Legal Aid
QUEENSLAND

Your Ref:	National Credit Laws	**Contact:**	Ross Beer
Our Ref:	RB:SA:CPU	**Telephone:**	(07) 3238 3442
Date:	17 July 2009	**Facsimile:**	(07) 3238 3340
		E-mail:	rbeer@legalaid.qld.gov.au

The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Inquiry into the National Consumer Credit Protection Bill 2009 (The Bill)

We have provided input to a submission by National Legal Aid in response to the then Draft Credit Bill and also assisted in a submission for this enquiry on the introduced Credit Bill.

Legal Aid Queensland welcomes the opportunity to elaborate on some (but not all) key concerns and provide case studies which may assist the enquiry. We would welcome the opportunity to address the enquiry by appearance if helpful.

We confirm our endorsement for the submission of National Legal Aid and enclose our separate, supplementary submission.

Yours sincerely

Ross Beer
A/Chief Executive Officer
Legal Aid Queensland

Role of Legal Aid Queensland and it's Consumer Protection Unit

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.

LAQ provides 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 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.

In Queensland, LAQ is the only agency funded to conduct litigation for consumers facing repossession of their homes. This contrasts with NSW, ACT, WA and Vic, states which have specialist consumer credit legal centres in addition to legal aid services. LAQ's consumer protection unit, in addition to undertaking policy and casework, supports financial counselors and advice lawyers across Queensland in delivering best practice credit and debt assistance.

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, detail and options are explored in this submission.

Summary of Contents – this submission

This submission contains over 20 case studies from consumer credit casework in Queensland and addresses the following issues:

- Compulsory external dispute resolution

The submission contains information supporting compulsory external dispute resolution ("EDR") as a licensing requirement. For detail read – "Access to Justice for Vulnerable Consumers- support for mandatory dispute resolution".

- Jurisdiction and pre litigation steps

LAQ is alarmed that consumers may have to defend court proceedings commenced in jurisdictions remote from their homes, see "Jurisdiction to bring proceedings".
As a safeguard, LAQ proposes that lenders provide evidence of attempted mediation (with an EDR) before litigating – see "No right to bring Court action to recover a debt without a mediation certificate".

- The role of brokers

A concern of NLA is reiterated, that consumers will be unintentionally disadvantaged by the Bill, – "Responsible Lending – shift of liability from Credit Provider to broker", if banks are allowed to rely on the opinion of intermediaries in assessment of the suitability of their products.

- A national interest rate cap

We also regard a national interest rate cap as a necessary plank in effective consumer protection. We say that the responsible lending requirements in the Bill, although welcome, are an inferior substitute for a national interest rate cap which is necessary to protect consumers.

- Necessity for legal support services

.We note that the availability of legal advice and information to consumers will be a critical success factor for the new Bill LAQ supports consumers being given information about availability of legal assistance as well as referral of disputes to the EDR scheme appropriate to their loan at ‘point of sale’ and when they default.

- Practices designed to avoid creditor obligations

Lastly, LAQ has noticed that many fringe lenders are using consumer leases rather than personal loans because these products are subject to less strict regulations under the UCCC. Many vulnerable Queenslanders are disadvantaged by this and the inclusion of consumer leases in the responsible lending requirements will assist us in our work, see “Consumer leases”.

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Access to Justice for Vulnerable Consumers - support for mandatory dispute resolution

In LAQ's experience, many vulnerable consumers find it very difficult to access statutory 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 current Queensland Consumer Credit Code. LAQ has developed a kit which 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 support the intention of the Bill to increase the availability of EDR (External Dispute Resolution) to all borrowers before a lender can take or continue legal action to recover property or enforce a credit contract but highlight that it can only be achieved through the provision of adequate funding to assist vulnerable consumers in all States using this process.

