

## Financial Counsellor / Community Worker template

### Letter from financial counsellor / worker: guarantee provided to ClearLoans which is void, unenforceable and unjust – complaint by GUARANTOR (not borrower)

## What is this template for?

This letter demands that Membo Finance Pty Ltd trading as ClearLoans releases your client from the guarantee they gave to ClearLoans and refunds all amounts paid to ClearLoans under the guarantee. This is because the circumstances in which your client signed the guarantee was likely in breach of the *National Consumer Credit Protection Act 2009* (Cth), including the *National Credit Code,* and therefore the guarantee should be declared void and unenforceable*.*

## 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. A guarantee is a legally binding promise made by one person (the guarantor) ensuring that another person (the borrower) carries out their legal responsibilities under a loan contract. The guarantor will be legally responsible for paying the loan if the borrower refuses to, or can’t, pay the debt.
2. The *National Credit Code* (**NCC**)requires that guarantees which relate to a credit contract regulated by the NCC meet the following requirements:
	1. Be in writing and signed by the guarantor;
	2. A copy of the credit contract (i.e. the related loan contract) must be given to the guarantor **before** they sign the guarantee as well as a document explaining the rights and obligations of the guarantor (known as Form 9 of the *National Consumer Credit Protection Regulations* 2010);
	3. A copy of the guarantee must be given to the guarantor within 14 days after they sign the guarantee (unless the guarantor has already got this document).
3. You will need to get detailed instructions from your client about their relationship with the borrower, the circumstances in which they entered into the guarantee (i.e. online or over the phone, with or without the borrower present), what they understood they were signing and whether they felt any pressure by the borrower or ClearLoans to sign the guarantee.
4. You will also need instructions from your client about whether they have paid any money to ClearLoans, their circumstances of financial hardship and whether ClearLoans have engaged in debt collection against them.
5. You should get the name of the borrower and consider whether your agency would have a conflict of interest if it were to assist both the borrower and the guarantor, or if your agency has assisted the borrower in the past.
6. It is preferable that you obtain copies of the guarantee, the credit contract signed by the borrower and a statement of how much has been paid by the guarantor and the borrower. We suggest that you use our document request letter to do this.
7. You should amend this template to reflect your client’s circumstances. For example, if the borrower has experienced financial hardship, debt collection and harassment, or if the borrower perpetuated family violence against the guarantor, we recommend that you amend this template letter to refer to those circumstances.
8. Some ClearLoans guarantees which we have reviewed do not comply with Regulation 81 of the *National Consumer Credit Protection Regulations 2010* because the warning does not include the words, “READ THIS GUARANTEE AND THE CREDIT CONTRACT”*.* Consumer Action can provide you with legal advice if your client’s guarantee does not comply with that requirement.
9. If your client needs to take their dispute to the Australian Financial Complaints Authority (AFCA), AFCA will consider good industry practice and its own guidelines in determining the dispute with ClearLoans. It may therefore consider:
	1. The *Banking Code of Practice* (**BCP**)which gives particular rights to guarantors, including the right to sign the guarantee in the absence of the borrower;
	2. From 1 July 2019, the BCP gave additional rights to guarantors including allowing guarantors a minimum of three days to review their guarantee documents and to consider their obligations as a guarantor before signing and returning their guarantee;
	3. The AFCA Approach to Complaints Lodged by Guarantors;
	4. The ASIC and ACCC Debt collection guideline for collectors & creditors;
	5. Where applicable, the Australian Bankers Association’s Industry Guideline: Financial Abuse and Family and Domestic Violence Policies, which recognises that coercing a partner to guarantee a loan is a form of financial abuse.
10. Section 76 of the National Credit Code (which concerns “unjust transactions”) has applied to regulated guarantees since 2006. Your client has 2 years to ask AFCA or a Court to set aside the guarantee on the grounds that it is an unjust transaction. The 2 year time limit starts from when the guarantee was rescinded, discharged or otherwise comes to an end.
11. 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.

