

## Financial Counsellor / Community Worker template

### Letter from financial counsellor / worker: small amount credit that is unsuitable and unjust

## What is this template for?

This letter demands compensation or debt waiver on behalf of your client from a pay day lender who has given your client a small amount credit contract (see definition below) in breach of the laws referred to in the template.

*National Consumer Credit Protection Act 2009* (Cth)

## What do I need to know before using this template?

The information in this template is not legal advice. If you have any questions about your client's situation, please contact Consumer Action Law Centre.

1. “Payday loans” is a term we use to describe a small amount credit contract. A small amount credit contract is a loan:
	1. where the amount borrowed is $2,000 or less; and
	2. under which the repayment period is for 16 days to 12 months.
2. You will need to have obtained all of the contracts that your client has entered into with the pay day lender before completing this letter. We suggest you use our document request letter to do this.
3. In most cases, the responsible lending provisions in Chapter 3 of the *National Consumer Credit Protection Act 2009* (Cth) apply to payday loans entered into on or after 1 July 2010.
4. For payday loans entered on or after 1 March 2013, further specific responsible lending protections also apply. These relate to the amount of fees or charges the payday lender can charge and when a payday lender will be presumed to have given a loan irresponsibly.
5. Section 76 of the National Credit Code (which concerns “unjust transactions”) has applied to regulated payday loans since 2006.
6. Because the question of which laws apply can be quite complex, we recommend that you seek legal advice before using this template. See our worker advice details below.
7. Ensure that you confirm your client's full instructions regarding their current and past financial situation and the enquiries that the lender made in their assessment of suitability of the loan before sending this letter.
8. We recommend that financial counsellors use the FCA payday lending toolkit available to member financial counsellors on the FCA website.

## Worker help

For legal advice about your client’s consumer law, credit or debt problems, call our *Worker Advice Line* on (03) 9602 3326. Or email us at advice@consumeraction.org.au.

**Example letter**

Your address
Your telephone number

Date

General Manager of Compliance

[Address]

Dear Sir/ Madam,

**RE: [NAME OF CLIENT AND LOAN/ ACCOUNT NUMBER]**

I act on behalf of [client’s name] in relation to the small amount credit contract/ contracts (**“SACC/ SACCs”**) he/ she has with you. I enclose his/ her authority to act.

Based on the documents I have seen, it appears that you haven’t met your responsible lending obligations under Chapter 3 of the *National Consumer Credit Protection Act 2009* (Cth) (**“NCCPA”**) in relation to this SACC/ these SACCs.

Furthermore, it appears that the SACC involves a transaction that is/ SACC's involve transactions that are unjust within the meaning of section 76 of the National Credit Code (**“NCC”**).

I am also concerned that your dealings with my client in relation to the SACC/ SACCs amount to unconscionable conduct in breach of section 12CB of the *Australian Securities & Investments Commission Act* 2001 (Cth) (**“ASIC Act”**).

### Responsible lending for small amount credit contract

The SACC/ SACCs you entered into with my client was/ were unsuitable for him/ her because he/ she could only comply with his/ her obligations under it/ them *with substantial hardship* and/or it/they failed to meet my client’s requirements and objectives. This means that by entering into the SACC/ SACCs you breached section 133 of the NCCPA.

This is clear from the following [delete whichever does not apply]:

1. My client had been a debtor under two or more other SACCs in the 90 day period before entering into this SACC/ these SACCs with you (see s 131(3A)(b) NCCPA).
2. My client was in default under another SACC with [name of other lender] at the time of entering into this SACC/ these SACCs (see s 131(3A)(a) NCCPA).
3. You inexplicably and without confirming my client’s requirements and objectives, reduced the repayments after [X weeks/fortnight/months] which had the effect of prolonging the period of the loan and thereby maximising your profits under the small amount credit regime.
4. You failed to verify the financial situation of my client before entering into the SACC/ SACCS. Specifically, you failed to obtain and consider my client’s bank statements for the 90 day period before the SACC was/ SACCs were entered into, which you were required to do under section 130(1A) of the NCCPA.
5. You relied upon a benchmark to calculate my client’s expenses rather than assess my clients real expenses in breach of ASIC Regulatory Guide 209 and the decision in *ASIC v The Cash Store*
6. Based on my client’s financial situation at the time she/ he entered into the SACC/ SACCs, you knew or ought to have known that my client could not repay the credit contract or not without experiencing significant financial hardship, for example, because [delete or add as applicable]:
7. it was clear that my client couldn’t make repayments and also meet his/ her reasonable living expenses;
8. my client would make repayments solely from his/ her Centrelink income;
9. my client would have to reduce his/ her spending on reasonable living expenses and reduce his/ her consumption of necessary goods and services;
10. my client would have little or no money for recreational activities;
11. [insert other].
12. In fact, making repayments did cause my client hardship, in that [delete or add as applicable]:
13. my client had to borrow further money from [name of lender] to make repayments;
14. my client had to borrow further money from [name of lender] to meet his/ her reasonable living expenses;
15. my client had to approach charitable organisations to obtain food parcels to survive;
16. [insert other].
17. Because of these breaches, my client is entitled to compensation under section 178 and/ or section 179 of the NCCPA.

### Unjust and unconscionable credit contract

I also believe that under section 76 of the NCC, having regard to the circumstances relating to the SACC/ SACCs at the time it was/ they were entered into, that the SACC was/ SACCs were unjust.

Relevantly, these circumstances include the following [delete or add as applicable]:

1. You could have ascertained by reasonable inquiry at the time that my client could not pay in accordance with the SACC’s/ SACCs’ terms or not without substantial hardship (see s 76(2)(l) NCC);
2. My client was not able to negotiate the terms of the credit contract (see s 76(2)(c) and 76(2)(d));
3. The credit contract is not expressed in clear language (see s 76(2)(g));
4. My client did not receive any independent legal or financial advice about the credit contract (see s 76(2)(h));
5. The terms of the credit contract and their legal and practical effect were not accurately explained to my client or understood by my client (see s 76(2)(i) and s 76(2)(k));
6. Unfair pressure/undue influence/unfair tactics were used against my client [explain the nature of the unfair pressure/undue influence/unfair tactics] (see s 76(2)(j);
7. The interest rate under the loan is exorbitant (s 76(2)(o));
8. My client was not able to protect his/her own interests because of his/her age/physical condition/mental condition [provide details] (see 76(2)(f);

These factors mean the loan contract(s) ought to be re-opened and my client would be entitled to a refund of all fees and charges and any other amounts that they did not benefit from under the loan(s).

### Unconscionable conduct

Further or alternatively, given the circumstances described above, it appears your dealings with my client in relation to the SACC/ SACCs amount to unconscionable conduct within the meaning of the common law and/ or section 12CB of ASIC Act.

As a result, my client is entitled to seek compensation for his/her loss caused by the unconscionable conduct, including all interest, fees and charges under the loan(s).

My client's loss is $[XX] calculated as follows:

1. Fees of $[XX];
2. Charges of $[XX]
3. [other costs as relevant]

### Next steps

In light of the above, I ask that you waive the entire debt and pay my client compensation for loss in the amount of $[XX].

Please send your written response to this letter to our office by [due date].

Yours faithfully

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[NAME OF FC]

Copy to: ASIC Complaints by facsimile: