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Dear Manager

Treasury consultation: Consumer Credit Reforms

Thank you for the opportunity to comment on the Government's proposed amendments to the national consumer credit law framework. This submission is made on behalf of Consumer Action Law Centre (**Consumer Action**), Financial Rights Legal Centre (**Financial Rights**), Financial Counselling Australia, Consumer Credit Law Service (WA) Inc (**CCLSWA**), CHOICE, Uniting Communities Consumer Credit Law Centre SA (**CCLCSA**), Care and Consumer Law Centre ACT (**CARE ACT**), NILS Network of Tasmania, Indigenous Consumer Assistance Network and Redfern Legal Centre (collectively, **Our Organisations**).

A substantial part of the work of each of Our Organisations is directed at improving consumer rights and outcomes in relation to consumer credit in Australia. We have a wide range of practical expertise in consumer credit laws, largely based upon the lived experiences of clients we assist, through free financial counselling and legal advice services. Further information about each of Our Organisations is available at **Appendix B**.

Our submission addresses all materials released as part of the consultation (collectively, the **Draft Materials**).

Our Organisations have a strong working relationship with Treasury and government, and are regular submitters to similar consultations. We normally provide constructive feedback in these consultations, aimed at improving the impact of planned changes to policy and law. Unfortunately, we are unable to say anything positive about the Government's plans. The repeal of responsible lending obligations for almost all forms of consumer credit is the most short-sighted, poorly thought out policy proposed by a government in credit or financial services in recent memory. The Draft Materials are fundamentally defective, and no number of amendments can solve this.

The legislation, if enacted, would:

- reduce people's legal rights against lenders and brokers in relation to lending;
- reduce the incentives for lenders to comply with lending standards due to the removal of penalties for irresponsible lending;
- reduce requirements for lenders and brokers to check information on loan applications;
- dismantle the ASIC and APRA 'twin peaks' regulatory regime for bank lending.

In short, it would greatly reduce the extent to which the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) does what its name suggests it does. This reform risks more people being sold unsuitable credit products that will do them and the economy long term financial harm. This is not the solution to a recession—in fact, these measures are more likely to prolong the recession.[1] In addition, the planned reform directly contradicts Recommendation 1.1 of the Financial Services Royal Commission.

Despite drastically reducing the consumer protections currently provided by responsible lending obligations (**RLOs**), the Draft Materials manage to make the application of law in this area even more complex than it is now. As there is no way to reduce the harm the Draft Materials would cause, we make one single recommendation to the Government:

RECOMMENDATION 1. Abandon this legislation and retain responsible lending laws in their current form.

Our submission details the range of problems that would result from passing the Draft Materials. Case studies are provided throughout the submission to help illustrate specific points, and a number of additional case studies that broadly speak to the importance of RLOs are also provided at **Appendix A.**

[1] International Monetary Fund, *Global Financial Stability Report October 2017: Is Growth at Risk?*, World Economic and Financial Surveys, October 2017, Chapter 2, p 54, https://www.imf.org/en/Publications/GFSR/Issues/2017/09/27/global-financial-stability-report-october-2017. This report confirms that high household indebtedness (a high likelihood if enacting the Draft Materials reduces lending standards, as appears to be its effect) "can cause significant debt overhang problems when a country unexpectedly faces extreme negative shocks" and "can be a source of financial vulnerability and lead to prolonged recessions".

TABLE OF CONTENTS

1. History of responsible lending 4
   1.1. Responsible lending allows for scalable and flexible assessments 6
   1.2. Credit has continued to flow under responsible lending 7
2. The impact of repealing responsible lending laws 9
   2.1. Complex changes that reduce borrower rights 9
   2.2. Disregard of Recommendation 1.1 of the Hayne Royal Commission 10
   2.3. The impact of unaffordable debt 10
3. Removing incentives to comply – penalties and deterrence 12
   3.1. Non-ADI lenders 13
   3.2. ADI lenders 13
4. Removal of individual borrower legal rights 14
   4.1. No legal basis to seek compensation from lenders 15
   4.2. Unclear how AFCA complaints would work – if at all 16
   4.3. No access to remedies post default judgment 18
   4.4. Best interests duty for brokers no replacement for irresponsible lending 18
5. Fewer assessment and verification obligations 20
   5.1. Licensees will know less about the circumstances of a consumer 20
   5.2. No requirement to consider a borrower requirements and objectives 21
   5.3. Removing responsible lending obligations will hurt people experiencing financial abuse 22
   5.4. Using estimates disregards important circumstances of consumers 25
   5.5. Reverse mortgages 26
   5.6. Credit cards 27
6. A more complex, confused and inconsistent regulatory system 28
   6.1. The Wallis inquiry and the 'twin peaks' model 28
   6.2. Overlapping and confused roles of ASIC and APRA 29
   6.3. Obvious opportunities for regulatory avoidance 29