## Worker help

The Consumer Action legal team can help you by reviewing your draft letter addressed to ClearLoans and providing you with advice about your client’s legal rights.

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.

**WORKER TEMPLATE DOCUMENT REQUEST TO CLEAR LOANS ON BEHALF OF GUARANTOR CLIENT**

[REFERENCE NUMBER] Case File Number

Solicitor Name

[DATE]

Membo Finance Pty Ltd (ACN 159 693 464) trading as ClearLoans

58 Gipps Street

COLLINGWOOD VIC 3066

**By email: complaints@clearloans.com.au**

Dear ,

Re: [CLIENT NAME] – Guarantee of [$AMOUNT] loan to [BORROWER NAME] (borrower) (loan), ClearLoans Reference: XX (guarantee)

I act on behalf of [CLIENT NAME] in relation to the above guarantee and enclose a copy of my Authority under the *Privacy Act 1988* (Cth). I request that you direct all contact about this matter to my office and not to my client.

**Request for documents**

I request that you provide copies of the following documents about this account:

1. Copies of all documents relating to the above loan contract and guarantee under section 185(1) of the *National Credit Code* (the **Code**) including:
* the credit contract and guarantee;
* any credit-related insurance contract in your possession; and
* any notices you have sent to my client.
1. A statement of amount owing in accordance with section 36(1) of the Code setting out:
* the current balance of the account;
* any amounts credited or debited to the loan over the life of the account;
* any amounts overdue and when each such amount became due; and
* any amount payable and the date it became due.
1. A statement of amount payable as at today's date with details of items which make up that amount in accordance with section 83 of the Code.
2. Any certification in relation to the provision of independent legal advice and/or independent financial advice, provided to my client.
3. Any application documents pertaining to my client with respect to the loan application and guarantee.
4. Copies of any file notes and call recordings of any phone conversations between ClearLoans and my client.
5. Any relevant correspondence between ClearLoans involved in the transaction with my client.
6. [IF THERE ARE FAMILY VIOLENCE CONCERNS] A copy of ClearLoan’s guidelines, policies and/or procedures regarding family violence. ***Please do not notify the borrower that we have made this request as it may compromise my client’s safety***.

Please send the above documents to my office within the timelines specified in the NCCPA, the Code and/or the *Privacy Act 1988* (Cth) by email ([EMAIL ADDRESS]) or post ([POSTAL ADDRESS]).

In the meantime, I request that ClearLoans takes no other action on this account until at least 14 days after I receive all the documents. If you cannot agree to this request, please advise my office immediately.

Please note that my office is not authorised to acknowledge, admit or ratify any agreement with ClearLoans and this letter is not to be interpreted in that way.

Please contact me on [PHONE NUMBER] or by email on [EMAIL ADDRESS] if you have any questions.

Yours faithfully,

**[Your name]**

 **WORKER TEMPLATE LETTER OF DEMAND TO CLEARLOANS ON BEHALF OF GUARANTOR CLIENT**

Our Ref:

[DATE]

Membo Finance Pty Ltd (ACN 159 693 464) trading as ClearLoans

58 Gipps Street

COLLINGWOOD VIC 3066

**By email: complaints@clearloans.com.au**

Dear Sir/Madam

Re: [CLIENT NAME] – Guarantee of [$AMOUNT] loan to [BORROWER NAME] (borrower) (loan), ClearLoans Reference: XX (guarantee)

I act on behalf of [CLIENT NAME] (**my client**) in relation to the above guarantee and enclose a copy of my client’s authority. I request that you direct all contact about this matter to my office and not to my client.

My client seeks to be released from the guarantee and seeks a refund of all amounts paid under it on the basis that ClearLoans breached its legal obligations regarding guarantees, responsible lending and unjust credit contracts under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the *National Credit Code* (**the Code**).

