

Redfern Legal Centre



The General Manager
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PARKES ACT 2600

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14 October 2011

Dear Sir/Madam

Please find attached Redfern Legal Centre's submission (**CCCLAB Submission**) on the *Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 (the Bill)*.

This submission incorporates our earlier submission, *Payday Lending and Credit Law Reforms*, which we submitted in response to Treasury's invitation to comment on the exposure draft of the *National Consumer Credit Protection Amendment (Enhancements) Bill 2011 (the NCCPA Bill)*.

We would welcome the opportunity to further discuss our submission with you should you wish to do so.

Yours faithfully,

Redfern Legal Centre

Joanna Shulman
Chief Executive Officer



SUBMISSION:

**Redfern Legal Centre's submission on the Consumer Credit and Corporations
Legislation Amendment (Enhancements) Bill 2011**

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with special thanks to Melanie Lim for her assistance**

DATE: 14 October 2011

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1. Introduction: Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. RLC's work in Credit & Debt

RLC identifies economic rights as important in the attainment of a just society. RLC has long recognised that, without the ability to exercise their economic rights, people are unable to maintain other rights. Economic rights are essential to effective and productive participation in society, including keeping families together, safe housing, jobs, and freedom. For this reason, RLC has continued to emphasise casework delivery to people in relation to banking, credit and debt problems. RLC provides specialist credit and debt face-to-face and telephone advice services.

RLC also provides a support service to financial counsellors in NSW, whereby financial counsellors are able to call or email our credit and debt solicitors to obtain legal information and assistance as they need it.

3. RLC's views in summary

Overall, we support the amendments proposed by the Bill, as they will provide important protections for consumers vulnerable to exploitation by unethical practices in the consumer credit market.

It is important that to ensure that consumer credit protections are consistent and workable, as this is an area where consumers are particularly vulnerable to unscrupulous practices. The consequences of poor industry practices impact significantly on consumers, and consumer debt problems can quickly spiral into other problems associated with indebtedness. Consumers are often at a disadvantage due to poor understanding of the consumer credit products they are signing up for, and may confuse sales techniques with financial advice. Strong regulation is necessary to prevent industry participants from taking advantage of this lack of understanding.

4. RLC's comments on specific issues

4.1 Enhancements to the regulation of credit

The Explanatory Memorandum states that the Bill will enhance the regulation of credit by:

- enhancing the capacity of debtors who are in financial hardship to seek a variation of their credit contract;
- introducing a remedy for unfair or dishonest conduct by credit service providers;
- restricting the use of particular words or phrases;
- enhancing the range of remedies available to consumers; and
- increasing the circumstances in which ASIC has standing to apply to the court for an order.

4.1.1 Part 1: Protection of debtor in cases of hardship

The proposed amendment to broaden the circumstances in which a credit provider is obliged to consider a hardship request is a significant protection for borrowers.

Under the current laws, the debtor is entitled to request a hardship variation in limited circumstances, and may only request a variation in one of the three forms stipulated in the legislation. These limitations can make it difficult for a debtor (who is unlikely to have a detailed knowledge of the applicable legislative provisions) to frame their hardship request in the manner required by the legislation.

We support the removal of the \$500,000 limit to a consumer's right to request a hardship variation of their consumer credit contract, particularly as Sydney's median house price is \$595,745.¹

We support the introduction of a criminal penalty for a breach of the requirement to give the debtor notice of whether or not they agree to negotiate a change to the credit contract. This will act as a strong incentive for creditors to meet their obligations under the proposed amendments.

We strongly support the introduction of the proposed subsection 89A, which requires creditors to respond to a hardship request before commencing enforcement proceedings. The amendment to require creditors to wait 14 days from the date that the creditor gives the debtor notice of its refusal to negotiate is important to allow the debtor time to seek advice or take action before enforcement

¹ Demand but no supply as prices head north, Sydney Morning Herald, Jessica Mahar and Erik Jensen March 4, 2010 <http://www.smh.com.au/business/property/demand-but-no-supply-as-prices-head-north-20100303-pj3z.html>, accessed on 11 October 2011

action begins.

We note that the proposed section 89A(1)(c)(ii) is drafted such that the standard is the creditor's reasonable belief:

"...the credit provider reasonably believes that the basis on which the current hardship notice was given is materially different from the bases on which the other hardship notices were given."

We do not see any justification for the imposition of an unreliable subjective standard such as the creditor's belief. The standard should be objective, i.e. whether the hardship notice is materially different from previous notices.

