

National Consumer Credit Protection Bill

Legal Aid Queensland's ("LAQ") civil law services seek to make legal rights a reality for disadvantaged people. We provide community legal education, legal information, legal advice, extended assistance and casework services in relation to consumer issues.

We provide advice to approximately 50,000 people each year across all legal areas. Around 30% of those advices are in relation to civil law issues. We also have a specialist Consumer Protection Unit (CPU) with a focus on consumer credit which is staffed by 3 full time lawyers. That unit provides direct advice to over 1000 Queenslanders each year and conducts limited casework to the extent our resources permit. The unit gives priority to matters where there may be a more wide-ranging beneficial effect for all consumers and where clients have been victims of consumer injustices.

LAQ welcomes the opportunity to comment on the Bill.

LAQ has had the benefit of contributing to a submission on the Bill produced by National Legal Aid. ("NLA") The recommendations in that submission are supported and some further concerns and options explored this submission.

Access to Justice for Vulnerable Consumers

In LAQ's experience, many vulnerable consumers find it very difficult to access the protections offered to them due to the costs of running a court application and their inexperience with and fear of, the court system. This means they have difficulty in accessing justice without the assistance of lawyers.

One of the best examples of this concerns the ability of consumers to apply for a hardship variation to their loan under s.66 of the Queensland Consumer Credit Code. LAQ has developed a kit that allows consumers to access the hardship application procedure in the Courts. The kit sets out step by step what the consumer is required to do to make a hardship application and obtain a variation of their loan in an easy to follow manner. It also includes a precedent application and affidavit that a consumer should follow.

Despite this assistance, only 3 people (that we are aware of) in Queensland have used the kit to apply to a court to vary their loan pursuant to s.66 of the Code in the past 10 years. Contrast this with states with tribunals such as NSW where in the past year borrowers made 234 applications.

As a consequence, LAQ is of the view that recourse to hardship variations solely through a court process without funding for assistance does not provide meaningful access to justice. For this reason we strongly advocate for the availability of External Dispute Resolution (EDR) to all borrowers before a lender can take legal action to recover property or enforce a credit contract. We also advocate for funding for legal assistance to assist vulnerable consumers.

In the alternative, a specialist credit tribunal (as has existed in Victoria and NSW) is the best vehicle for providing access to justice in the absence of the availability of the EDR process.

Jurisdiction to bring proceedings

Legal Aid Queensland's primary concern with the Bill is that our clients will be disadvantaged unless creditors and their assignees are restricted from commencing court proceedings in locations convenient to the creditor but remote from the borrower.

LAQ supports the recommendation in National Legal Aid's submission which is reproduced below to rectify this serious access to justice risk.

Recommendation:

Amend s80 (3) to include

- An additional restriction to provide that any proceedings commenced by a credit provider must be instituted in the registry nearest to where the debtor resides at the date of filing and if that address is not known, at the address where the debtor resided at the date of the contract.
- The default notice containing a prominent heading at the top stating that it is a default notice and specifying that if legal proceedings are commenced they will be commenced at the court registry nearest to where the debtor resides at the date of filing and if that address is not known, at the address where the debtor resided at the date of the contract.
- If a credit provider issues proceedings in the incorrect jurisdiction:
 - The proceedings should be discontinued with the credit provider required to pay the debtor's additional costs incurred as a result of issuing in the incorrect jurisdiction on a solicitor-client basis; and
 - A relevant penalty prescribed in the legislation levied against the credit provider.

We make the comment that the Bill differs from the Uniform Consumer Credit Code (UCCC)¹ by de-linking the need to sue a borrower where the 'debtor is ordinarily resident' (s 6, UCCC). The consequence of this loss of nexus between the debtor's home and any court action will mean that creditors and their debt collector assignees will be at liberty to sue in, for example, Sydney for a client residing in a remote location². This creates particular difficulties for borrowers and does not support access to justice because:

¹ (meaning of UCCC as per glossary in the Exposure Draft Commentary, 27 April 2009)

² The UCCC provided that jurisdiction (s 6) was 'where the debtor is ordinarily resident'. S 177(1) provided for regulations to give effect to cross-vesting of administrative and judicial powers inter-state but there have not been any regulations enacted to give effect to this power.

S 80 UCCC provides for restrictions upon credit providers exercising their rights.

S 166 provides that if the credit provider's rights are assigned the UCCC applies to the assignee.

The UCCC provided for contracts to be made electronically (s164A(3)) and in those circumstances s 6 enabled the contract to be formed in the jurisdiction where the debtor resides. In the absence of s6 and the potential for expansion of on-line contracts there is significant uncertainty as to where the contract is formed.

- Low cost legal advice about proceedings in another state is not easy to access;
- Defending proceedings in another state (preparation and appearance) is extremely time intensive and costly for the borrower;
- Clients are usually put to the cost of video conferencing and telephone appearance or travel and accommodation even where a stay and transfer of proceedings is probable;
- Vulnerable consumers will be overwhelmed and unlikely to exercise their rights³.

Currently the UCCC (s 80) provides for restrictions upon credit providers exercising their rights. This section is an appropriate point in the National Code to flag obligations to credit providers considering court action.

The concerns about the potential impact of borrowers being sued in a State where they do not live are raised in the Commentary at 4.2 on p 119.

We agree with the commentary on p 120 that this may be a 'material barrier to justice for consumers'.

The difficulty even with a jurisdictional requirement, is that in the absence of a specific penalty, there is little incentive for a credit provider to comply as there is a strong likelihood of obtaining a default judgment unimpeded by a consumer who cannot physically access the registry or assistance.

It is not recommended that a jurisdictional restriction be able to be agreed between the parties given the imbalance of power between consumer and credit provider and the likelihood of standard terms reflecting credit provider convenience.

Currently a lack of jurisdiction does not prevent proceedings issuing but puts the onus on the defendant to raise the jurisdictional bar and request a stay of court action. There are many examples of poor consumer outcomes for consumers having difficulty accessing their rights even with the current law. Banks are not likely to sue consumers in a State where they do not reside but national debt collection companies are increasingly likely to do so.

The case studies below illustrate examples of individual injustice.

The following case studies set out the access to justice difficulties that are faced by vulnerable consumers if the additional requirement proposed by LAQ to be included as part of the requirements of a s.80 default notice is not adopted.

Case Studies from Legal Aid Queensland:

Case Study 1

A debt collector assignee insisted that a small amount was owing to a telecommunications company (now in liquidation). The Debt Collector commenced proceedings in Sydney and the client who had never lived outside Queensland and was a Centrelink dependent, single mother in very poor health, did not take action when served with the court claim. At all times, she denied that the debt was due and if it was due, the money had been owing for more than 6 years.(which suggested that the claim was statute barred). Many months later and without any notice to the client, the Collector proceeded to obtain an order in a Sydney court which garnished her bank account, taking in excess of \$6 000 (received as a result of the Federal Government's economic incentive), leaving the client destitute with insufficient funds to purchase groceries.

³ The Commentary refers to debtors being particularly vulnerable in the absence of the ability to afford a defence or in the absence of capacity to seek assistance at p 120, *Background*.

Case Study 2

A client living in Bundaberg in Queensland was served with a court claim filed in Sydney in relation to an overdue bank credit card debt. He had never lived outside of Queensland. He accessed legal advice and the Debt collector assignee who had commenced proceedings agreed to a stay to enable the client to obtain access to the bank statements and get legal advice. The National Debt collector maintained that it could commence proceedings in NSW invoking the jurisdiction of the Consumer Credit Code (Queensland) and that it did not have an obligation to commence proceedings in the place where the debtor resided.

In the last six months, Legal Aid Queensland has seen a marked increase in Debt Collectors commencing proceeding in NSW for debts regulated by the Queensland Consumer Credit Code. It is our view that the lender is unable to do this on the grounds that the NSW court does not have the jurisdiction to hear Qld matters without an express cross vesting of the legislation.

Case Study 3

Clients, husband and wife, owed approximately \$220 000 on their mortgages.

Debt Collector had purchased a personal loan debt from a bank and claimed \$7 714.17 together with further costs ("the debt") as a result of a judgment entered against them in New South Wales in May 2007.

The clients have not lived in NSW for more than 10 years.

Clients received a phone call in January 2009 left on their home answering machine claiming that the caller had purchased the property at a bailiff auction and demanding that the client's provide vacant possession.

The property had been sold for \$20 000 pursuant to warrant for execution taken out by the Debt Collector without any notice in writing or by telephone or face-to-face with the clients.

The female client was permanently employed but the male client was suffering from mental health problems preventing him from working. The clients do not have any credit cards and their bills were almost up to date.

The home is a three bedroom, one bathroom, low set house with one garage. The home was sold for \$20,000 despite it being valued at \$325,000.

The clients originally took out a personal loan in August 2001 in Queensland for \$8225 with Westpac Banking Corporation. It was their understanding that they had paid approximately half this loan when the male client became ill and consequently ceased regular payments.

The clients were not given an opportunity to vary the loan due to hardship pursuant to s 66 Consumer Credit Code. The loan was originally a consumer credit card debt. The client was not given an opportunity to re-pay the debt by installments or any option at all. The client had an unencumbered car that could have been sold to meet the debt.

The clients, distraught, sought legal assistance and had lost approximately \$100 000 in equity in their home as a result of the sale, subject to existing encumbrances, for \$20 000.

Case Study 4

Mrs X, a working mother of four, had recently separated from her husband. She had been in poor health over more than 18 months and from September 2007, underwent 5 separate operations on her bowel. Mrs X had informed us that her estranged husband was an alcoholic who has been violent towards her during their marriage.

- She had three credit card debts, two with Bank A and one with Bank B. The balances were:*
- \$3348.85 and \$1938.98 for Bank A debts; and \$3511.69 for the debt owed to Bank B.*
- Both banks, dissatisfied with Mrs X's failure to keep up with repayments, sold the debts to Company C a company which buys and collects debts. Company C then amalgamated the small debts and filed a claim in Sydney, in the Downing Local Court (where Mrs X has never lived) for a total of \$8,799.52.*
- Mrs X, had the care/custody of her four children and given her ongoing hospitalisation and ill health had little prospect of being able to defend proceedings launched in another State. Even if she was healthy, she could not afford the expense of travelling to Sydney to defend the proceedings as she has no money.*

Company C obtained judgment in Sydney with little supporting documentation, then registered the judgment in Queensland. Without any further communication with Mrs X, the company took out a warrant of execution for sale of the family home which Mrs X owns as a joint tenant with her husband subject to a mortgage with a deposit taking institution. Mr X has nothing whatsoever to do with the credit card debts (except in so far as each of the husband and wife have family law rights against each other.)

Mrs X approached Legal Aid Queensland's Consumer Protection Unit.

She had received less than 2 week's notice of the auction date for her share of the property, which was given to her by her neighbour who saw strange people walking through her property. The auction was going to proceed on Tuesday 16th December 2008, less than 10 days before Christmas.

A forced auction of a half share of the home, subject to existing mortgage would not have realised sufficient proceeds to pay out current debts and would have left Mrs X and her children homeless at short notice before Christmas.