[If applicable] ***In light of the circumstances of family violence disclosed in this complaint, I request that you do not disclose this complaint or any personal circumstances of my client to the borrower.***

**Background**

1. My client is [INSERT DETAILS OF CLIENT E.G. AGE, FINANCIAL STATUS, FAMILY STATUS, LIVING ARRANGEMENTS, FAMILY VIOLENCE, DISABILTIES, MENTAL HEALTH ISSUES, culturally and linguistically diverse, ABORIGINAL OR TORRES STRAIT ISLANDER ETC].
2. On XXX my client entered into the guarantee with ClearLoans in the following circumstances:
	1. [Insert details of relationship between borrower and client, including any family violence or dependency];
	2. [Insert details of sign up process between ClearLoans and the client];
	3. [insert if applicable]: My client did not understand what they was entering into or the significance of the guarantee. My client understood that [insert details].
3. [Insert if applicable] On XXX ClearLoans started debiting loan repayments from my client’s bank account. This caused my client hardship because [insert details].
4. [insert if applicable] On XXX ClearLoans started contacting my client and demanding payment of the debt. The impact of this debt collection on my client was [insert details e.g. anxiety, stress, exacerbation of mental health issues, embarrassment, inconvenience].

**Legal claims against ClearLoans**

Breach of guarantor provisions – sign up

1. ClearLoans has not complied with the guarantee provisions of the Code because:
	1. The guarantee was not signed by the guarantor (Section 55 of the Code);
	2. ClearLoans did not give my client a copy of the credit contract or proposed credit contract and a document in the form prescribed in Form 9 of the Regulations, explaining the rights and obligations of a guarantor (Section 56 of the Code) *before* signing; and
	3. ClearLoans did not give my client a copy of the signed guarantee and a copy of the credit contract within 14 days after the guarantee was signed (Section 57 of the Code).
2. Section 62 of the Code provides that it is a criminal offence for a credit provider to enter a guarantee that contravenes the above requirements. The guarantee is therefore void and unenforceable due to non-compliance.
3. Because the guarantee was arranged entirely [insert as applicable: over the phone and/or via electronic communication], ClearLoans had no ability to assess whether my client was being pressured into providing the guarantee by the borrower. ClearLoans did not have adequate safeguards in place to ensure that my client had a genuine opportunity to obtain independent legal advice before entering the guarantee.
4. The Banking Code of Practice (**BCP**)outlines best industry practice in relation to guarantees, and AFCA states in its guarantee approach document that it expects non-subscribers to the BCP to follow these guidelines too. Clear Loans departed from the BCP by [delete below paragraphs where not applicable to your client’s circumstances]:
	1. [For guarantees signed after 1 July 2019 insert:] Not waiting 3 days to accept a guarantee after information about the guarantee was provided to the guarantor (where the guarantor did not obtain independent legal advice) (clause 107-108);
	2. giving the guarantee documents to the borrower to arrange for signing of the guarantee by the guarantor, instead of to the guarantor (clause 109);
	3. failing to ensure that the guarantee was signed in the absence of the borrower (clause 110);
	4. enforcing security against the guarantor before those rights were enforced against the borrower (clauses 113-114).

Breach of responsible lending laws

1. ClearLoans failed to meet its responsible lending obligations under the NCCPA because the loan was unsuitable for the borrower. In particular ClearLoans failed to:
	1. make reasonable inquiries about the borrower’s requirements and objectives;
	2. make reasonable inquiries about the borrower’s financial circumstances;
	3. take reasonable steps to verify the borrower’s financial situation.
2. In fact, the loan was unsuitable for the borrower because they were unable to comply with the financial obligations under the loan or could only do so with substantial hardship.
3. ClearLoans therefore breached its obligations under the NCCPA and my client is entitled to their consequential loss suffered as a guarantor, including a declaration that the guarantee is void or unenforceable and compensation.