APPENDIX A – ADDITIONAL CASE STUDIES 33

APPENDIX B – ABOUT THE CONTRIBUTORS 37

1. History of responsible lending

While the Global Financial Crisis (**GFC**) may have taken place mostly in America and Europe, it has been well documented that Australia had its own home-grown lending problems at the same time. From around 2000 onwards there had been a general and growing awareness in the financial services industry of problems with inappropriate lending practices. Between 2002 and 2010, improper, lax and even predatory lending practices became increasingly common. Financial Rights (then called the Consumer Credit Legal Centre) produced a report to the Australian Securities & Investments Commission (**ASIC**) in 2003 examining the mortgage and finance broker industry. The report was in response to the growing prevalence of mortgage brokers in the market and the concerns expressed by community advocates and caseworkers who were experiencing a growing incidence of complaints involving brokers. These experiences led to these groups identifying the industry as lightly and unevenly unregulated, and as containing some high-risk players and unfair practices.[2]

Other issues identified by consumer advocates in this period included:

- Increasing use of low doc and no docs loans to lend money to people who had no capacity to pay;
- Inappropriate promotion of line of credit loans which were more expensive and poorly suited to many borrowers, including in some cases to elderly people in lieu of reverse mortgages;
- Poor quality valuations;
- Loans for interstate investment properties with inflated prices resulting in significant borrower/investor losses;
- Scams involving fake "savings" provided by high cost fringe lenders, to sell overpriced properties to newly arrived migrants and refugees with no capacity to pay;
- Equity/asset stripping lending (high interest, high fees and brokerage and no capacity to pay);
- Repeated limit increases on credit cards, unsolicited or otherwise, based on repayment history of minimum amounts, rather than affordability, resulting in unmanageable limits;
- Interest–free deals in-store which resulted in backdated high interest debt if the borrower could not pay off 100% of the debt within the interest free period; and
- Car yard loans and leases for poor quality vehicles at high interest, with inadequate supporting documentation, and sometimes fraudulent documentation provided on site.

While many of these practices were in the non-bank sector, they were far from exclusively so. The Storm Financial debacle[3] provided an excellent case study on how perverse incentives worked within banks to drive behaviour that was clearly outside standard policies and procedures; many other examples of which were later laid bare by the Financial Services Royal Commission.[4]

In 2007, the House of Representatives Standing Committee on Economics, Finance and Public Administration Home loan lending Inquiry into home loan lending practices and the processes used to deal with people in financial difficulty outlined concerns that credit was too easily available and that many Australians were overcommitted and facing financial hardship. The Committee recommended that the Commonwealth Government take over the regulation of credit from the states and territories. This includes the regulation of mortgage brokers and non-bank

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[2] Consumer Credit Legal Centre NSW (Inc), *REP 19 A report to ASIC on the finance and mortgage broking industry*, March 2003, https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-19-a-report-to-asic-on-the-finance-and-mortgage-broking-industry/.

[3] Senate Standing Committees on Economics; *Final Report, Performance of the Australian Securities and Investments Commission*; Chapter 6; para 6.3; 26 June 2014.

[4] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry; Final Report; 4 February 2019. (**Financial Services Royal Commission**).

lenders. Committee Chair Bruce Baird at the time said "*it is clear to the committee that something needs to be done to stop predatory practices. The states have been trying to come up with a regime to regulate mortgage brokers since around 2002. It is still not in place.*"[5]

The growing awareness of Australia's lending problems led COAG to announce in March 2008 the need for a broad regulatory reform agenda that would include taking early action and progress on mortgage credit and advice, margin lending and non-deposit taking institutions. The Productivity Commission found that a single national regulatory regime covering both mortgages and mortgage brokers would be "*an efficient response to the need to address a number of malpractices on the part of certain brokers*".[6]