- After refusing any attempts to negotiate, Company C had finally, only after the intervention by the Australian Securities Investment Commission, agreed not to proceed with an auction of the home on 16 December 2008. Mrs X then obtained permission to sell her house. She sold the house for its full and current market value. Mrs X has now paid out all her creditors and is debt free.*

Caxton Legal Centre, a community legal centre in Brisbane has also seen a significant number of clients after judgment is entered in interstate courts.

From a service delivery point of view, matters commenced interstate are extremely resource intensive to assist with. A client being sued in NSW cannot just be advised and sent away to get on with running their matter. In almost every case, extra work has to be done for them, including drafting of documents, linking with interstate services and negotiating with the other party. It is probable that for important cases, town agency arrangements would need to be organised. Needing to respond to these matters means that Legal Aid Queensland's and Caxton Legal Centre's low cost model of advising and assisting large numbers of consumer law clients is compromised.

Cases from Caxton Legal Centre, a community legal centre in Brisbane-

Case Study 5

Client A came to see us at Caxton Legal Centre because she had been served with a statement of claim from the Downing Centre Local Court in NSW for a debt of around \$7000 from an unspecified source. The client thinks that the debt may be related to a personal loan she had, and was a couple of payments short of paying out, when she stopped payment in 2001. If it is related to that, the loan was obtained from a bank branch in Queensland. We wrote to the debt collection agency which was suing her and said that the debt was statute barred and proceedings were commenced in the wrong jurisdiction. With pressure, they discontinued proceedings in the Downing Centre. They are yet to provide any information which indicates that there is a legal basis for their continued pursuit of our client.

Case Study 6

Client B brought a large item door to door in her home in suburban Brisbane in 2004. There was a linked credit contract. About 4 months later, our client returned the item to the seller who assured her that there was no need to do anything else, that there would be no more to pay as the item was returned. The client heard nothing more until proceedings were commenced in NSW in 2009. The client now has the difficult task of responding and making submissions to the court in NSW about transferring proceedings so a substantive defence can be mounted here in Queensland. Caxton Legal Centre accessed help from Redfern Legal Centre to advise the client about process but the practical hurdles remain considerable.

Case Study 7

Client C came into our debt advice service in relation to a claim by an insurance company for damage to a rental car. The client, who lives in Queensland, rented the car directly from a shopfront in Queensland and the (alleged) damage occurred here. The insurance company elected to commence proceedings in the Victorian Civil and Administrative Tribunal (VCAT). The client was able to organise a telephone attendance for the first court date and he will make submissions about jurisdiction at that attendance. It is fortunate that VCAT allows telephone attendance; our experience of the NSW courts (excluding the Consumer Trader and Tenancy Tribunal) is that they will not.

No right to bring Court action to recover a debt without a mediation certificate

LAQ advocates the adoption of a system similar to that which currently operates in the Family Court of Australia. Family Court action cannot be brought by either party to a dispute unless they possess a mediation certificate that confirms that the parties have attempted mediation and not been able to resolve the dispute.

Similarly in terms of credit law, LAQ supports the introduction of a system that would require a credit licensee to hold a certificate that confirms that they and the vulnerable consumer have accessed EDR to resolve the dispute before Court proceedings are commenced pursuant to s 80 of the draft National Credit Code (NCC).

The requirement to obtain the certificate could be waived when a creditor is exempted from providing a notice pursuant to s 80 to a borrower before commencing court proceedings.

Small Claims Jurisdiction – REM 120 & C100

Part 4.3 of the Bill and specifically section C100 specifies the circumstances in which a plaintiff may access the small claims procedure in the Federal Magistrates or a state Magistrates Court. LAQ notes that with the removal of the Federal Magistrate's Court, an alternative commonwealth forum will be needed to allow vulnerable consumers access to justice in a small claims proceeding. As outlined above, LAQ submits that the best means of achieving access to justice for vulnerable consumers is through a specialist credit tribunal that would possess the expertise to assist vulnerable consumers.

However, in addition to the development of a specialist tribunal, LAQ also advocates that changes be made to the Small Claims Procedure that is set out in the Bill in order to ensure greater access to justice for vulnerable Consumers.

Specifically, the small claims procedure is triggered when:

- (a) a person applies for an order under section REM 120, which sets out when a Court may order a person in breach of the Act to pay compensation for the loss and damage suffered by a consumer;⁴
- (b) when a consumer requests a hardship variation under section 68 of the NCC;⁵
- (c) when a consumer requests a postponement of their loan under section 88 of the NCC;⁶ and
- (d) when a consumer requests compensation for a breach of a key requirement under the NCC pursuant to section 107.⁷

LAQ supports vulnerable consumers, with legal assistance, being able to settle these issues in a cost effective and efficient manner using the small claims procedure. However, LAQ is concerned by the potential effects of the jurisdictional limits placed upon awards that may be made by the Court pursuant to section C100(2) of the Bill.

This section restricts awards of compensation made under REM120 of the Bill for breaches of the Act which cause a consumer loss or damage to \$20,000 or any higher amount prescribed by regulations.

LAQ is particularly concerned by the application of this provision with respect to the Responsible Lending Conduct provisions set out in Chapter 3 of the Bill.

Firstly, LAQ points out that if a licensee providing credit assistance breaches sections R190 or R192 of the Act which make it an offence to suggest or assist a consumer to enter or remain in an unsuitable credit contract or increase the credit limit under a credit contract to an unsuitable level., the loss suffered by a vulnerable consumer is likely, in many cases, to greatly exceed \$20,000.

Similarly, if a credit provider breaches sections R250, R260 or R265 of the Act which requires them to undertake a proper assessment of the suitability of a credit contract for a consumer before granting it to them, will also see vulnerable consumers suffer losses which far exceed \$20,000.

LAQ sees no reason to restrict the compensation that may be claimed by vulnerable consumers, who are often unable to afford to take Court action to \$20,000 or less for a breach of the

⁴ C100(1)(a)(i) National Consumer Protection Bill 2009

⁵ C100(1)(a)(ii) National Consumer Protection Bill 2009

⁶ C100(1)(a)(ii) National Consumer Protection Bill 2009

⁷ C100(1)(a)(ii) National Consumer Protection Bill 2009

Responsible Lending Provisions by the Licensee in circumstances where in a majority of cases the loss and damage suffered the a vulnerable consumer will be significantly larger than \$20,000.

The best examples of this are:

Case Study 8 – Credit Card Limit Increases

Mr and Mrs S are pensioners, aged 86 and 79, living in a medium sized Regional Queensland town. Mr S is a war veteran who has been receiving the war veterans pension for the last 30 years. This pension has been the only source of income that Mr and Mrs S have received for the last 30 years.

Mr S first applied for a credit card with Bank Z 20 years ago. He was assessed and given a credit card limit of \$5,000. Over time, Mr and Mrs S received a number of unsolicited credit card limit increase offers, which they signed and returned. This has resulted in a credit card Limit of \$43,500. At no stage was any reassessment of Mr and Mrs S ability to afford any of the new credit limits undertaken by Bank Z. At no stage during this period has Mr and Mrs S income increased and at all times their only income was the War veterans pension received by Mr S.

Mr and Mrs S now owe in excess of \$33,000 on the credit card. They are not in default because they continue to meet the minimum monthly repayment level because they have not bought any clothes for the past 10 years and obtain all of their food from the Local Op Shop and from hand outs from a number of charities..

The failure of Bank S to undertake any form of responsible lending practices by assessing Mr and Mrs S's capacity to repay the new credit card Limit has caused Mr and Mrs S loss and damage in excess of \$20,000 because they now will never in a position to repay all of the balance owing on the credit card. They are only able to meet the minimum monthly payments under extreme hardship.

Mr and Mrs S cannot afford to take this matter to court. Their case demonstrates the need for a Small Claims procedure, so parties like them can access low cost resolution of their legal problems. However, there is no reason on the facts of Mr and Mrs S case that their compensation should be restricted to \$20,000 given the utter failure by Bank Z to follow any Responsible Lending Practices and assess their ability to repay.

Case Study 9 – Mortgages

Mr and Mrs K obtained a mortgage of \$500,000 to purchase a house in Queensland with Bank T. When the initial assessment of their capacity to pay was undertaken, Mr and Mrs K had the ability to repay the loan.

Mrs K subsequently became severely ill and required around the clock care from her husband. This care necessitated that he give up his job and take on contract work from home that provided a less stable and more sporadic income.

It was about this time, Mr and Mrs K applied for a variation on their mortgage, which included an increase of \$60,000 in the amount they borrowed under the mortgage for home improvements to assist with Mrs K's medical care. At this time, Mr and Mrs K had already defaulted twice on the mortgage but had been able to catch up on the arrears owing. Bank T were advised of the changed circumstances regarding Mr K's employment and Mrs K's illness and still approved the loan.

Mr and Mrs K quickly fell into default under the new loan arrangements. They were 6 months behind on the loan repayments. Mr and Mrs K realised they needed to sell the property before they lost further equity in their house and asked for time to sell the property and for payments to be reduced due to hardship while the property was being sold.

Instead of assisting Mr and Mrs K in the way requested, Bank T offered them a further \$40,000 variation to their loan for the express purpose of making mortgage repayments while the House was being sold.

This approach was clear equity stripping by Bank T, in addition Bank T made no effort to assess their capacity to repay in circumstances where they were already in default on their existing varied mortgage.

Mr and Mrs K have no money to take this matter to Court and should be able to access compensation using the small claims procedure for what would be a clear breach of the responsible lending provisions of the new Act.

LAQ sees no valid reason for Mr and Mrs K (and other vulnerable consumers like them) to have their compensation restricted to \$20,000 in circumstances where the loss they suffer as a result of a breach of responsible lending provisions far exceeds this amount.

Recommendation: Clarification of threshold for hardship applications

LAQ proposes that the limits on the award of compensation for a breach of the new Act, which is set out in C100(2) should be increased from \$20,000 to \$75,000.

Compensation for Hardship, Postponement and breaches of Essential Requirements of the Act under C100(1)(a)(ii)

LAQ is concerned that it is not clear whether the jurisdictional limit for the Federal Magistrates Court exercising the small claims procedure set out in C100(2) of \$20,000 also applies:

- (a) to hardship or postponement applications brought by a vulnerable consumer before the Court that a licensee has considered but not approved; or
- (b) to claims for compensation by vulnerable consumers for a licensee's failure to consider hardship and/or postponement applications; or
- (c) to compensation orders for breaches of key requirements of the Credit Code under section 107 of the new NCC.

With respect to hardship and postponement applications, in almost all cases where a vulnerable consumer requires a hardship variation or a postponement of their loan pursuant to section 66 or 88 of the Code, the loan amount is in excess of \$20,000. It would not make sense for the threshold set out in C100(2) to apply to hardship or postponement applications using the small claims procedure. LAQ seeks urgent clarification of this point.

Where a licensee does not properly consider a hardship or postponement application or where a licensee does not comply with a key requirement of the Credit Code, in many cases the consumer's loss will exceed \$20,000. LAQ sees no reason why the jurisdictional limit should apply to compensation claims made pursuant to section 107 of the Code which use the small claims procedure.

