

## Financial Counsellor / Community Worker template

### Letter from financial counsellor / worker: unsuitable and unjust loan by ClearLoans – complaint by BORROWER (not guarantor)

## What is this template for?

This letter demands that Membo Finance Pty Ltd trading as ClearLoans (**ClearLoans**)releases your client from all liability under the loan contract with ClearLoans and refunds all amounts paid by your client under the loan. This is because the circumstances in which your client signed the loan were likely in breach of the *National Consumer Credit Protection Act 2009* (Cth), including the *National Credit Code.*

## 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. The *National Consumer Credit Protection Act 2009* (Cth) (**the NCCPA**) says that before providing a loan, the lender must make reasonable inquiries and verifications and assess the suitability of the contract for the prospective borrower. A credit contract will be unsuitable if the borrower would not be able comply with the repayments (or could only comply with substantial hardship), or the contract would not meet the borrower’s requirements and objectives.
2. We suggest you use our document request letter to obtain copies of the credit contract, the assessment of suitability and related documents.
3. You will need to get detailed instructions from your client about their income and expenditure at the time of the assessment, and the purpose for which they wanted the loan. You will also need instructions about what inquiries and verification (if any) ClearLoans made about your client’s income and expenses.
4. Section 76 of the *National Credit Code* (**the Code**) allows an unjust credit contract to be set aside. You will need instructions about whether any of the factors in section 76(2) apply to the transaction. In particular, you should ask your client about:
	1. Their personal circumstances including their age, income, financial status, family status, literacy, living arrangements, health, any relevant experiences of family violence, whether they have a disability, housing status and whether they identify as Aboriginal or Torres Strait Islander;
	2. The sign-up process with ClearLoans including whether the contract was entered into over the phone or online and whether the client submitted any paperwork to ClearLoans;
	3. Whether your client has experienced financial hardship because of the loan from ClearLoans.
5. Your client has 2 years to ask the Australian Financial Complaints Authority (**AFCA**) or a Court to set aside the loan on the grounds that it is an unjust transaction. The 2 year time limit starts from when the loan contract was rescinded, discharged or otherwise comes to an end. Your client may also ask for compensation for irresponsible lending and has 6 years to make that claim from when the loan was entered into.
6. You will need instructions from your client about whether they have paid any money to ClearLoans and whether ClearLoans has engaged in inappropriate debt collection practices against them.
7. There are separate requirements for guarantees which are contained in the Code which ClearLoans may also have not complied with.
8. You should get the name of the guarantor and consider whether your agency would have a conflict of interest if it were to assist both the borrower and the guarantor, or if the guarantor is a former client.
9. If your client needs to take their dispute to AFCA, AFCA will consider good industry practice and its own guidelines in determining the dispute with ClearLoans. It may therefore consider:
	1. AFCA’s Approach to responsible lending (at the time of writing this document has not been released);
	2. Australian Securities and Investments Commission Regulatory Guide 209 Credit licensing: Responsible lending conduct;
	3. The Banking Code of Practice;
	4. 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 take out a loan is a form of financial abuse.
10. 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

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 BORROWER 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 Sir/Madam,

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

I act on behalf of [CLIENT NAME] in relation to the above loan and enclose a copy of our 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. A copy of the assessment of suitability under section 132 of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**).
3. Any application documents regarding the loan application and guarantee, and in particular any certification in relation to the provision of independent legal advice and/or independent financial advice, provided to my client.
4. Copies of any file notes and call recordings of any phone conversations between ClearLoans and my client.
5. Any relevant correspondence between ClearLoans and/or any broker 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 guarantor 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 CLEAR LOANS ON BEHALF OF BORROWER 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] – Loan of [$AMOUNT] to [BORROWER NAME] ClearLoans Reference: XX (the loan), guarantee provided by [GUARANTOR NAME] (guarantor) (guarantee)

I act on behalf of [CLIENT NAME] (**my client**)in relation to the above loan 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 that they be released from all liability relating to the loan and seeks a refund of all amounts paid under the loan on the basis that ClearLoans breached its legal obligations regarding responsible lending, unjust credit contracts and guarantees 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 guarantor.***

**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 loan with ClearLoans in the following circumstances:
	1. Insert details of relationship between client and guarantor;
	2. Insert details of sign up between ClearLoans and the client;
	3. [insert if applicable]: My client did not understand what they were entering into or the significance of the loan.
3. [insert if applicable]: Contrary to my client’s understanding, the loan funds were advanced to the guarantor instead of my client.
4. To date, my client has paid $xxx to ClearLoans under the loan. The loan repayments have caused my client financial hardship.
5. On XXX ClearLoans started contacting my client and demanding payment of the debt. The impact of this debt collection on my client was [e.g. anxiety, stress, exacerbation of mental health issues. Insert further details of debt collection harassment if applicable].

**Legal claims against ClearLoans**

Breach of responsible lending laws

1. ClearLoans failed to meet its responsible lending obligations under the NCCPA because the loan was unsuitable for my client. In particular ClearLoans failed to:
	1. make reasonable inquiries about my client’s requirements and objectives;
	2. make reasonable inquiries about my client’s financial circumstances;
	3. take reasonable steps to verify my client’s financial situation.
2. In fact, the loan was unsuitable for my client because they were unable to comply with the financial obligations under the contract or could only do so with substantial hardship. This is because [INSERT REASONS].
3. [Where the loan funds were advanced to the guarantor not the borrower] The loan did not meet my client’s requirements and objectives because the loan funds were paid to the guarantor, not to my client.

The loan contract is an unjust credit contract

1. The loan is an unjust transaction under section 76 of the Code and should be reopened because:
	1. 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.
	2. The loan was in the form of a standard contract, containing provisions which were not subject to negotiation between the parties.
	3. It was not reasonably practicable for my client to negotiate for the alteration or rejection of any of the provisions of the loan.
	4. Due to my client’s vulnerabilities, they were unable to reasonably protect their interests.
	5. ClearLoans did not provide a sufficient explanation to my client of their obligations under the loan, and failed to take adequate measures to ensure my client understood the nature and implications of the loan.
	6. ClearLoans failed to make reasonable inquiries as to whether my client would have been able to pay in accordance with the terms of the loan or not without substantial hardship.
	7. My client did not have a genuine opportunity to obtain independent legal or financial advice before entering the loan.

Breach of guarantor provisions – sign up

1. I am also concerned that ClearLoans may have breached its obligations by entering into a credit contract with a guarantee that is unenforceable under the Code and the Regulations. This is relevant factor in assessing the unjustness of the loan.

Hardship

1. [insert if applicable]: ClearLoans did not comply with the hardship provisions of the Code, and did not try to help my client when they were experiencing financial difficulty contrary to chapter 41 of the Banking Code.
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.

**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 all parties from liability under the loan;
	2. refund all amounts paid by my client under the loan;
	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 above terms 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,