Jurisdiction to bring proceedings

Legal Aid Queensland's primary concern with the Bill is that our clients will be disadvantaged from the status quo unless creditors and their assignees are prevented from commencing court proceedings in locations convenient to the creditor but remote from the borrower. This is a situation that would significantly reduce a consumer's ability to access justice. The solution proposed by the Bill (to deal with this in regulations) is not ideal from our perspective. This matter is so critical, that at the least, a preview of the proposed regulatory fix is essential to ensure that consumers are not put at risk by the transfer of credit to the Commonwealth.

LAQ supports the recommendation in National Legal Aid's submission to the Draft Bill 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:
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> - 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.

Consumers are disadvantaged by the Bill because it differs from the UCCC[1] by de-linking the need to sue a borrower in the jurisdiction 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 location[2]. This creates particular difficulties for borrowers and does not support access to justice because;-

- Accessing low cost legal advice about proceedings in another state is not as of right and not universally available;
- Defending proceedings in another state (preparation and appearance) is extremely time intensive and costly for the borrower;
- Clients are usually required to pay 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 by the prospect of attempting to enforce their legal rights in another State. As a consequence, they are likely to withdraw from the process and as a result, are unlikely to exercise their legal rights[3].

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 to the draft bill 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 with any jurisdiction requirement as there is a

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[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 UCCC 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.

[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.*

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 to a contract on a contract by contract basis because the imbalance of power between a consumer and a credit provider is likely to result in any standard terms that are agreed upon 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 less likely to sue consumers in a State where they do not reside but Banks do sell debts to national debt collection companies which are increasingly likely to do so.

The Bill provides for this issue to be addressed by regulations (not yet promulgated or available for review) but if inadequate, our vulnerable clients will be at a serious disadvantage as a consequence of the national bill.

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 (jurisdiction):

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.

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. There is no jurisdictional basis for this new practice adopted by credit providers and debt collectors.

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 a bank. 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 X and one with Bank Y. The balances were:

$3348.85 and $1938.98 for Bank X debts; and $3511.69 for the debt owed to Bank Y.

Both banks, dissatisfied with Mrs X's failure to keep up with repayments, sold the debts to Company Z, a company which buys and collects debts. Company Z 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 Z 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, Compnay Z had finally, only after the intervention by the Australian Securities Investment Commission, agreed not to proceed with an auction of the home next on 16 December 2008. Mrs X then obtained permission to sell her house. She obtained a contract on the house for its full and current market value. The sale of the home went unconditionally on 11 March 2009, and has now been sold.

Mrs X is 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. The fact that the proceedings are commenced interstate intimidates the clients, and unfamiliarity with the court and the process makes it difficult for them to feel in control of their response. Unless they quickly find their way to Legal Aid Queensland's Consumer Protection Unit or one of a small number of Community Legal Centres with a consumer law practice, they will probably not be able to respond appropriately to the proceedings that are commenced without any jurisdiction basis in New South Wales.

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, a lot of extra work is required 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 organized. Needing to respond to these matters means that 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 (jurisdiction)-

Case Study 5

Client A came to see 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 sought debt advice 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 VCAT. The client was able to organize 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 CTTT) 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 contained in regulations that would require a credit licensee to hold a certificate that confirms that they and the consumer have accessed EDR to resolve the dispute before Court proceedings are commenced pursuant to s 80.

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. Without this certificate, there is no link between requirements imposed by the ASIC supervised EDR system and the Federal Court supervised conduct of court litigation. In the context of credit now being a concern of the Commonwealth, it is important that this link be maintained.

Responsible Lending – shift of liability from Credit Provider to broker

S 128 of the Credit Bill changes the existing credit law. It shifts responsibility from lenders to brokers for assessment of loan applications. This concern is raised in NLA's submission.

By providing immunity to credit providers who do not go through the proper process of verifying a credit application, such a provision has the potential to directly undermine the effectiveness of the national regime to protect consumers from unsuitable credit contracts.

The section may well lead to an increase in irresponsible lending.

The following examples are of practices which on a public policy basis, lenders ought hold ultimate responsibility in order to improve market behaviour.

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, which have led to their credit card limit at $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 and rely on hand outs from a number of charities.

The failure of Bank Z 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.