4.1.2 Part 2: Remedies for unfairness or dishonesty by providers of credit services

We strongly support the introduction of remedies for unfair or dishonest conduct by credit service providers, even in circumstances where the service provider did not receive a fee or payment from the consumer. The proposed amendments will not only give consumers recourse against credit service providers for dishonest or unfair conduct, but they will act as a significant deterrent against engaging in such conduct.

4.1.3 Part 3: Representations about eligibility to enter credit contracts, consumer leases etc. without assessing unsuitability

We strongly support these amendments. Using advertisements or marketing techniques that make representations regarding the certainty of approval for a particular consumer credit product is irresponsible. Representations as to eligibility convey the impression that the consumer has passed some kind of "test", or met the eligibility requirements of the credit provider. To some consumers, being told they are "eligible" for a credit product acts as a de facto decision-making process, in that they assume that they must be able to afford the product if they have passed the eligibility requirements. This can result in consumers signing up for credit products they cannot afford.

Case Study

Warren is a 45-year-old man from Redfern, with limited understanding of financial matters. He sought advice from Redfern Legal Centre in relation to his various credit card debts. Warren had 6 credit cards. When queried as to why he had so many credit cards, Warren said that whenever he got a letter in the mail stating that he had pre-approval for a card or was told by a salesperson that he was eligible for a credit facility, Warren assumed that that meant that he could afford the credit facility. He assumed that salesperson or the credit institution had made an assessment of his income. Warren was pleased to receive such offers of credit because he thought they meant that he had a good income and was a good credit risk from the perspective of the credit provider. He always accepted such offers.

4.1.4 Part 4: Prohibitions on certain representations and other matters

We support the proposed amendments to restrict the use of certain words and phrases by licensees in connection with a credit service. We note that the list of restricted words may need to be revised in the future to respond to changes in industry practices.

4.2 Reverse mortgages

RLC is not currently undertaking casework for clients with matters relating to reverse mortgages. However, RLC is strongly supportive of creating additional product specific obligations and protections to address the particular risks associated with reverse mortgages.

Under the current law, the NCCP Act regulates reverse mortgage contracts consistently with all other credit contracts. It does not include any additional responsible lending conduct obligations or requirements in relation to reverse mortgages. In addition, it does not include any disclosure requirements specific to reverse mortgages, nor does it include any maximum limitations with respect to a borrower's liability in relation to the debt. Further, the obligations imposed on lenders do not require the disclosure of either projections of future equity or certain information on the contract nor do they require the provision of a reverse mortgage information statement.

It is our opinion that reverse mortgages should have additional, targeted regulation because they differ from other credit contracts. Some of the main differences are that: -

- They are marketed exclusively to those over the age of 60, that is, to seniors or persons approaching an age where they will retire from the workforce;
- Interest rates are generally higher than average home loans;
- The debt can rise quickly due to the effect of compound interest;
- As a result, consumers may end up owing more than their property is worth unless their loan has a No Negative Equity Guarantee (NNEG). Even in situations where consumers have obtained a reverse mortgage with a NNEG, they can lose their NNEG if they don't repair and maintain their property to a standard set by the lender;
- At the time consumers are considering taking out the loan, they have no way of accurately determining a wide range of factors such as the value of the equity in their home over time, or their future financial circumstances or future needs as they age;
- The loan may affect their pension eligibility; and
- If the consumer is the sole owner but there is a non-title holding resident for example a spouse, then that person may not be able to stay in their home after the titleholder dies.

In order to provide adequate consumer protection for older and senior consumers who are often vulnerable to exploitation by unethical practices in the consumer credit market, targeted regulation should include the introduction of the following measures:

- A statutory protection against negative equity;
- Pre-contractual disclosure requirements (including requirements on lenders to present the consumer with different scenarios in relation to the impact of a reverse mortgage on the equity in their home before they enter into a reverse mortgage, and to disclose the way in which non-title holding residents will be treated under a reverse mortgage contract); and
- Other protections that will reduce the risk of people being evicted from their homes (including a requirement for the consumer to have independent legal advice prior to entering the contract, prohibiting certain types of conduct from being a default, and an obligation on the part of the lender to make reasonable attempts to personally contact a defaulting debtor to explain their default status and allow them to remedy the default).