In July 2008, COAG agreed to measures designed to provide better protections for financial consumers across Australia. It envisaged that:

> *"National regulation through the Commonwealth of consumer credit will provide for a consistent regime that extinguishes the gaps and conflicts that may exist in the current regime. The new regime is anticipated to introduce licensing, conduct, advice and disclosure requirements that meet the needs of both consumers and businesses alike".*[7]

It took several years of consultation and negotiation before the Consumer Credit Protection Reform Package was introduced. It included a national licensing scheme to overcome some of the current anomalies—a 'single standard and uniform regime for consumer credit regulation and oversight'.[8] It also included a world first responsible lending regime intended to address the problems identified above; the need for which had been reinforced by widespread losses stemming from the US sub-prime mortgage sector triggering the Global Financial Crisis.

According to Philip Field, former lead Banking Ombudsman at the Financial Ombudsman Service,[9] the process "*probably took the best part of two or three years of negotiations and roundtable meetings to get it into place and get people on board including consumers, lenders, and brokers*".[10]

In 2014 Gerard Brody, Consumer Action Law Centre, informed the Parliamentary Joint Committee on Corporations and Financial Services that, since the introduction of the licensing regime and particularly the responsible lending obligations, experience in the mainstream lending area indicated that practices had improved. He explained:

> *"Our experience is that the new obligations under the national credit law have improved processes and that we are not seeing the type of loss that people have experienced in the past, particularly because of the responsible lending obligations and the obligations upon credit providers to assess someone's capacity to repay and assess that a loan is in line with their objectives".*[11]

The responsible lending laws had the impact of preventing some of the more toxic and improper lending seen in the early 2000s. Over time however, our casework experience, backed up by data on financial stress in the community, is that lenders have not been applying the laws in the way intended. We discuss this further in Section 2.2 in relation to the Financial Services Royal Commission.

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[5] House of Representatives Economics, Finance And Public Administration Committee Home Loan Lending Inquiry, *House Economics Committee Recommends Commonwealth Regulation of Credit* Media Release, 17 September 2007: https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/efpa/banklending/media/media04.pdf
[6] Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry report no. 45, vol. 1, 30 April 2008, p. 9.
[7] Senate Standing Committees on Economics; *The Performance of ASIC*; Chapter 6. Para 6.6. 26 June 2014.
[8] The Hon Chris Bowen MP, Second Reading Speech, National Consumer Credit Protection Bill 2009, *House of Representatives Hansard*, no. 10, 2009 (25 June), p 7148.
[9] Now the Australian Financial Complaints Authority.
[10] Mr Philip Field, Lead Ombudsman, Banking and Finance, Financial Ombudsman Service, *Proof Committee Hansard*, 20 February 2014, p. 24. Quoted from Senate Standing Committees on Economics; The Performance of ASIC; Chapter 6.
[11] Mr Gerard Brody, Chief Executive Officer, Consumer Action Law Centre, *Proof Committee Hansard*, 20 February 2014, p. 42. – Quoted from Senate Standing Committees on Economics; The Performance of ASIC; Chapter 6

It is worth noting, however, that since their introduction, the responsible lending laws have generated a decade of investment by industry and legal interpretation.

Repealing the bulk of responsible lending provisions in a matter of months, with a paltry two-week consultation period on draft legislation, flies in the face of the lessons we learned in the GFC and is bad economic policy.

1.1. Responsible lending allows for scalable and flexible assessments

The key obligations that RLOs impose on credit licensees through the NCCP Act are principle based and relatively simple. At its core, RLOs require that a credit contract or credit increase be 'not unsuitable' for the consumer. A credit contract will be unsuitable if:

- the consumer is unable to comply with the financial obligations under the contract, or could only comply with substantial hardship; or
- the contract does not meet the consumer's requirements and objectives.[12]

Before making the assessment, the lender (or broker in the case of a preliminary assessment) must make reasonable inquiries about the consumer's requirement and objectives in relation to the credit contract, make reasonable inquiries about the consumer's financial situation and take reasonable steps to verify the consumer's financial situation.[13]

These are high level general principles that allow licensees a level of discretion as to how they choose to meet them, subject to some basic requirements. As stated in ASIC's *Regulatory Guide 209 Credit Licensing: Responsible Lending Conduct*, the legislation allows flexibility to determine what is appropriate in individual situations.[14]

Responsible lending is also a test that does not require perfection or great precision—evidenced by use of the term 'not unsuitable'. As Commissioner Hayne noted in the Final Report of the Financial Services Royal Commission, the 'not unsuitable' test is directed at avoiding harm—it does not prescribe that the licensee needs to identify a particular benefit that will come from the credit product.[15] The purpose of RLOs is consumer protection, and the obligations they impose on licensees do not require more than is necessary in the circumstances to protect the borrower from harm.