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 making no effort to assess their capacity to repay in circumstances where Bank T knew Mr and Mrs T 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.

Difficulties with the current proposed responsible lending provisions are further explored below at “Responsible Lending Conduct – The Practical Operation of Chapter 3”.

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

A problem with the procedure set out in the Bill is that neither Financial Ombudsman Service (“FOS”) or the Credit Ombudsman Service Limited (“COSL”) have the power under their terms of reference (as currently in force) 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. Nor do they have 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 the schemes currently view as a commercial decision of the lender and outside the scope of an EDR scheme. For the sake of fairness and efficiency, it ought to be possible for a decision to be substituted through the EDR process. This issue has been addressed by ASIC’s new regulatory guideline 139 and proposed changes to the terms of reference and rules by the EDR schemes. We suggest that Parliament support this approach by legislation to underpin the proposed guidelines. In order to have a nationally consistent comprehensive credit law, this issue ought be addressed in the Bill.

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

LAQ seeks to assist more vulnerable Queenslanders to be in a position to access EDR. This means stopping court proceedings while a claim made by a vulnerable consumer 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 External Dispute Resolution Scheme against the Licensee. This requirement would include the situation where a consumer is 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, this would give Parliamentary imprimatur to the position adopted in the revised ASIC 139 guidelines which regulate EDR schemes licensing approvals including approval of EDR scheme Terms of Reference requirements. From a consumer's perspective an EDR scheme will be hamstrung unless it has 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.

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Access to EDR Schemes – Consequences of a National Code – geographical accessibility

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

Currently FOS (Financial Ombudsman Service, the flagship financial services scheme) is based in Melbourne and COSL (Credit Ombudsman Service with over 8500 members) 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 especially those 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 not focused in Sydney and Melbourne. 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 the 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 National Consumer Credit Code 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 especially in the absence of protection from usurious interest rates as explored below.

Division 2 Credit Guide, support for its utility

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 with and their remedies if those providing credit assistance do not comply with their obligations.[4]
LAQ particularly supports the requirement that assignees of the rights under a credit contract provide consumers with relevant information about the assignee.

However, the information must be concise, delivered at the appropriate time and directed at the substantial issues.

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.

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 prioritizing rapid collection of debt.

Case Study 11

[4] R130,230,330 and 430 of National Consumer Protection Bill

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 assignees may have been required to generate up to10 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 – disclosure of fees and charges

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 assistance[5] and the maximum amount of fees and charges that will be payable by the licensee to another person.[6]

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 not immediately apparent to the consumer.

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

[5] R135 (2)(b)(i) and (ii)
[6] R135 (2)(b)(iii)

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, for example, in the Commonwealth Privacy reforms (in the context of credit reporting) 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 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.

LAQ cannot argue with a conclusion that a credit contract to finance improved opportunities for Ms L's children does fit the consumer's requirements and objectives. However, what the credit company failed to correctly assess was 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 or meet the repayments when she received 8 hours of overtime a fortnight. This is a circumstance which occurred once every three months.

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 on demand

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 that licensees 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 by different credit providers.

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 where 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 and what is fair in all the circumstances have little or no guidance which will allow them to assess conduct in the context of responsible lending.

Recommendation:

That the Bill specifies the circumstances in which a licensee will have acted honestly in the context of responsible lending, LAQ supports the view that they will have acted honestly only where they have checked the sources of all information they are using to make a preliminary assessment of a consumer's suitability for credit and then made an assessment, in compliance with Chapter 3 of the Bill.

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. These cases see finance brokers (credit assistance providers) not make a full assessment of a consumers ability to repay, the lender (credit provider), rely solely upon the broker's assessment and the lender not undertake a complete assessment themselves of the consumer's ability to repay the loan.

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. This assessment by a credit provider should, at the very least include, complying with their own responsible lending obligations and would 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 only receiving 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 by the broker, 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 will 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 Bill[7] that one of the objects of the Bill is to prevent equity stripping when licensees are dealing with vulnerable consumers.
LAQ supports the inclusion in the Bill of a presumption that a loan is unsuitable if it requires the sale of the family home to meet the obligations under the loan.

