemployed. As security for the debt, the pawnbroker took a bill of sale over Ms M's car. The car was valued at $13,500. Repayments on the loan were $500 per month, representing an annualised interest rate of 300%. The provisions of the contract and their legal and practical effect were not explained to Ms M and there was no UCCC compliant disclosure. The repayments represented approximately 60% of Ms M's income.

Ms M repaid $3,000 between May and November 2007. In December however she contacted the pawnbroker requesting a deferment of that month's payment. The pawnbroker did not respond. Without notice, the pawnbroker took possession of Ms M's car. There was no court order and the car was on private property. The pawnbroker demanded the sum of $3,950. Despite requests, at no time has the pawnbroker provided any information as to how this amount was calculated.

The pawnbroker appears to be relying on the pawn broking exemption to the Consumer Credit Code, but the loan has few of the features of a typical pawn broking arrangement (where the goods are handed into the possession of the pawn broker and the loan is less or close to the value of the goods), and all the features of an unjust personal loan.

Appendix B

Current Provisions in the CTTT	Legislation / Caselaw ("Act" refers to the Consumer, Trader And Tenancy Tribunal Act 2001; "Reg" refers to the Consumer, Trader And Tenancy Tribunal Regulation 2002)	Reason for retaining equivalent provisions
Procedures		
The Tribunal may determine its own procedures, subject to the Act	S28(1) Act	Processes need to be informal and flexible to ensure that consumers are not intimidated by the process or disadvantaged by procedural technicalities. Consumers should not be discouraged from pursuing proceedings because of procedural disadvantages if they are unable to afford representation.
Not bound by rules of evidence, and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of procedural fairness	S28(2) Act	
Goal to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.	S28(3) Act	
The Tribunal is to take reasonably practicable measures to ensure all parties understand the nature of the assertions made and their legal implications, and the procedural of the Tribunal and any decisions or rulings made in relation to the proceedings	S28(4) Act	The Tribunal holds the obligation assist parties understand their obligations and contribute to their case. It is accordingly given appropriate powers to act on its own motion in a wide variety of circumstances, from arranging interpreters, to amending documents and procedures, and calling

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The Tribunal must ensure each party is given a reasonable opportunity to call or give evidence and make submissions	S35 Act	witnesses on its own motion. Applications can also be made in regional registries and any Fair Trading Centre in NSW. Fair Trading staff assist consumer with forms and their completion.
The Tribunal can call any witness of its own motion, examine any witness by oath or statutory declaration and compel witnesses to answer questions	S39 Act	
The Tribunal must arrange an interpreter if it considers a party is not sufficiently in spoken English	S37 Act	
The Tribunal can make any amendments to any documents at any stage of the proceedings and on any terms the Tribunal thinks fit in the interests of justice	S32 Act	
The Tribunal may adjourn proceedings to any time and place (including for the purpose of enabling the parties to negotiate a settlement)	S28(5) Act	Incorporating mediation and conciliation as part of the process provides an opportunity for matters to be resolved quickly and cost-effectively. This is particularly where parties can speak openly and freely without prejudicing their evidence at trial. A significant proportion of CCLC's matters are settled prior to hearing, with the assistance of a Tribunal-appointed mediator.
The Tribunal has a duty to use its best endeavours to bring the parties to a settlement	S54 Act	
Evidence of anything said during mediation is not admissible in any proceedings	S62(4)	
The costs of mediation are generally payable by the Tribunal	S60	

The Tribunal may require evidence or argument to be presented in writing and decide on the matters on which it will hear oral evidence or argument	S28(5) Act	The ability of the Tribunal to dispense with the requirement for consumers to testify in a hearing in appropriate circumstances can relieve consumers of significant stress and anxiety
The Tribunal can dispense with a hearing, with the consent of all parties, and make a determination based on documentary evidence	S34	
The Tribunal may allow appears to give evidence or conduct the proceedings by telephone, audio visual link or any other means of communications	S38 Act	Consumers currently have access to hearings in regional areas, with Tribunal members specializing in credit matters attending particularly remote areas on a circuit, often using the Local Court (magistrates court) facilities. This, along with the ability for parties to attend and conduct proceedings by telephone and other electronic means ensures consumers leaving in remote areas are not disadvantaged. CCLC has regularly used telephone access to allow clients who would otherwise have not been able to attend, to speak and give evidence on their own behalf.
Legal representation		
Parties must apply for permission to be represented (whether by a legal practitioner or any other person)	S36(1), (2) Act	Restricting the use of legal representation helps to empower consumers with the confidence to commence proceedings.