Changes on the grounds of hardship

LAQ endorses the submissions of National Legal Aid concerning Changes on the grounds of hardship to a consumers loan. In addition, LAQ wishes to make the following submissions on the practical operation of EDR Schemes being sued for the assessment of hardship.

External Dispute Resolution Schemes and the assessment of hardship

One of the major reasons that the draft Bill requires that all creditors must be a member of an approved external dispute resolution scheme is to allow all consumers and particularly vulnerable consumers the opportunity to obtain a free and impartial assessment of their hardship variation applications by an ASIC approved External Dispute Resolution Scheme. It is based on the underlying assumption that it is consumers and not the creditors who drive the legal process when a consumer falls behind on their loan repayments and the lender is forced to send a default notice under s.80.

Practically the exact opposite occurs in Australia. In our experience, creditors initiate proceedings and vulnerable consumers are then, if fortunate, made aware of their rights pursuant to the UCCC. We believe that there are a number of reasons for this. Consumers have tried negotiating with the lender and when those negotiations have broken down tend to await the next step from the creditor. Consumers, from our experience and research conducted in NSW believe they have a financial rather than a legal problem and that they do not have any rights. Often consumers do not believe that the situation is serious enough to seek legal assistance until they receive Court documents like a Claim and Statement of Claim. This is highlighted by LAQ's experience that 82% of all people that we have advised on the issue of repossession so far this financial year were already in receipt of a court claim.

Similarly we are informed by the Credit Ombudsman (who assists borrowers when hardship applications are not properly considered by members) that only 10% of complainants accessed the Credit Ombudsman Service Limited's (COSL) service before a s 80 notice was served and half of all hardship complainants access the service after court proceedings are commenced. (unlike the Financial Ombudsman Service (FOS), COSL will in limited circumstances accept complaints after court proceedings are on foot.)

The key point to draw from these statistics is that it is lenders and not consumers who drive the default and hardship process. The consequence of this is that most cases that involve a consumer's default on a mortgage or on a personal loan have court proceedings that have already been started before consumers and particularly vulnerable consumers act.

The reason the practical operation of the default process is important is that the two main ASIC approved external dispute resolution schemes, the FOS will not look at complaints concerning cases that are already or have been the subject of Court proceedings. COSL will only consider complaints that are the subject of court proceedings if the lender has not given the person the opportunity to apply for a hardship variation.

This is highlighted by

1. FOS http://www.fos.org.au/centric/home_page/about_us/faq_banking_finance.jsp

Who say:

“If your dispute with your financial services provider is or has been the subject of court proceedings, the Financial Ombudsman Service cannot investigate the dispute. In this case, you should seek legal advice about what options may be available to you.”

2. COSL at

<http://www.creditombudsman.com.au/4517.01.1-0-Complaints+Covered.php>

Who say:

“if your complaint is already the subject of proceedings before a court, tribunal, arbitrator, other ombudsman or other Dispute Resolution Scheme, or is under investigation by any ombudsman (unless both you and the Member consent in writing to your complaint being considered by the Credit Ombudsman)

- if your complaint is, was or becomes subject to proceedings before a court, tribunal, arbitrator or other ombudsman or dispute resolution scheme (unless both you and the Member agree to the complaint being heard by COSL)
- if your complaint has already been determined by a court, tribunal, arbitrator or ombudsman, or other dispute resolution scheme (unless the proceeding leading to the determination commenced after our receipt of your complaint)
- if the complaint is more appropriately dealt with by a court, tribunal, arbitrator or another dispute resolution scheme
- if the complaint involves an issue which the Member believes might have important consequences for the Member or the credit industry or raise an important or novel point of law”

The practical effect of this is that currently, if a dispute concerning a mortgage default or default on a personal loan is already in Court, FOS will not examine any hardship applications. In addition, COSL will only consider a hardship application from the perspective of whether the lender has afforded the debtor natural justice by offering a hardship application. Neither scheme undertakes an assessment of whether the hardship application is fair and reasonable in the circumstances and whether or not the lender’s acceptance or refusal of the hardship application is reasonable in the circumstances.

Given that 8 out of every 10 people who seek advice concerning repossession and a hardship variation of their loan, already have cases that concern their application in Court, compulsory membership of an ASIC approved EDR Scheme will not, of itself, assist the majority of Australians requiring a hardship variation of their loan to gain that assistance from an EDR Scheme.

The consequence of this approach by the EDR schemes is that thousands of vulnerable Australians will not have the opportunity to avail themselves of the protection that the Government and this Bill is attempting to provide them unless they fall within the narrow consideration of hardship applications, once a case is in Court, offered by COSL. A solution to this would be for ASIC to require all EDR Schemes to consider hardship applications despite Court action and to stay Court action pending resolution of the hardship application.

Access to Justice - Assessment of the Merits of a Hardship Application

The additional problem with the procedure set out in the Bill is that neither FOS nor COSL has the power under its terms of reference to make an assessment of the reasonableness of the hardship

application made by a debtor and of the lender's response to the hardship application. They also lack the power to substitute the lender's decision with a fresh decision.

LAQ submits that for the proposed system of EDR Schemes' assessment of hardship applications to work effectively, all EDR schemes must be able to undertake an assessment of the reasonableness of the hardship variation sought by the consumer and the reasonableness of its acceptance or refusal by the lender. This is an assessment that they currently view as a commercial decision of the lender and outside the scope of an EDR scheme. For the sake of efficiency, it should be possible for a decision to be substituted through the EDR process.

Stay of Court Proceedings to allow assessment of a dispute and hardship application by an EDR Scheme

LAQ seeks to assist more vulnerable Queenslanders being in a position to access EDR. This means stopping court proceedings while a claim is considered in EDR.

LAQ proposes including another General Conduct Obligation of Licensees under LIC170 (1)(n) which requires a licensee holder to stay any Court Proceedings that have been started against a consumer when they bring a dispute before an EDR scheme including where they are seeking an assessment of a hardship application. This additional obligation would ensure that the aim of the Bill to allow consumers greater access to EDR schemes for the assessment of hardship applications when they fall into difficulty on a loan would be achieved.

Furthermore, any EDR scheme seeking the approval of ASIC would have to include in their terms of reference the ability to hear complaints about a hardship variation, not only from the perspective of whether a hardship variation has been offered but also be able to undertake an assessment of the reasonableness of a hardship variation being offered by a debtor to a lender and if, appropriate substitute or decide the application.

Access to EDR Schemes – Consequences of a National Code

Another concern that LAQ has is accessibility of the approved External Dispute Resolution Schemes to consumers outside of Sydney and Melbourne.

Currently FOS is based in Melbourne and COSL in Sydney.

LAQ submits that as part of the greater responsibility and prominence that is being placed upon EDR Schemes under the National Consumer Protection Bill and Code 2009, EDR Schemes should be under a corresponding obligation to increase their presence in states other than New South Wales and Victoria. This increased presence will allow consumers in all states better access to the services offered and assist in achieving the Bill's goal of making EDR Schemes the pre-eminent way of resolving disputes between creditors and debtors.

This increased presence by EDR Schemes should include, at the very least, an office in the Capital City of each State and Territory. LAQ holds the view that such a presence is appropriate because each State and Territory will face different issues and different types of complaints that require referral to an EDR Scheme because there is variation in the markets operating in each region of Australia. These differences are highlighted by each State and Territory's different demographics and the different strengths and weaknesses in regional economies. Without staff on the ground in each of these States and Territories. EDR Schemes risk being inaccessible to vulnerable consumers with language and communication difficulties.

It is important that, even though a National Consumer Protection Bill and Consumer Credit Code is enacted that national regulators and the government ensure that all services are accessible

throughout Australia. This requires both EDR Schemes and the providers of legal advice to consumers to be headquartered in each capital city of all Australian States and Territories and then be able to effectively provide services to those vulnerable consumers in regional areas as well. LAQ with its Head Office in Brisbane, 13 Regional offices and 47 community access points has extensive experience of overcoming barriers to justice which impact on our clients. We are aware that in order to raise awareness of service it is critical to partner with existing service providers and ensure that community agencies are aware of the options for local borrowers and their families.

Responsible Lending Conduct – The Practical Operation of Chapter 3

LAQ supports the idea of responsible lending conduct being a requirement of the National Consumer Credit Code but does not believe that responsible lending requirements should be linked solely to licensing. Instead, LAQ submits that responsible lending provisions should be free standing provisions in the NCCC that allow not just the Licensing Regulator but consumers to bring irresponsible lenders to account in the courts.

In addition, LAQ cannot support the responsible lending provisions in their current form because they do not provide adequate protection for consumers from irresponsible lending and from usurious interest rates.

Division 2 Credit Guide

LAQ supports the idea of ensuring that all persons or organisations providing credit assistance should be required to provide information that makes it clear who a consumer is dealing and their remedies if those providing credit assistance do not comply with their obligations.⁸

Case Study 10

LAQ recently assisted an elderly client, Ms L who had a small personal loan with one of the major banks 9 years ago which had \$5000 owing on it when she last made a payment six years ago. The debt had been sold to Debt Collector C who, despite recovery of the debt being statute barred, proceeded to make twice daily phone calls demanding that Ms L make a payment on the loan or she would be taken to court. When she requested information about the company and the debt, which she did not remember, she was told that she had no right to information about the company and that court proceedings would tell her all she needed to know. By the time she sought advice from Legal Aid, fearing the embarrassment of court, she had made a payment and re-enlivened a stale debt, primarily because she had not received information from the new debt collector.

From a practical perspective, LAQ is concerned that inundating consumers with yet another document in the form of a Credit Guide may not necessarily assist in their understanding of the debt that they have entered into. There is the likelihood of Consumers receiving up to 4 different credit guides for each and every debt that they possess.

From the perspective of vulnerable consumers who have multiple small debts with multiple organisations, this approach risks causing them enormous confusion without increasing awareness of rights and obligations.

R230, R330, R430 requires credit providers, credit representatives of credit providers and authorised debt collectors of credit providers to each provide a consumer with a credit guide if and

⁸ R130,230,330 and 430 of National Consumer Protection Bill

when they enter into communication with a borrower. LAQ supports the provision of information at the time the borrower could use the information, that is, prior to point of sale, upon default and upon assignment. Providing copious documents at the time a contract is signed dissuades a borrower from assimilation of relevant information as they are usually, at that point, committed to the purchase, or, only focused on salient information such as the interest rate, duration of loan and amount and date for repayments.

LAQ also points out that the mere provision of a credit guide to vulnerable consumers by a credit provider or representative will not provide for a fairer system for consumers unless it is accompanied by a corresponding change in the attitude of credit providers that ensures that they attempt to assist vulnerable consumers in trouble instead of prioritising rapid collection of debt.

Case Study 11

LAQ recently assisted Ms Y, a client, who had suffered a stroke, who had 2 credit card debts worth \$3,000 and \$1,500 and 1 personal loan that was \$2,500 in arrears. By the time LAQ became involved, Ms Y had received letters from 4 different organisations about the first credit card debt, 3 organisations about the second credit card debt and 3 different organisations about the personal loan. She was unsure who she needed to talk to and in her attempts to ring the credit providers involved had not been informed who was currently in charge of resolving the debt owed in each case.