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

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.

[7] Explanatory Memorandum Pages 20,100,101 and 140.

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 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.”

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. It is required separately to and is 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 17

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 18

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, despite attempting to charge a usurious interest rate, 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.

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

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. Given that there is now to be a delay in the Responsible Lending provisions, the State caps ought to be extended until such time as Phase 2 reform is complete and, the responsible lending provisions are in force.

Background information on interest rate caps

In Queensland, staff in our Civil Justice (Consumer Protection Unit) who advised over 75 distressed borrowers facing repossession in the financial year just ended, predict that the removal of the current State 48% interest rate cap[8] will exacerbate equity stripping by predatory lenders.

In our State, prior to the interest rate cap predatory lenders secured second mortgages over homes and at 240%, this means that a $10 000 loan to assist with bill paying during a period of unemployment, will become an equity stripping debt of close to $100,000if the borrowers are unable to make repayments in the first 12 months.

We understand that the position of the Commonwealth at this time is that there will not be federal regulation of caps pending a review scheduled to occur as part of Phase 2 of the Commonwealth's review of consumer credit law but the Commonwealth holds the view that the States are free to retain whatever interest rate caps they want pending the phase 2 review.

Prevalence of high cost loans in Queensland necessitating a 48% cap

Payday lending arrived from the US to Queensland in 1999/2000. Our experience with payday lenders is that the majority of users of payday lenders are workers on low incomes.

Prior to the introduction of the cap in Queensland which only occurred on 31 July 2008, lenders could charge anything they wanted to for credit in Queensland as there was no ceiling on the interest rate which was payable.

In NSW, VIC and ACT there was and is a 48% maximum payable ceiling or cap on how much interest can be charged on a consumer loan. In NSW and the ACT this cap includes the cost of fees and charges as is the case with Queensland's new law.

We have regularly seen interest rates on loans of more than 240% per annum and sometimes effective interest rates of up to 1600% per annum prior to the introduction of the 48% interest rate cap. Many of these loans also take security over the family house or the family car or other household possessions. Prior to the cap, the interest rates charged were regularly disproportionate to the risk to the lender and placed working families at a real risk of losing their home.

In surveys with micro-lenders in 2006, the Centre for Credit and Consumer Law situated at Griffith University found that 92% of loans surveyed had effective annual interest rates of between 140% and 520%. It is the view of the Legal Aid Queensland and many other consumer agencies that these rates are exploitative and usurious.

Queensland convinced that a cap necessary

After 8 years of debate, review and consultation, Queensland's then Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, the Honourable Kerry Shine MP wrote to Legal Aid Queensland on 15 April 2008 advising of the Bligh Government's determination to "*protect Queenslanders from the serious harm that can result from high interest, fees and charges often associated with short term consumer loans. The Government considers a*

[8] The Consumer Credit Codes in NSW, ACT and Queensland currently have regulations which set the maximum interest rate that can be charged in consumer loans at 48%, inclusive of fees and charges ("a comprehensive cap").

48 per cent cap is critical to achieving this goal". The 48% cap, inclusive of fees and charges commenced in Queensland on 31 July 2008.

Inadequacy of licensing, EDR and positive lending obligations to protect vulnerable Queenslanders from high cost interest rates.

The transfer of powers is to be done in 2 phases. The first phase will recreate the State Consumer Credit Code as a Commonwealth Consumer Credit Code and provide for licensing, compulsory membership of dispute resolution ("mandatory EDR"), positive obligation to lend prudently and regulation of margin lending. Phase 2 will expand the Code to non residential lending, introduce prudential lending obligations and examine whether there should be national interest rate caps.

The measures to be introduced in phase 1 including licensing and mandatory EDR are welcome but will not protect Queenslanders in and of themselves from high interest rate loans. Before the introduction of the cap in Queensland in July last year 240% interest rates were the standard for borrowers with an impaired credit rating trying to make ends meet. We are concerned that the removal of the cap after just 11 months operation will see the return of the predatory pay day loans which caused our service considerable concern and left many vulnerable Queenslanders trapped in a debt spiral and re-directing their Centrelink entitlements from food on the table to pay day lenders.