There is no entitlement to legal representation if the amount claimed is under $10,000, unless exceptional circumstances warrant representation	S36(3) Act	One of the key reasons why consumers do not begin legal proceedings is the perception (which often turns into the reality) that they will be disadvantaged by lack of legal representation. Note Legal Aid's concerns.
There is a limited list of circumstances in which the Tribunal may grant leave, including in order to prevent disadvantage or where complex issues of law or fact are likely to arise	Reg 14	
Costs		
Parties are to pay their own costs, subject to any contrary order by the Tribunal	S53 Act	Protection against adverse costs orders is critical to the willingness of consumers to seek redress. Most consumers struggling with debt will have little or no capacity to afford extra expenses, and have no inclination to risk further liabilities, especially where their home is at risk. In practice there is a strong presumption against costs for unrepresented people.
Where the amount claimed is less than $10,000, the Tribunal can only award costs if there are exceptional circumstances	Reg 20(2)	
Where the amount claimed is between $10,000 and $30,000, the Tribunal can only award costs if there are exceptional circumstances and an order has been made that a party to the proceedings has engaged in conduct that unreasonably disadvantaged another party to the proceedings	Reg 20(3), S30	

Where the amount claimed is more than $30,000, the Tribunal award costs as it sees fit	Reg30(4)	
The Tribunal can also order costs where an applicant fails to attend a hearing, or the proceedings are frivolous, vexatious, misconceived or lacking in substance	Reg30(5)	
The Tribunal may, as a condition of granting leave for representation, require the legal practitioner to disclose the estimated costs of that representation	Reg18	
Application fees		
No application fees apply for applications under 68 or 88 of the UCCC	Reg 10(3)	Low application fees, and the option to apply for waiver of fees in special circumstances, is essential to ensuring that consumers are not barred from commencing proceedings due to their financial situation.
Scale of reasonable fees for initiating proceedings in the commercial division: 1. $33 if the amount claimed is less than $10,000 2. $67 if the amount claimed is between $10,000 and $25,000 3. $176 if the amount claimed is more than $25,000	Reg 10	
A discount also applies to pensioners and students, reducing the fee to $5	Reg 10(2)	

Application fees can be waived, postponed or refunded	Reg 11	
Applications following issue of statement of claim		
Consumers can apply for a stay of enforcement action and hardship following the issue of a statement of claim in a court	Auckett and Auckett v Secure Funding Pty Ltd (COM 08/51861, judgment handed down 18/12/08, reported)	Unless this is replicated in the new law and small claims processes, consumers would be forced to lodge hardship applications as cross-claims in substantive legal proceedings. This is an extremely costly, complex method of obtaining a short-term repayment arrangement, particularly for repossession matters in the State Supreme Courts. The credit provider can essentially continue to incur substantial legal costs relating to the substantive proceedings, which may be passed on to the consumer even if the hardship application is successful.
Rehearing applications		
Applications for rehearings must be made within 14 days of a party being notified of the Tribunal's order in the completed proceedings	S22 Act	We are unaware of any equivalent provisions in state courts to ensure finality of proceedings.
Miscellaneous Procedures		
When an application is made, the Tribunal arranges for service of the other parties and conducts its own company searches to ensure that each party is served at the correct address		Unrepresented litigants often have difficulties understanding service requirements and distinguishing between the significance of 'main place of business address' and 'registered business address'. Small measures of assistance provided with procedural requirements can assist consumers progressing their case and prevent undue delays eg. from needing to later re-effect service.

Tribunal has specialist divisions, allowing Tribunal members to specialize in a distinct area such as credit.	The experience and knowledge of judges handling credit matters will be crucial to the success of the new legislation, given the discretionary approach to concepts such as “not unsuitable” credit products.