Under the proposed Bill, credit providers and their authorised representatives would have been required to provide 10 different credit guides to the consumers. Apart from the added confusion that this would have caused Ms Y, the provision of credit guides is toothless if, as seen in this case, a vulnerable consumer's attempts to work out her debts were met with a lack of compassion and a disclaimer of responsibility. None of the responsible lending conduct provisions specifically address the concerns for this vulnerable consumer.

Credit Assistance Providers

LAQ acknowledges that R130 and R135 attempt to ensure that finance brokers do not over-charge vulnerable consumers for their financial assistance when they recommend loans or assist vulnerable consumers to consolidate debts and manage their finances.

LAQ particularly supports the requirement in R135(2)(b) which forces credit assistance providers to disclose the maximum amount of fees and charges incurred by the licensee in providing the credit assistance⁹ and the maximum amount of fees and charges that will be payable by the licensee to another person.¹⁰

Such disclosure assists in the management of the risk that vulnerable consumers will be faced with unexpected fees and charges as they attempt to get their finances under control.

LAQ supports the expansion of the credit quote requirement in R135 to credit providers when a vulnerable consumer is applying for a loan. In particular with respect to payday loans, LAQ has seen the practice developing where brokerage fees being charged by a payday lender are included on Page 8 out a 14 page contract and therefore are not clearly revealed to a client.

⁹ R135 (2)(b)(i) and (ii)

¹⁰ R135 (2)(b)(iii)

Case Study 12

LAQ assisted Mr H, a client with a number of debts, who sought a 6 month loan of \$1,000 at 48% per annum interest rate with Company J. Page 4 of the 8 page contract mentioned the possibility of a brokerage fee being charged and Page 7 of the contract contained a schedule of brokerage fees payable on loans of differing amount that could be taken out from that company. However, the loan application was filled out for \$1,000 and it wasn't until after Mr H received the loan documents back that he discovered that a \$350 brokerage fee had been charged to refer the loan to Company J's parent company. Mr H indicated that had he been informed about the brokerage fee up front in the manner suggested by the Bill for credit assistance providers, he would not have taken out the loan.

Preliminary Assessment of the Unsuitability of Credit – Part 3 Division 4

LAQ supports the concept of requiring holders of an Australian Credit License to make a preliminary assessment of the unsuitability of a credit contract for vulnerable consumers. However, LAQ does not support the responsible lending provisions as they are expressed in Division 4. As highlighted earlier, they do not meet the requirements of a responsible lending framework set out in the Commonwealth Privacy reforms and from a practical perspective will not result in a proper assessment of whether a credit contract is suitable for a vulnerable consumer.

Specifically, LAQ refers to the requirements in R160(1)(a) that a licensee make reasonable inquiries about the consumer's requirements and objectives in relation to the contract and R165(1)(b) that a credit contract will not meet the consumer's requirements and objectives at the time the contract is proposed.

This requirement appears to require an assessment of a vulnerable consumer's personal attributes with respect to the credit contract. LAQ does not see any valid reason for assessing a consumer's personal attributes (disability, ethnicity or citizenship status) as relevant to whether a credit contract is unsuitable or not for a consumer.

Instead, LAQ advocates that any assessment of the suitability of a credit contract for vulnerable consumers should involve:

- (a) Ensuring the consumer is fully informed;
- (b) Assessing whether the product is appropriate to the consumers financial circumstances and needs; and
- (c) Assessing whether the consumer has the ability to repay.

A proper assessment of these factors by the licensee assessing credit suitability of a credit contract will ensure that consumers receive credit products that are suitable to them. On this point LAQ would highlight the records of the Step-up and other micro loan Programs run by NAB and Good Shepherd Youth and Family Service and the Progress Loans Program run by the ANZ and the Brotherhood of St Lawrence who make micro loans to the most vulnerable consumers in our society who have default rates of less than 2% on their loans because a proper assessment of the ability to repay is undertaken. They do not make any assessment of the consumer's requirements and objectives at the time of the loan but instead focus on the criteria outlined in (a)-(c).

LAQ is concerned that a focus on objectives and requirements of the consumer will lead to inappropriate credit contracts being granted to vulnerable consumers who cannot afford to repay them.

Case Study 13

LAQ recently assisted a mother of two, Ms L who bought a Maths Computer Tutor program for \$5,500 with accompanying finance because she wanted to improve the Maths performance of her two children.

It is arguable that a credit contract to finance improved opportunities for Ms L's children does fit the consumer's requirements and objectives. However, the credit company failed to correctly assess that Ms L already had a number of responsibilities that depending on the overtime she received she was likely to fall between \$10-50 a week short on the repayment under the loan. She was unable to meet the repayments unless she received 8 hours of overtime a fortnight, which did not occur in every fortnight..

The Lender admitted that Ms L's focus on getting the finance to help her children swayed them to grant the loan in circumstances where an assessment of her financial circumstances and ability to repay would have seen the finance denied.

Recommendation:

LAQ recommends that the requirement on licensees to assess the consumer's requirements and objectives as part of the suitability of a credit contract be removed because it takes away from what the focus of assessing the suitability of a credit contract should be, that is:

- (a) Ensuring the consumer is fully informed;
- (b) Assessing whether the product is appropriate to the consumers financial circumstances and needs; and
- (c) Assessing whether the consumer has the ability to repay.

Providing the consumer with the assessment

R170 allows a consumer to request a copy of the preliminary assessment made by a licensee of the suitability of a credit contract for them.

Recommendation:

LAQ recommends that instead of consumers having to request the preliminary assessment of their credit suitability, licensees should be required to give that assessment to consumers when they finish the assessment without consumers having to request a copy.

LAQ is also concerned that R170 (2) requires the licensee to give the assessment in the manner (if any) prescribed by the regulations. LAQ notes that the manner of the credit assessment is not prescribed by the regulations.

LAQ is concerned that this approach may lead to a wide variation in the amount and type of information provided to consumers in the preliminary assessments. This variety in the type and scope of information provided to consumers is likely to cause them a great deal of confusion as to why their applications for credit are being refused or accepted.

Recommendation:

That a new Form be included in the National Consumer Credit Protection Regulation concerning Preliminary Credit Assessment pursuant to R170 (2) which specifies what must be included by a licensee when it provides a preliminary assessment to a consumer.

This Form must require a licensee to include the following information about the preliminary assessment they have undertaken of a consumer's suitability for credit.

1. The Consumer's Income and its sources;
2. The expenses of the consumer including any already existing loan repayments;
3. The fortnightly repayments required under the loan;
4. A list of any fees and charges under the Loan and the proposed interest rate;
5. A list of all the information and sources the licensee used to make the assessment;
6. The licensee's decision concerning whether the credit contract sought by the consumer is suitable for them.

REM 190 – Relief from liability for contravention of Civil Liability Provision

Meaning of Honest and Fairly in the Circumstances

LAQ is concerned by the vague test set out in REM190 that allows a licensee to be excused from liability for a breach of a civil penalty provision if they have acted honestly and it is fair in all the circumstances to excuse them from some or all of their liability.

Consumers, consumer advocates and the courts assessing whether a licensee has acted honestly in the circumstances have little or no guidance which will allow them to assess conduct in the context of responsible lending.

Recommendation:

That the Bill should provide more guidance about the circumstances in which a licensee will have acted honestly in the context of responsible lending. Part of this guidance should include a requirement for a lender to check the sources of all information they are using to make a preliminary assessment of a consumer's suitability for credit.

Assessments by Finance Brokers

LAQ is concerned that allowing a licensee relief from liability for the contravention of a civil liability provision (responsible lending conduct), will not overcome the problems currently faced by clients of LAQ in dealing with finance brokers. We have seen many cases where finance brokers (credit assistance providers) do not make a full assessment of a consumers ability to repay, and the lender (credit provider), relies solely upon the broker's assessment and does not require a complete assessment themselves of the consumers ability to repay.

What usually follows is when the loan goes bad, the credit provider blames the information provided to them on a form by the finance broker.

In these circumstances, LAQ sees no reason why a credit provider should avoid liability for a contravention of the responsible conduct set out in Chapter 3, unless they have also done an assessment of a vulnerable consumer's ability to repay the loan and a preliminary assessment of the consumer's suitability for the credit contract sought. A credit provider cannot have acted honestly and fairly (reasonably) in the circumstances unless they have received the broker's

assessment of the consumer's suitability for credit and then conducted their own assessment before granting the contract, which should, at the very least include complying with their own responsible lending obligations and should require them to check the accuracy of the information provided to them by the consumer and the broker. A credit provider should not be able to avoid liability under REM 190 because they have relied on the assessment of a finance broker to meet their own responsible lending requirements.

Both finance brokers and credit providers should be separately liable for the breach of Responsible Lending Conduct provisions in circumstances where the credit provider has relied on a finance broker's assessment of a consumer's ability to repay without conducting an assessment of their own.

Case Study 14

LAQ recently assisted Mr T, who lives in Western Queensland and obtained a loan to purchase a house for \$190,000 despite the fact his only income is a disability support pension. Mr T used a finance broker, to whom he gave correct financial information including his income and current liabilities. The Finance broker assessed him as being able to repay the loan and then forwarded the loan to Company I who approved the loan on the basis of the information provided by the broker and did no further checks. The difficulty was that on the information provided to the credit Provider, Mr T's income had been doubled.

Mr T fell into default and lost the house. For the purposes of REM190, it is not clear that both the credit provider and broker would be liable for a breach of the responsible conduct lending provisions. Because "honest and reasonable in the circumstances" is vague and not defined in the Bill, there is at least an argument that the credit provider may be exempted from some liability for their breach under REM190.

Recommendation:

LAQ recommends that the Bill should clearly state that a credit provider and any of their representatives will not be excused from liability under REM190 for a breach of their responsible lending obligations under Chapter 3 in circumstances where they have relied on the assessment of a consumer's ability to repay a loan made by a finance broker without themselves also assessing the consumer's ability to repay and the sources on which a finance broker has made that assessment.

Equity Stripping

LAQ supports the comments made in the commentary to the Bill¹¹ that one of the objects of the Bill is to prevent equity stripping when licensees are dealing with vulnerable consumers.

However, LAQ is concerned that the importance of preventing equity stripping for vulnerable consumers is not highlighted in the Bill itself. The reason for this is that it is not clear from the Bill in its current form that Parliament intends to stop and has legislated with the intention of stopping this practice.

¹¹ Explanatory Memorandum Pages 20,100,101 and 140.

Recommendation:

The Bill should include, as part of the Responsible Lending Conduct provisions a provision that makes equity stripping a specific offence to ensure that vulnerable consumers are protected from abuse of this type.

A Vulnerable Consumer's Ability to make Minimum Repayments but not reduce the Principal owing

LAQ points out that the responsible lending provisions do not address the circumstance where a consumer can meet the minimum repayments owing on a credit card but will never be able to repay the debt. The consequence of such lending is that a vulnerable consumer is trapped in a debt spiral that they are unable to get out of.