The reason why the introduction of licensing, EDR and positive lending obligations does not adequately protect vulnerable Queensland consumers is that each of these protections will rely on a normative standard to assess whether vulnerable consumers are being exploited or adversely affected. Without a 48% interest rate cap there is no normative and objective standard for industry or consumer advocates with which to asses whether vulnerable consumers are being treated fairly. Consumer advocates and payday industry representatives will be left to argue over what is a reasonable interest rate in the circumstances.

Without the objective standard expressing the communities view in NSW, QLD, VIC and ACT that interest rates above 48% are not acceptable, agreement between lenders and consumer advocates is highly unlikely about what is a fair interest rate. This disagreement will increase the amount of time taken to resolve disputes, increase the number of vulnerable consumers who will be forced to take court action to protect their rights and will greatly reduce the number of vulnerable consumers that consumer advocates are able to assist.

Reasons for the Commonwealth to regulate for caps now for States with existing caps:

- Removing the cap pre-empts the decision taken by the Commonwealth to review whether there should be caps. The issue of caps is specifically referred to in part of Phase 2 of the Commonwealth's Action Plan which specifically states that it is conducting "an examination of State and Territory approaches to interest rate caps".

- Removing caps by the transfer of the jurisdiction of credit to the Commonwealth risks testing limitless interest rate charges in Victoria for the first time, in circumstances where the availability of credit has been greatly reduced as a result of the current economic crisis.

- The placement of a comprehensive cap in New South Wales in 2005 and Queensland in July 2008, and then its overnight removal in September 2009 and potential reintroduction in July 2010 will lead to uncertainty for current prosecutions of cap breaches, confusion for consumers (and industry), and difficulties for us in providing accurate advice and protecting vulnerable consumers.

- The removal of caps will lead to greater cost and complexity for consumers because it will be very difficult for consumer advocates (lawyers and financial counselors) to argue for loan reductions when there is no clear legislative intent as to what constitutes an interest rate which is unacceptable to the community. This will mean greater hardship for families already suffering as a result of the current economic downturn.

- Even if caps are retained locally, we are afraid that from each State's perspective there would be:
  - No money to enforce the cap;
  - No incentive to enforce the cap when the regulator would now be Commonwealth (ASIC);
  - No enforcement mechanism standing alone with the cap.
  - No political interest in the matter, given that the credit would be the Commonwealth's issue.

For this reason, the ideal solution would be the recognition of the existing State Interest Rate Caps in the new Commonwealth Credit laws and the assurance from each State and Territory that its commitment to enforcement of the caps in place will continue pending resolution of this issue nationally.

. By removing interest rate caps at this critical time in the economic cycle the Government would not be assisting vulnerable Australians achieve a fair go as borrowers. The current economic crisis provides even greater incentive to prevent fringe lenders from exploiting vulnerable Australians

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, in the National Consumer Credit Protection legislation is the requirement in the responsible lending provisions for 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.[9]

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.

Difficulties with Business Purpose Declarations

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) to avoid operation of the National Credit Code.

[9] Chapter 3, part 3-1, Division 4, National Consumer Credit Protection Bill

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

Case Study 19 – 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 retied 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 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.

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 that 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 for example 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 that a credit assistance provider, credit provider, assigned credit provider, credit representatives and debt collectors is a member of.[10]

[10] R130, R230, R232, R330 and R430 of National Consumer Protection Bill 2009.

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 that will be created.

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 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. We welcome the amendment to the draft Bill which extends the credit guide obligations and responsible lending requirements to consumer lessors. In LAQ's experience, many vulnerable consumers believe that they have entered into a contract to buy a car or goods and a loan 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 and are successful mainly 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 rampant 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 20

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 o $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%.

The consumer leasing provisions in the national code will not protect consumers from these sorts of arrangements.

Case Study 21

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.

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

Case Study 22

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%.

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

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