The guarantee is an unjust credit contract

1. The guarantee was also unjust under section 76 of the Code and should be reopened because:
	1. ClearLoans failed t0 properly assess my client’s ability to enter the guarantee freely and without undue pressure or influence of the borrower.
	2. There was an imbalance of bargaining power between my client and ClearLoans in favour of ClearLoans, particularly when having regard to my client’s vulnerabilities.
	3. The guarantee was in the form of a standard contract, containing provisions which were not subject to negotiation between the parties.
	4. It was not reasonably practicable for my client to negotiate for the alteration or rejection of any of the provisions of the guarantee.
	5. Due to my client’s vulnerabilities, they were unable to reasonably protect their interests.
	6. ClearLoans did not provide a sufficient explanation to my client of their obligations under the guarantee, and failed to take adequate measures to ensure their understanding of its provisions and effect. ClearLoans did not take adequate measures to ensure my client understood the nature and implications of the guarantee.
	7. ClearLoans failed to make reasonable inquiries as to whether my client would have been able to pay in accordance with the terms of the guarantee or not without substantial hardship.
	8. My client did not have a genuine opportunity to obtain independent legal advice before entering the guarantee. Any recommendation to obtain independent legal advice stated on the guarantee was essentially meaningless where ClearLoans had inadequate safeguards to prevent undue influence by the borrower.

Hardship

1. ClearLoans persisted in recovery action in disregard of my client’s hardship circumstances. ClearLoans’ failure to consider my client’s circumstances is contrary to the hardship provisions of the Code and chapter 41 of the Banking Code and its requirements to help customers experiencing financial difficulty;
2. I also refer to clause 13 of the ASIC/ACCC Debt Collection Guidelines and request that ClearLoans immediately ceases all enforcement activities for the loan as liability is disputed.
3. [If applicable] Further, ClearLoans’ conduct towards my client falls short of the current standards in place for credit providers set out in the Australian Bankers’ Association’s “Industry guideline: Financial Abuse and family and domestic violence policies” which recognises financial abuse as a form of family violence, including coercing a partner in a relationship to guarantee a loan.

**Proposed resolution**

1. On the basis of my client’s legal claims as set out in this letter, I request that ClearLoans does the following within 14 days in full and final settlement of this account:
	1. releases my client from liability under the guarantee;
	2. refund all amounts paid under the guarantee to my client;
	3. agrees not to make any adverse reports to credit reporting entities about the account and to take all reasonable steps to remove adverse reports that have already been made.

Should my client not receive payment and written confirmation of your agreement to the terms above within 14 days, I intend to refer this matter for legal action.

My client otherwise reserves all of their legal rights including the right to make further claims in relation to misleading and deceptive conduct and unconscionable conduct, and to claim compensation for any non-financial loss they have suffered from ClearLoans’ debt collection practices.

Please call [name] on ### should you have any queries.

Yours faithfully

**WORKER TEMPLATE ASIC COMPLAINT ABOUT CLEARLOANS**

Our Ref:

[DATE]

**By regular post**

Australian Securities and Investment Commission

Misconduct & Breach Reporting

GPO Box 9827

Melbourne VIC 3000

Dear Sir/Madam,

**Complaint about ClearLoans – [guarantee given by [CLIENT NAME]] OR [loan given to [CLIENT NAME]]**

I make this complaint about Membo Finance Pty Ltd trading as ClearLoans on behalf of my client [CLIENT NAME] and enclose their signed authority.

My client is [INSERT DETAILS OF CLIENT E.G. AGE, FINANCIAL STATUS, FAMILY STATUS, LIVING ARRANGEMENTS, FAMILY VIOLENCE, DISABILTIES, MENTAL HEALTH ISSUES, CALD, ABORIGINAL OR TORRES STRAIT ISLANDER ETC].

On [INSERT DATE] my client signed the [guarantee/loan] with ClearLoans. I believe that by signing my client up to the [guarantee/loan], ClearLoans breached its obligations under the credit laws in relation to guarantees and/or responsible lending.

I **enclose** a copy of my client’s letter of demand to ClearLoans which sets out my client’s claims in detail. I also **enclose** a copy of my client’s documents – these are provided for ASIC’s internal purposes only.

[IF APPLICABLE]: We have been contacted by other people who have similar disputes with ClearLoans and believe this complaint is indicative of a broader systemic problem that warrants ASIC’s urgent investigation.

Please call [name] on ### should you have any queries.

Yours faithfully

Yours faithfully,