Under the responsible lending conduct provisions, it is open for a credit provider/licensee to argue that they have lent responsibly because they have assessed the vulnerable consumer's ability to repay and they are able to meet the repayments.

Such an interpretation, while technically correct, cannot be allowed to be open to licensees because of the incredible hardship that it causes vulnerable consumers.

Case Study 15

LAQ has recently assisted Mr and Mrs K two pensioners who obtained a credit card 10 years ago with a limit of \$8,000. At the time, Mr and Mrs K received an old aged pension but no other income. Over the past 10 years, Mr and Mrs K have received a number of unsolicited credit card offers which have seen the credit card limit increase to \$33,000. They currently owe \$21,000 on the credit card.

Mr and Mrs K signed all the unsolicited credit card increases and have never missed one repayment on the loan. However, the reason for this is that making the minimum repayments and their rent takes up 90% of their pension. The remaining 10% is spent on basic food and utilities; neither has eaten dinner out in this period. The reason the payments are being maintained is through extreme hardship which cannot be assessed on the ability to repay because in these circumstances that gives a false impression of the circumstances to the licensee.

Recommendation:

R165 (4) should be included in the Bill.

R165 (4) should state that "when assessing a consumer's ability to repay or comply with their financial obligations under a credit contract, the consumer does not have the capacity to repay the credit contract in circumstances where they can meet the minimum repayments under the loan but cannot reduce the principal owing under the loan."

Enforcement of Responsible Lending Provisions

LAQ seeks clarification concerning the remedies available to consumers for a breach of responsible lending obligations. While it is clear that Civil Penalty provisions apply to breaches

and ASIC is able to prosecute these breaches, it is not clear if for example consumers may seek the variation of a credit contract from their current contract to one which complies with responsible lending provisions. One option available for the Bill is to allow consumers the same remedies as are available under s66 (2) of the Code for Hardship applications to apply to breaches of responsible lending provisions.

Recommendations:

That the Bill prescribe the remedies and options available to a consumer when the licensee that they have been dealing with is found guilty of breaching the responsible lending conduct provisions. LAQ supports allowing consumer's access to the same remedies as they have under s.66 (2) of the Code for breaches of responsible lending provisions.

Interest Rate Caps and Responsible Lending

LAQ is deeply concerned by the view expressed by Treasury Officials at a public meeting in Brisbane that responsible lending provisions are likely to do away with the need for interest rate caps that protect vulnerable consumers from abuse by payday and other short term lenders.

LAQ strongly supports the view that a 48% interest rate cap inclusive of fees and charges is a vital part of any National Consumer Credit Protection legislation that stands separate from and of equal importance to any responsible lending regime.

The reason for this is that the Responsible Lending Regime as it is currently expressed provides no objective, normative standard which allows lenders, consumers, consumer advocates, EDR Schemes or courts to assess whether consumers are being charged a fair interest rate. A consideration that is particularly important in light of REM190 which excuses credit licensee holders from liability when they have acted honestly and when it is fair in all the circumstances. Such an assessment is very difficult to undertake without an objective standard with which to assess at least part of a licensee's conduct.

In addition, LAQ also strongly supports the view that the Responsible Lending Regime will not protect vulnerable consumers from exploitation by lenders who charge usurious interest rates.

Case Study 16

LAQ has recently assisted Mrs F, a 30 year old mother of two, who obtained a pay day loan of \$1,450 (which included a \$450 brokerage fee.) The Interest rate charged was over 200% when, as required by the Queensland Consumer Credit Code, the brokerage fee was included in the interest rate.

Mrs F could afford her repayments by making sacrifices elsewhere for the first 6 repayments but then fell into arrears as the usurious interest rates cut in. She would have been able to afford repayments with an interest rate of 48%. She sought advice from LAQ at this point.

Currently, Mrs F is protected from exploitation by the 48% interest rate cap, inclusive of all fees and charges in Queensland, New South Wales and the ACT. The Consumer Protection Unit of LAQ was able to assist Mrs F by pointing out the breach of the interest rate cap and ensuring that she was only required to repay the principal \$1,000 owing under the loan.

Under the responsible lending conduct provisions as they are currently drafted the licensee will not have committed a breach of the responsible lending provisions because when they entered the credit contract and made the preliminary assessment, Mrs F could have afforded the loan. However, because of the usurious interest rate, Mrs F quickly fell into arrears in circumstances where she could have repaid the loan had a fair interest rate been charged.

In this case the responsible lending provisions in the Bill would not have protected Mrs F from exploitation.

Case Study 17

LAQ has assisted Ms C, a young single woman of 24, who took out a pay day loan, to pay for unforeseen expenses. The loan was for \$600, a \$650 brokerage fee was charged and the effective interest rate was 166.67%.

Ms C is making her repayments and was correctly assessed as having the capacity to repay, albeit with some hardship. She sought advice from the Consumer Protection Unit of LAQ concerning the interest rate she was being charged.

Currently, Mrs F is protected because the 48% interest rate cap in Queensland ensures that the maximum interest rate that Ms C is charged is 48%. LAQ was able to assist Ms C by highlighting to the lender their breach of the interest rate cap and ensuring that all Ms C was required to repay was the principal amount of the loan.

In these circumstances, without the interest rate cap, the responsible lending provisions in the Bill do not protect Ms C from exploitation because the licensee correctly assessed her capacity to repay the credit contract. Because, the responsible lending provisions, as currently drafted, have no normative and objective standard with which to assess a fair interest rate, Ms C, the vulnerable consumer would not be protected by the responsible lending provisions when she is currently protected by the interest rate cap in Queensland.

Passing on the Cost of Preliminary Credit Assessment

A second and equally important reason why it is vital to include a 48% interest rate cap, inclusive of all fees and charges is to protect consumers from the imposition of additional costs if lenders seek to transfer compliance costs to borrowers. In the National Consumer Credit Protection legislation the responsible lending provisions require credit providers and other licensee to undertake a preliminary credit assessment of a consumer's ability to meet their financial obligations under a credit contract.¹²

LAQ acknowledges that this additional requirement may impose costs on fringe lenders and other licensees whose currently procedure for assessing a consumer's ability to repay a loan is lacking or inadequate.

LAQ is concerned that without an inclusive 48% interest rate cap, these lenders will pass this additional cost on to consumers. This is a tactic that would further exploit the vulnerable consumers who generally seek assistance from payday and other fringe lenders. If it were to be allowed by the Bill it would go directly against one of the aims of the Bill which is to ensure better protection for vulnerable consumers.

¹² Chapter 3, part 3-1, Division 4, National Consumer Credit Protection Bill

Recommendation:

LAQ recommends that as Part of Phase 2 of the credit reforms, it is vital that a 48% interest rate cap, inclusive of all fees and charges be included to protect vulnerable consumers from exploitation by fringe lenders.

The Application of the Code

LAQ strongly endorses the submissions made by National Legal Aid concerning the application of the Code and the use and wording of business purpose declarations (BPDs).

LAQ submits that the problems with the use of BPDs is highlighted by the following case study.

Case Study 18 – Abuse of BPD

LAQ has recently assisted an elderly married couple, Mr and Mrs D, who are 77 and 65 years of age, who have been retired for a number of years.

In 2000, they owed approximately \$5,000 on their mortgage. When their adult daughter got into financial difficulty they arranged to borrow \$170,000 secured against their primary residence. The Loan was refinanced twice because Mr and Mrs D were unhappy with the fees and charges being applied to the loan.

With the assistance of a broker they sought a 3rd refinance of the loan from Bank J. Representatives from the broker and Bank J attended Mr and Mrs D's home to assist them in filling out the application form. The representatives of the broker and bank told Mr and Mrs D that they needed to get an ABN Number in order to receive the low interest loan that was being arranged for them. The reason given for this was that because of Mr and Mrs D's ages and the fact that neither had a driver's licence, the identification provided by the ABN was necessary to approve the loan.

An ABN was obtained and a BPD was signed by Mr and Mrs D, despite the fact that neither had worked for a number of years and neither had been involved in running and operating a business during their working lives.

The BPD was sought solely so that Bank J could attempt to stop the Consumer Credit Code applying to the loan taken out by Mr and Mrs D and highlights how the use of a BPD can be abused to target vulnerable elderly consumers.

Licensing of persons engaged in Credit Activities

Legal Aid Queensland (LAQ) supports the requirement in the Bill for all persons who engage in credit activities to obtain an Australian Credit Licence. LAQ also supports the list of general conduct obligations that are set out in LIC170. However, LAQ is concerned that the practical effect of the requirement in LIC170(1)(i) that a person who is engaged in credit activities must be a member of an ASIC approved external dispute resolution scheme will not achieve the intention of the Bill and will fail to practically assist or protect the rights of vulnerable consumers. (We refer to our comments above concerning EDR schemes.)

LIC 170(1)(i) - Australian Credit Licence Requirement that credit providers be a member of an ASIC Approved External Dispute Resolution Scheme

LAQ approves generally of the requirement that is contained in LIC170 that all holders of an Australian Credit Licence are required to be a member of an ASIC approved external dispute resolution scheme.

LAQ also supports the requirement in s.80(3)(g) of the proposed Code that a default notice sent to a debtor who is in default must contain information prescribed by the regulations about the approved dispute resolution scheme and the debtor's rights under that scheme. In addition, LAQ submits that the default notice required to be served under s.80 of the draft Code should also refer consumers in default to the free credit legal services available in their State of residence. Eg Legal Aid Queensland and Caxton Legal Centre in Queensland. The inclusion of this information will give consumers information that allows them to practically exercise their legal rights under Consumer Credit Law instead of just informing consumers about their rights.

LAQ agrees in principle with the idea that as part of pre-contractual disclosure before obtaining a loan consumers should be made aware of the details of the approved external dispute resolution scheme of which a credit assistance provider, credit provider, assigned credit provider, credit representatives, or debt collectors is a member.¹³

LAQ proposes that the requirements listed for pre-contractual disclosure under section 14 of the Code and the information that must be listed in the Credit Guide should be combined so that credit providers, where they are under an obligation to provide both a pre-contractual disclosure and a Credit Guide need only provide consumers with one document that complies with their licensing and their pre-contractual disclosure requirements.

It should only be if an assignee or other party of a credit provider or credit provider is under no obligation to comply with section 14 of the draft Code concerning pre-contractual disclosure that they then be required to provide a credit guide to consumers in accordance with their licensing requirements.

The availability of support services

LAQ supports and endorses NLA's submissions concerning the importance of the availability of adequate legal advice and support services as vulnerable consumers engage with the new processes that this bill introduces which are designed to improve their access to justice. The access to justice of vulnerable consumers will only be improved if Legal Aid, Community Legal Centres and Financial Counselors are provided with enough funding to meet the demand from vulnerable consumers for assistance to enforce their rights.

What is not caught by the Bill?

Consumer leases

LAQ has recently experienced significant problems in dealing with companies that instead of allowing vulnerable consumers to purchase a car, will rent or lease the car over a period of 2-5 years. Once the lease period is up the vulnerable consumer may be offered the chance to purchase the car for additional one-off payment but there is no contractual right to purchase (hire-purchase). At no stage during the lease is the title to the car transferred to the consumer.