We note that under the proposed amendments, specific targeted protections, obligations and disclosure requirements that include those outlined above will be introduced on credit providers and persons engaging in credit services in relation to reverse mortgage contracts. As such, RLC strongly supports the amendments proposed by the Bill as being providing important additional consumer protection for older and senior consumers.

4.3 Small amount credit contracts

See Attachment 1.

4.4 Caps on costs etc. for credit contracts

See Attachment 1.

4.5 Consumer leases

The Enhancements Bill proposes to introduce a whole body of regulation that specifically imposes requirements on persons who engage in credit activities in relation to consumer leases. This area of consumer credit law is substantially less regulated than other consumer credit contracts. Unless the lease contains a right or obligation to purchase the item(s) (allowing it to be categorised as a credit contract under section 9 of the Code), lessees have far fewer protections under the current laws regulating consumer leases than borrowers have in relation to consumer credit contracts.

Often, consumers of consumer leases are not even aware that the contract they have entered into is a lease arrangement:

Case study

Lauren is a mother of five. When her car broke down, Lauren went to a well-known car dealership to buy a second hand car. After speaking with the sales representative, Lauren signed a contract and drove off with a second hand vehicle. Lauren soon ran into difficulties meeting her payments. She came to Redfern Legal Centre for advice. Lauren was shocked to learn that she had in fact signed a consumer lease, and that at the end of the lease she would not own her vehicle. This had not been made clear to her when she went to the dealership with the intention of buying a car.

RLC is strongly supportive of creating rights and protections for lessees under consumer leases that substantially mirror the applicable rights and protections available for debtors under credit contracts, as is proposed by the new legislation. Addressing this gap in consumer credit laws is important to prevent unscrupulous industry participants from taking advantage of the loophole in order to bypass their obligations under the Act. Therefore, we consider it desirable that the new consumer lease provisions reflect the language and substantive content of equivalent credit contract provisions. This will not only address regulatory inconsistencies between consumer leases and credit contracts, but will also make it easier and simpler for the new regime to be implemented by stakeholders affected by the proposed amendments, including consumers, lessors, financial counsellors and solicitors, as the credit contract provisions are already well understood and adopted in the industry.

The proposed amendments are commendable in that they clearly and comprehensively set out the rights and obligations of lessees and lessors of consumer leases. We agree that leases containing a right or obligation to purchase are effectively the same as credit contracts, and therefore that section 9 of the Code should be maintained deeming such leases to be credit contracts. We agree with the application of Part 11 of the Code to consumer leases as defined in s 169 of the Code.

We propose that the following additional amendments be considered for inclusion in the new Consumer Law.

4.5.1 Amendments to Division 2 – form and information to be included in consumer leases

We support the proposed amendments in this Division. In addition to the proposed amendments, we submit that section 174 of the Code should be amended to require the following information to be disclosed in a consumer lease in addition to

the disclosure requirements already contained in section 174:

- the term of the lease; and
- the rights of the lessee if the goods are damaged, defective, or stolen.

Moreover, we submit that section 175 should be amended (or a new section should be inserted), requiring lessors to provide prospective lessees with:

- a pre-contractual statement that sets out the matters required to be disclosed in a consumer lease under section 174, and
- an information statement in a form to be prescribed by the regulations explaining the statutory rights and obligations of a lessee.

We believe that it is important that these documents be provided to the lessee prior to the lease contract being entered into, so that lessees are better placed in a position to be fully informed of their rights and obligations under a consumer leasing contract. Our proposed amendments would reflect the equivalent provision already applicable to credit providers as contained in s 16 of the Code.

4.5.2 Division 8 – repossession, termination and enforcement of consumer leases

We submit that proposed section 179D(4) should be reconsidered to give lessors less latitude in deciding whether a default is not “capable of being remedied”. The section should exhaustively limit the situations in which a lessor is able to “reasonably believe” that default is ‘non-remedial’, or remove the subjective standard of the lessor’s own reasonable belief, to prevent over-reliance on this provision by lessors when issuing default notices.

Furthermore, we reiterate our comments under item 4.1.1 above. Proposed section 89A(1)(c)(ii) (which applies to credit contracts), finds its equivalent in proposed section 179F(1)(c)(ii) in its application to consumer leases. We find it unsatisfactory that the standard upon which a lessor can judge that the basis of a hardship notice is materially different from the bases upon which previous hardship notices were given is the lessor’s own reasonable belief. As outlined above, we suggest that the standard should be objective, i.e. whether the hardship notice is materially different from previous notices.