The problem with this method adopted by a number of car companies is that the cars which are leased are usually at least 10 years old and worth less than \$7,000. By the time the vulnerable

¹³ R130, R230, R232, R330 and R430 of National Consumer Protection Bill 2009.

consumer has made all the lease payments on the car, they have paid over \$20,000 and have no title to the car.

Currently, Consumer Leases are regulated by Part 10 of the Consumer Credit Code and Part 10 of the Bill. The requirements concerning disclosure in a consumer lease are far less onerous than the requirements for credit contracts under the rest of the Code. In addition, under the current Bill, there would be no requirement placed upon the provider of a consumer lease to provide a prospective lessee with the equivalent of a credit guide or a clear explanation of the contract that the vulnerable consumer has entered into. In LAQ's experience, many vulnerable consumers believe that they have entered into a contract to buy a car or good when in fact they have only entered into a lease or rental of the car. The advertising of these cars does not allude to a lease, the majority of our clients are unaware that their ownership of the car will be limited to possession.

The major lessors in Queensland aggressively market and from our perspective consciously set out to exploit vulnerable consumers. They are successful because the requirements imposed upon them by the Code are less stringent than the disclosure requirements imposed upon credit providers who enter into a credit contract with a vulnerable consumer. The result of this is that consumers do not possess adequate information about the nature of the agreement (consumer lease) that they are entering into. As a consequence, they enter into agreements that provide them with little or no benefit but requires them to pay significant cost.

LAQ submits that by omitting consumer leases from the stringent disclosure requirements and accompanying civil penalties pursuant to UCCC s 100, the market is skewed towards the use of leases instead of hire-purchase or credit contracts. The consequence of this is widespread exploitation of the most vulnerable consumers who are car dependent (often living in areas poorly serviced by public transport) and, attracted to this end of the market because it caters for 'bankrupt', credit impaired and centrelink dependent consumers.

Case Study 19

Mrs M needed a car and approached a lender in late 2008. The lender regularly advertises finance for vehicles for borrowers who have bad credit history's or limited incomes.

Mrs M approached the lender/ car dealer and signed an agreement before she was shown any vehicle

She was shown a 1995 Toyota Corolla for which the lender assigned a cash price of \$16500 and imposed an interest rate of 9% with repayments of \$18915.00 and a hypothetical residual value of \$500.00.

The Redbook valuation for a private sale of a model of Toyota Corolla in May 2009 was between \$3300.00 and \$4900.00. If the market value and therefore the cash price is properly \$4900.00 then the effective interest rate on the contract is 181%. If market value and therefore the cash price is properly \$3300, the effective interest rate is 311%.

Case Study 20

Mrs P is on an aged pension. She entered into a loan to purchase a car. Instead she received a lease over a vehicle where the cash price of the car, a 2003 Holden Astra was disclosed as \$26,700. The redbook valuation is \$9300. There was a requirement to pay an upfront amount of \$1500 and fortnightly payments \$280.00.

Mrs P doesn't remember signing any agreement and believes she was under the influence of barbiturates at the time.

Case Study 21

Ms W has a slight intellectual disability. She purchased a vehicle for \$15,990 and a warranty offered by the car dealer for \$1695.00, including other associated costs the amount due at settlement was \$18285. A lease for \$17285.00 was entered without any right to purchase the vehicle requiring fortnightly payments of \$225.90.

The Redbook valuation for a private sale of a 1998 Mitsubishi Magna in May 2009 was between \$2700.00 and \$4100.00. If the market value and therefore the cash price is properly \$4100.00 then the effective interest rate on the contract is approximately 150%. If market value and therefore the cash price is properly \$2700, the effective interest rate is approximately 230%.

The consumer leasing provisions in the national code will not protect consumers from these sorts of arrangements nor give relief for unjust contracts.

Recommendation:

LAQ recommends that the disclosure and civil penalties regime treat consumer leases in the same manner as hire-purchase contracts.

Appendix A – Recommendations

Jurisdiction to bring proceedings	2
Small Claims Jurisdiction – REM 120 & C100	3
Preliminary Assessment of the Unsuitability of Credit – Part 3 Division 4	4
Providing the consumer with the assessment	5
Meaning of Honest and Fairly in the Circumstances	6
Assessments by Finance Brokers	7
Equity Stripping	8
A Vulnerable Consumer’s Ability to make Minimum Repayments but not reduce the Principal owing	9
Enforcement of Responsible Lending Provisions	10
Interest Rate Caps and Responsible Lending; Passing on the Cost of Preliminary Credit Assessment	11
Consumer leases	12

Jurisdiction to bring proceedings

Recommendation:

Amend s80 (3) to include

- An additional restriction to provide that any proceedings commenced by a credit provider must be instituted in the registry nearest to where the debtor resides at the date of filing and if that address is not known, at the address where the debtor resided at the date of the contract.
- The default notice containing a prominent heading at the top stating that it is a default notice and specifying that if legal proceedings are commenced they will be commenced at the court registry nearest to where the debtor resides at the date of filing and if that address is not known, at the address where the debtor resided at the date of the contract.
- If a credit provider issues proceedings in the incorrect jurisdiction:
 - The proceedings should be discontinued with the credit provider required to pay the debtor's additional costs incurred as a result of issuing in the incorrect jurisdiction on a solicitor-client basis; and
 - A relevant penalty prescribed in the legislation levied against the credit provider.

Small Claims Jurisdiction – REM 120 & C100

Part 4.3 of the Bill and specifically section C100 specifies the circumstances in which a plaintiff may access the small claims procedure in the Federal Magistrates or a state Magistrates Court. LAQ notes that with the removal of the Federal Magistrate's Court, an alternative commonwealth forum will be needed to allow vulnerable consumers access to justice in a small claims proceeding. As outlined above, LAQ submits that the best means of achieving access to justice for vulnerable consumers is through a specialist credit tribunal that would possess the expertise to assist vulnerable consumers.

Recommendation: Clarification of threshold for hardship applications

LAQ proposes that the limits on the award of compensation for a breach of the new Act, which is set out in C100(2) should be increased from \$20,000 to \$75,000.

Preliminary Assessment of the Unsuitability of Credit – Part 3 Division 4

LAQ refers to the requirements in R160(1)(a) that a licensee make reasonable inquiries about the consumer's requirements and objectives in relation to the contract and R165(1)(b) that a credit contract will not meet the consumer's requirements and objectives at the time the contract is proposed.

Recommendation:

LAQ recommends that the requirement on licensees to assess the consumer's requirements and objectives as part of the suitability of a credit contract be removed because it takes away from what the focus of assessing the suitability of a credit contract should be, that is:

- (a) Ensuring the consumer is fully informed;
- (b) Assessing whether the product is appropriate to the consumers financial circumstances and needs; and
- (c) Assessing whether the consumer has the ability to repay.

Providing the consumer with the assessment

R170 allows a consumer to request a copy of the preliminary assessment made by a licensee of the suitability of a credit contract for them.

Recommendation:

LAQ recommends that instead of consumers having to request the preliminary assessment of their credit suitability, licensees should be required to give that assessment to consumers when they finish the assessment without consumers having to request a copy.

LAQ is also concerned that R170 (2) requires the licensee to give the assessment in the manner (if any) prescribed by the regulations. LAQ notes that the manner of the credit assessment is not prescribed by the regulations.

Recommendation:

That a new Form be included in the National Consumer Credit Protection Regulation concerning Preliminary Credit Assessment pursuant to R170 (2) which specifies what must be included by a licensee when it provides a preliminary assessment to a consumer.

Meaning of Honest and Fairly in the Circumstances

LAQ is concerned by the vague test set out in REM190 that allows a licensee to be excused from liability for a breach of a civil penalty provision if they have acted honestly and it is fair in all the circumstances to excuse them from some or all of their liability.

Recommendation:

That the Bill should provide more guidance about the circumstances in which a licensee will have acted honestly in the context of responsible lending. Part of this guidance should include a requirement for a lender to check the sources of all information they are using to make a preliminary assessment of a consumer's suitability for credit.

Assessments by Finance Brokers

LAQ is concerned that allowing a licensee relief from liability for the contravention of a civil liability provision (responsible lending conduct), will not overcome the problems currently faced by clients of LAQ in dealing with finance brokers. We have seen many cases where finance brokers (credit assistance providers) do not make a full assessment of a consumers ability to repay, and the lender (credit provider), relies solely upon the broker's assessment and does not require a complete assessment themselves of the consumers ability to repay.

Recommendation:

LAQ recommends that the Bill should clearly state that a credit provider and any of their representatives will not be excused from liability under REM190 for a breach of their responsible lending obligations under Chapter 3 in circumstances where they have relied on the assessment of a consumer's ability to repay a loan made by a finance broker without themselves also assessing the consumer's ability to repay and the sources on which a finance broker has made that assessment.

Equity Stripping

LAQ is concerned that the importance of preventing equity stripping for vulnerable consumers is not highlighted in the Bill itself. The reason for this is that it is not clear from the Bill in its current form that Parliament intends to stop and has legislated with the intention of stopping this practice.

Recommendation:

The Bill should include, as part of the Responsible Lending Conduct provisions a provision that makes equity stripping a specific offence to ensure that vulnerable consumers are protected from abuse of this type.

A Vulnerable Consumer's Ability to make Minimum Repayments but not reduce the Principal owing

LAQ points out that the responsible lending provisions do not address the circumstance where a consumer can meet the minimum repayments owing on a credit card but will never be able to repay the debt. The consequence of such lending is that a vulnerable consumer is trapped in a debt spiral that they are unable to get out of.

Recommendation:

R165 (4) should be included in the Bill.

R165 (4) should state that "when assessing a consumer's ability to repay or comply with their financial obligations under a credit contract, the consumer does not have the capacity to repay the credit contract in circumstances where they can meet the minimum repayments under the loan but cannot reduce the principal owing under the loan."

Enforcement of Responsible Lending Provisions

LAQ seeks clarification concerning the remedies available to consumers for a breach of responsible lending obligations. While it is clear that Civil Penalty provisions apply to breaches and ASIC is able to prosecute these breaches, it is not clear if for example consumers may seek the variation of a credit contract from their current contract to one which complies with responsible lending provisions. One option available for the Bill is to allow consumers the same remedies as are available under s66 (2) of the Code for Hardship applications to apply to breaches of responsible lending provisions.

Recommendations:

That the Bill prescribe the remedies and options available to a consumer when the licensee that they have been dealing with is found guilty of breaching the responsible lending conduct provisions. LAQ supports allowing consumer's access to the same remedies as they have under s.66 (2) of the Code for breaches of responsible lending provisions.

Interest Rate Caps and Responsible Lending; Passing on the Cost of Preliminary Credit Assessment

Responsible Lending Regime as it is currently expressed provides no objective, normative standard which allows lenders, consumers, consumer advocates, EDR Schemes or courts to assess whether consumers are being charged a fair interest rate. A consideration that is particularly important in light of REM190 which excuses credit licensee holders from liability when they have acted honestly and when it is fair in all the circumstances. Such an assessment is very difficult to undertake without an objective standard with which to assess at least part of a licensee's conduct.

LAQ is concerned that without an inclusive 48% interest rate cap, these lenders will pass this additional cost on to consumers. This is a tactic that would further exploit the vulnerable consumers who generally seek assistance from payday and other fringe lenders. If it were to be allowed by the Bill it would go directly against one of the aims of the Bill which is to ensure better protection for vulnerable consumers.

Recommendation:

LAQ recommends that as Part of Phase 2 of the credit reforms, it is vital that a 48% interest rate cap, inclusive of all fees and charges be included as part of the National Consumer Credit Protection Bill to protect vulnerable consumers from exploitation by fringe lenders.

Consumer leases

Consumer Leases are regulated by Part 10 of the Consumer Credit Code and Part 10 of the Bill. The requirements concerning disclosure in a consumer lease are far less onerous than the requirements for credit contracts under the rest of the Code. In addition, under the current Bill, there would be no requirement placed upon the provider of a consumer lease to provide a prospective lessee with the equivalent of a credit guide or a clear explanation of the contract that the vulnerable consumer has entered into. In LAQ's experience, many vulnerable consumers believe that they have entered into a contract to buy a car or good when in fact they have only entered into a lease or rental of the car. The advertising of these cars does not allude to a lease, the majority of our clients are unaware that their ownership of the car will be limited to possession

Recommendation:

LAQ recommends that the disclosure and civil penalties regime treat consumer leases in the same manner as hire-purchase contracts.

Appendix B – Case Studies

Jurisdiction to bring proceedings	2
<i>Case Study 1</i>	2
<i>Case Study 2</i>	2
<i>Case Study 3</i>	2
<i>Case Study 4</i>	3
<i>Case Study 5</i>	4
<i>Case Study 6</i>	4
<i>Case Study 7</i>	4
Small Claims Jurisdiction – REM 120 & C100	5
<i>Case Study 8 – Credit Limit Increases</i>	5
<i>Case Study 9 – Mortgages</i>	5
Division 2 Credit Guide	7
<i>Case Study 10</i>	7
<i>Case Study 11</i>	7
Credit Assistance Providers	8
<i>Case Study 12</i>	8
Preliminary Assessment of the Unsuitability of Credit – Part 3 Division 4	9
<i>Case Study 13</i>	9
<i>Case Study 14</i>	10
A Vulnerable Consumer’s Ability to make Minimum Repayments but not reduce the Principle owing	11
<i>Case Study 15</i>	11
Interest Rate Caps and Responsible Lending	12
<i>Case Study 16</i>	12
<i>Case Study 17</i>	12
The Application of the Code	13
<i>Case Study 18 – Abuse of BPD</i>	13
Consumer leases	14
<i>Case Study 19</i>	14
<i>Case Study 20</i>	14
<i>Case Study 21</i>	14

Jurisdiction to bring proceedings

Case Study 1

A debt collector assignee insisted that a small amount was owing to a telecommunications company (now in liquidation). The Debt Collector commenced proceedings in Sydney and the client who had never lived outside Queensland and was a Centrelink dependent, single mother in very poor health did not take action when served with the court claim. At all times, she denied that the debt was due and if it was due, the money had been owing for more than 6 years.(which suggested that the claim was statute barred). Many months later and without any notice to the client, the Collector proceeded to obtain an order in a Sydney court which garnished her bank account, taking in excess of \$6 000 (received as a result of the Federal Government's economic incentive), leaving the client destitute with insufficient funds to purchase groceries.

Case Study 2

A client living in Bundaberg in Queensland was served with a court claim filed in Sydney in relation to an overdue bank credit card debt. He had never lived outside of Queensland. He accessed legal advice and the Debt collector assignee who had commenced proceedings agreed to a stay to enable the client to obtain access to the bank statements and get legal advice. The National Debt collector maintained that it could commence proceedings in NSW invoking the jurisdiction of the Consumer Credit Code (Queensland) and that it did not have an obligation to commence proceedings in the place where the debtor resided.

Case Study 3

Clients, husband and wife, owed approximately \$220 000 on their mortgages.

Debt Collector had purchased a personal loan debt from a bank and claimed \$7 714.17 together with further costs ("the debt") as a result of a judgment entered against them in New South Wales in May 2007.

The clients have not lived in NSW for more than 10 years.

Clients received a phone call in January 2009 left on their home answering machine claiming that the caller had purchased the property at a bailiff auction and demanding that the client's provide vacant possession.

The property had been sold for \$20 000 pursuant to warrant for execution taken out by the Debt Collector without any notice in writing or by telephone or face-to-face with the clients.

The female client was permanently employed but the male client was suffering from mental health problems preventing him from working. The clients do not have any credit cards and their bills were almost up to date.

The home is a three bedroom, one bathroom, low set house with one garage. The home was sold for \$20,000 despite it being valued at \$325,000.

The clients originally took out a personal loan in August 2001 in Queensland for \$8225 with Westpac Banking Corporation. It was their understanding that they had paid approximately half this loan when the male client became ill and consequently ceased regular payments.

The clients were not given an opportunity to vary the loan due to hardship pursuant to s 66 Consumer Credit Code. The loan was originally a consumer credit card debt. The client was not given an opportunity to re-pay the debt by installments or any option at all. The client had an unencumbered car that could have been sold to meet the debt.

The clients, distraught, sought legal assistance and had lost approximately \$100,000 in equity in their home as a result of the sale, subject to existing encumbrances, for \$20,000.

Case Study 4

Mrs X, a working mother of four, had recently separated from her husband. She had been in poor health over more than 18 months and from September 2007, underwent 5 separate operations on her bowel. Mrs X had informed us that her estranged husband was an alcoholic who has been violent towards her during their marriage.

She had three credit card debts, two with Bank A and one with Bank B. The balances were:

- *\$3348.85 and \$1938.98 for Bank A debts; and \$3511.69 for the debt owed to Bank B.*

Both banks, dissatisfied with Mrs X's failure to keep up with repayments, sold the debts to Company C, a company which buys and collects debts. Company C then amalgamated the small debts and filed a claim in Sydney, in the Downing Local Court (where Mrs X has never lived) for a total of \$8,799.52.

Mrs X, had the care/custody of her four children and given her ongoing hospitalisation and ill health had little prospect of being able to defend proceedings launched in another State. Even if she was healthy, she could not afford the expense of travelling to Sydney to defend the proceedings as she has no money.

Company C obtained judgment in Sydney with little supporting documentation, then registered the judgment in Queensland. Without any further communication with Mrs X, the company took out a warrant of execution for sale of the family home which Mrs X owns as a joint tenant with her husband subject to a mortgage with a deposit taking institution. Mr X has nothing whatsoever to do with the credit card debts (except in so far as each of the husband and wife have family law rights against each other.)

Mrs X approached Legal Aid Queensland's Consumer Protection Unit.

She had received less than 2 week's notice of the auction date for her share of the property, which was given to her by her neighbour who saw strange people walking through her property. The auction was going to proceed on Tuesday 16th December 2008, less than 10 days before Christmas.

A forced auction of a half share of the home, subject to existing mortgage would not have realised sufficient proceeds to pay our current debts and would have left Mrs X and her children homeless at short notice before Christmas.

After refusing any attempts to negotiate, Company C had finally, only after the intervention by the Australian Securities Investment Commission, agreed not to proceed with an auction of the home on 16 December 2008. Mrs X then obtained permission to sell her house. She sold the house for its full and current market value.

Mrs X has now paid out all her creditors and is debt free.

Case Study 5

Client A came to see us at Caxton Legal Centre because she had been served with a statement of claim from the Downing Centre Local Court in NSW for a debt of around \$7000 from an unspecified source. The client thinks that the debt may be related to a personal loan she had, and was a couple of payments short of paying out, when she stopped payment in 2001. If it is related to that, the loan was obtained from a bank branch in Queensland. We wrote to the debt collection agency which was suing her and said that the debt was statute barred and proceedings were commenced in the wrong jurisdiction. With pressure, they discontinued proceedings in the Downing Centre. They are yet to provide any information which indicates that there is a legal basis for their continued pursuit of our client.

Case Study 6

Client B brought a large item door to door in her home in suburban Brisbane in 2004. There was a linked credit contract. About 4 months later, our client returned the item to the seller who assured her that there was no need to do anything else, that there would be no more to pay as the item was returned. The client heard nothing more until proceedings were commenced in NSW in 2009. The client now has the difficult task of responding and making submissions to the court in NSW about transferring proceedings so a substantive defence can be mounted here in Queensland. Caxton Legal Centre accessed help from Redfern Legal Centre to advise the client about process but the practical hurdles remain considerable.

Case Study 7

Client C came into our debt advice service in relation to a claim by an insurance company for damage to a rental car. The client, who lives in Queensland, rented the car directly from a shopfront in Queensland and the (alleged) damage occurred here. The insurance company elected to commence proceedings in the Victorian Civil and Administrative Tribunal (VCAT). The client was able to organise a telephone attendance for the first court date and he will make submissions about jurisdiction at that attendance. It is fortunate that VCAT allows telephone attendance; our experience of the NSW courts (excluding the Consumer Trader and Tenancy Tribunal) is that they will not.

Small Claims Jurisdiction – REM 120 & C100

Case Study 8 – Credit Limit Increases

Mr and Mrs S are pensioners, aged 86 and 79, living in a medium sized Regional Queensland town. Mr S is a war veteran who has been receiving the war veterans pension for the last 30 years. This pension has been the only source of income that Mr and Mrs S have received for the last 30 years.

Mr S first applied for a credit card with Bank Z 20 years ago. He was assessed and given a credit card limit of \$5,000. Over time, Mr and Mrs S received a number of unsolicited credit card limit increase offers, which they signed and returned. This has resulted in a credit card Limit of \$43,500. At no stage was any reassessment of Mr and Mrs S ability to afford any of the new credit limits undertaken by Bank Z. At no stage during this period has Mr and Mrs S income increased and at all times their only income was the War veterans pension received by Mr S.

Mr and Mrs S now owe in excess of \$33,000 on the credit card. They are not in default because they continue to meet the minimum monthly repayment level because they have not bought any clothes for the past 10 years and obtain all of their food from the Local Op Shop and from hand outs from a number of charities..

The failure of Bank S to undertake any form of responsible lending practices by assessing Mr and Mrs S's capacity to repay the new credit card Limit has caused Mr and Mrs S loss and damage in excess of \$20,000 because they now will never in a position to repay all of the balance owing on the credit card. They are only able to meet the minimum monthly payments under extreme hardship.

Mr and Mrs S cannot afford to take this matter to court. Their case demonstrates the need for a Small Claims procedure, so parties like them can access low cost resolution of their legal problems. However, there is no reason on the facts of Mr and Mrs S case that their compensation should be restricted to \$20,000 given the utter failure by Bank Z to follow any Responsible Lending Practices and assess their ability to repay.

Case Study 9 – Mortgages

Mr and Mrs K obtained a mortgage of \$500,000 to purchase a house in Queensland with Bank T. When the initial assessment of their capacity to pay was undertaken, Mr and Mrs K had the ability to repay the loan.

Mrs K subsequently became severely ill and required around the clock care from her husband. This care necessitated that he give up his job and take on contract work from home that provided a less stable and more sporadic income.

It was about this time, Mr and Mrs K applied for a variation on their mortgage, which included an increase of \$60,000 in the amount they borrowed under the mortgage for home improvements to assist with Mrs K's medical care. At this time, Mr and Mrs K had already defaulted twice on the mortgage but had been able to catch up on the arrears owing. Bank T were advised of the changed circumstances regarding Mr K's employment and Mrs K's illness and still approved the loan.

Mr and Mrs K quickly fell into default under the new loan arrangements. They were 6 months behind on the loan repayments. Mr and Mrs K realised they needed to sell the property before they lost further equity in their house and asked for time to sell the

property and for payments to be reduced due to hardship while the property was being sold.

Instead of assisting Mr and Mrs K in the way requested, Bank T offered them a further \$40,000 variation to their loan for the express purpose of making mortgage repayments while the House was being sold.

This approach was clear equity stripping by Bank T, in addition Bank T made no effort to assess their capacity to repay in circumstances where they were already in default on their existing varied mortgage.

Mr and Mrs K have no money to take this matter to Court and should be able to access compensation using the small claims procedure for what would be a clear breach of the responsible lending provisions of the new Act.

LAQ sees no valid reason for Mr and Mrs K (and other vulnerable consumers like them) to have their compensation restricted to \$20,000 in circumstances where the loss they suffer as a result of a breach of responsible lending provisions far exceeds this amount.

Division 2 Credit Guide

Case Study 10

LAQ recently assisted an elderly client, Ms L who had a small personal loan with one of the major banks 9 years ago which had \$5000 owing on it when she last made a payment six years ago. The debt had been sold to Debt Collector C who, despite recovery of the debt being statute barred, proceeded to make twice daily phone calls demanding that Ms L make a payment on the loan or she would be taken to court. When she requested information about the company and the debt, which she did not remember, she was told that she had no right to information about the company and that court proceedings would tell her all she needed to know. By the time she sought advice from Legal Aid, fearing the embarrassment of court, she had made a payment and re-enlivened a stale debt, primarily because she had not received information from the new debt collector.

Case Study 11

LAQ recently assisted Ms Y, a client, who had suffered a stroke, who had 2 credit card debts worth \$3,000 and \$1,500 and 1 personal loan that was \$2,500 in arrears. By the time LAQ became involved, Ms Y had received letters from 4 different organisations about the first credit card debt, 3 organisations about the second credit card debt and 3 different organisations about the personal loan. She was unsure who she needed to talk to and in her attempts to ring the credit providers involved had not been informed who was currently in charge of resolving the debt owed in each case.

Credit Assistance Providers

Case Study 12

LAQ assisted Mr H, a client with a number of debts, who sought a 6 month loan of \$1,000 at 48% per annum interest rate with Company J. Page 4 of the 8 page contract mentioned the possibility of a brokerage fee being charged and Page 7 of the contract contained a schedule of brokerage fees payable on loans of differing amount that could be taken out from that company. However, the loan application was filled out for \$1,000 and it wasn't until after Mr H received the loan documents back that he discovered that a \$350 brokerage fee had been charged to refer the loan to Company J's parent company. Mr H indicated that had he been informed about the brokerage fee up front in the manner suggested by the Bill for credit assistance providers, he would not have taken out the loan.

Preliminary Assessment of the Unsuitability of Credit – Part 3 Division 4

Case Study 13

LAQ recently assisted a mother of two, Ms L who bought a Maths Computer Tutor program for \$5,500 with accompanying finance because she wanted to improve the Maths performance of her two children.

It is arguable that a credit contract to finance improved opportunities for Ms L's children does fit the consumer's requirements and objectives. However, the credit company failed to correctly assess that Ms L already had a number of responsibilities that depending on the overtime she received she was likely to fall between \$10-50 a week short on the repayment under the loan. She was unable to meet the repayments unless she received 8 hours of overtime a fortnight, which did not occur in every fortnight..

The Lender admitted that Ms L's focus on getting the finance to help her children swayed them to grant the loan in circumstances where an assessment of her financial circumstances and ability to repay would have seen the finance denied.

Assessments by Finance Brokers

Case Study 14

LAQ recently assisted Mr T, who lives in Western Queensland and obtained a loan to purchase a house for \$190,000 despite the fact his only income is a disability support pension. Mr T used a finance broker, to whom he gave correct financial information including his income and current liabilities. The Finance broker assessed him as being able to repay the loan and then forwarded the loan to Company I who approved the loan on the basis of the information provided by the broker and did no further checks. The difficulty was that on the information provided to the credit Provider, Mr T's income had been doubled.

Mr T fell into default and lost the house. For the purposes of REM190, it is not clear that both the credit provider and broker would be liable for a breach of the responsible conduct lending provisions. Because "honest and reasonable in the circumstances" is vague and not defined in the Bill, there is at least an argument that the credit provider may be exempted from some liability for their breach under REM190.

A Vulnerable Consumer's Ability to make Minimum Repayments but not reduce the Principle owing

Case Study 15

LAQ has recently assisted Mr and Mrs K two pensioners who obtained a credit card 10 years ago with a limit of \$8,000. At the time, Mr and Mrs K received an old aged pension but no other income. Over the past 10 years, Mr and Mrs K have received a number of unsolicited credit card offers which have seen the credit card limit increase to \$33,000. They currently owe \$21,000 on the credit card.

Mr and Mrs K signed all the unsolicited credit card increases and have never missed one repayment on the loan. However, the reason for this is that making the minimum repayments and their rent takes up 90% of their pension. The remaining 10% is spent on basic food and utilities; neither has eaten dinner out in this period. The reason the payments are being maintained is through extreme hardship which cannot be assessed on the ability to repay because in these circumstances that gives a false impression of the circumstances to the licensee.

Interest Rate Caps and Responsible Lending

Case Study 16

LAQ has recently assisted Mrs F, a 30 year old mother of two, who obtained a pay day loan from \$1,450 (which included a \$450 brokerage fee.) The Interest rate charged was over 200% when, as required by the Queensland Consumer Credit Code, the brokerage fee was included in the interest rate.

Mrs F could afford her repayments by making sacrifices elsewhere for the first 6 repayments but then fell into arrears as the usurious interest rates cut in. She would have been able to afford repayments with an interest rate of 48%. She sought advice from LAQ at this point.

Currently, Mrs F is protected from exploitation by the 48% interest rate cap, inclusive of all fees and charges in Queensland, New South Wales and the ACT. The Consumer Protection Unit of LAQ was able to assist Mrs F by pointing out the breach of the interest rate cap and ensuring that she was only required to repay the principal \$1,000 owing under the loan.

Under the responsible lending conduct provisions as they are currently drafted the licensee will not have committed a breach of the responsible lending provisions because when they entered the credit contract and made the preliminary assessment, Mrs F could have afforded the loan. However, because of the usurious interest rate, Mrs F quickly fell into arrears in circumstances where she could have repaid the loan had a fair interest rate been charged.

In this case the responsible lending provisions in the Bill would not have protected Mrs F from exploitation.

Case Study 17

LAQ has assisted Ms C, a young single woman of 24, who took out a pay day loan, to pay for unforeseen expenses. The loan was for \$600, a \$650 brokerage fee was charged and the effective interest rate was 166.67%.

Ms C is making her repayments and was correctly assessed as having the capacity to repay, albeit with some hardship. She sought advice from the Consumer Protection Unit of LAQ concerning the interest rate she was being charged.

Currently, Mrs F is protected because the 48% interest rate cap in Queensland ensures that the maximum interest rate that Ms C is charged is 48%. LAQ was able to assist Ms C by highlighting to the lender their breach of the interest rate cap and ensuring that all Ms C was required to repay was the principal amount of the loan.

In these circumstances, without the interest rate cap, the responsible lending provisions in the Bill do not protect Ms C from exploitation because the licensee correctly assessed her capacity to repay the credit contract. Because, the responsible lending provisions, as currently drafted, have no normative and objective standard with which to assess a fair interest rate, Ms C, the vulnerable consumer would not be protected by the responsible lending provisions when she is currently protected by the interest rate cap in Queensland.

The Application of the Code

Case Study 18 – Abuse of BPD

LAQ has recently assisted an elderly married couple, Mr and Mrs D, who are 77 and 65 years of age, who have been retired for a number of years.

In 2000, they owed approximately \$5,000 on their mortgage. When their adult daughter got into financial difficulty they arranged to borrow \$170,000 secured against their primary residence. The Loan was refinanced twice because Mr and Mrs D were unhappy with the fees and charges being applied to the loan.

With the assistance of a broker they sought a 3rd refinance of the loan from Bank J. Representatives from the broker and Bank J attended Mr and Mrs D's home to assist them in filling out the application form. The representatives of the broker and bank told Mr and Mrs D that they needed to get an ABN Number in order to receive the low interest loan that was being arranged for them. The reason given for this was that because of Mr and Mrs D's ages and the fact that neither had a driver's licence, the identification provided by the ABN was necessary to approve the loan.

An ABN was obtained and a BPD was signed by Mr and Mrs D, despite the fact that neither had worked for a number of years and neither had been involved in running and operating a business during their working lives.

The BPD was sought solely so that Bank J could attempt to stop the Consumer Credit Code applying to the loan taken out by Mr and Mrs D and highlights how the use of a BPD can be abused to target vulnerable elderly consumers.

Consumer leases

Case Study 19

Mrs M needed a car and approached a lender in late 2008. The lender regularly advertises finance for vehicles for borrowers who have bad credit history's or limited incomes.

Mrs M approached the lender/ car dealer and signed an agreement before she was shown any vehicle

She was shown a 1995 Toyota Corolla for which the lender assigned a cash price of \$16500 and imposed an interest rate of 9% with repayments of \$18915.00 and a hypothetical residual value of \$500.00.

The Redbook valuation for a private sale of a model of Toyota Corolla in May 2009 was between \$3300.00 and \$4900.00. If the market value and therefore the cash price is properly \$4900.00 then the effective interest rate on the contract is 181%. If market value and therefore the cash price is properly \$3300, the effective interest rate is 311%.

Case Study 20

Mrs P is on an aged pension. She entered into a loan to purchase a car. Instead she received a lease over a vehicle where the cash price of the car, a 2003 Holden Astra was disclosed as \$26,700. The redbook valuation is \$9300. There was a requirement to pay an upfront amount of \$1500 and fortnightly payments \$280.00.

Mrs P doesn't remember signing any agreement and believes she was under the influence of barbiturates at the time.

Case Study 21

Ms W has a slight intellectual disability. She purchased a vehicle for \$15,990 and a warranty offered by the car dealer for \$1695.00, including other associated costs the amount due at settlement was \$18285. A lease for \$17285.00 was entered without any right to purchase the vehicle requiring fortnightly payments of \$225.90.

The Redbook valuation for a private sale of a 1998 Mitsubishi Magna in May 2009 was between \$2700.00 and \$4100.00. If the market value and therefore the cash price is properly \$4100.00 then the effective interest rate on the contract is approximately 150%. If market value and therefore the cash price is properly \$2700, the effective interest rate is approximately 230%.