In his announcement foreshadowing this reform, the Treasurer described the planned changes as a policy shift away from a prescriptive 'one-size-fits-all' approach to lending.[16] This description mis-characterises basic elements of the legal framework in the NCCP Act.

Meeting the first of the two requirements that determine suitability—the question of affordability—appears to be the aspect of RLOs the Treasurer considers to be problematic (though both are impacted by the Draft Materials). Affordability, as a concept, is central to the question of whether someone ought to be approved for a loan. Assessing whether a borrower is likely to be able to repay credit before it is advanced obviously goes to the very nature of the business of being a lender or broker.

It is sometimes suggested that there is thus an alignment of interests between lender and borrower—the lender that makes its decision by reference to its credit risk ensures that the borrower can repay the loan. However, a lender that judges that a borrower is unlikely to default is not the same as ensuring affordability. This is because a borrower may resort to such severe reduction in their spending (including essentials) to ensure repayment to the

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[12] NCCP Act, see for example, 118(2).
[13] NCCP Act, s 130(1).
[14] Australian Securities & Investments Commission, *Regulatory Guide 209 Credit licensing: Responsible lending conduct*, published 9 December 2019, available at: https://download.asic.gov.au/media/5403117/rg209-published-9-december-2019.pdf.
[15] Financial Services Royal Commission, *Final Report, Volume 1*, 2019, available at: https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf, p59.
[16] Treasurer The Hon Josh Frydenberg MP, Media release: *Simplifying access to credit for consumers and small business'*, 25 September 2020, available at: https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/simplifying-access-credit-consumers-and-small.

detriment of their health and wellbeing. Some credit products carry additional risk, for example, line of credit arrangements (such as credit cards) where contractual minimum repayments can result in liabilities increasing. It is for this reason that the NCCP Act includes consideration of a borrower's 'requirements and objectives' (see part 5.2 below).

To help address affordability, a credit licensee is required to assess and verify the financial situation of a prospective borrower in general, but the process is not heavily prescribed by legislation. As noted above, the key NCCP Act provisions that guide what a credit licensee must do as part of this process all contain the word 'reasonable'.[17] There are some additional assumptions imposed in relation to particular credit contracts, but these are reflective of higher risk items (including in relation to credit cards, through laws that only came into effect in 2019).[18] Use of the term reasonable makes clear that the work required to meet these requirements varies according to the circumstances. While credit licensees must always inquire about and verify the financial situation of a prospective borrower, the level of inquiries necessary to satisfy this will vary.

While borrowers may need to provide bank statements in some circumstances (especially as lenders will often find this the fastest and easiest way to assess a consumer's finances), the only time a licensee would need to discuss detailed expenditure with a borrower is where the affordability of a credit product for someone is a genuine concern, and those expenses may impact the assessment. These are the circumstances where the consumer benefits most from an expert view on whether they can afford the credit product, or whether it is suitable for them.

The recent decision of the Full Federal Court in *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111 (**ASIC v Westpac**) further demonstrates that RLOs do not require credit licensees to go through and assess every detail of a consumer's expenses. That case confirmed that credit licensees may use systems that satisfy RLOs that don't necessarily require a detailed assessment of a consumer's expenses.[19] There will be situations where a more detailed assessment is appropriate, but there is no requirement for this in every case. It is misleading to imply the current law dictates a 'one size fits all' approach.

Many lenders advertise the extremely prompt turnaround times for loan applications. With open banking technology being advanced and increasingly used, compliance with RLOs is likely to get even easier and faster in the near future. We have already heard from some lenders that have told us they are using open banking and see it as a means for making responsible lending assessments far simpler. ASIC has also supported RegTech responsible lending initiatives that speed up processes significantly.[20]

Finally, these obligations apply to holders of a credit licence. These are entities (and their representatives) that hold a licence indicating they have a level of expertise in this area, and people expect as much. Most consumers who are not financial experts themselves are likely to rely—at least to some extent—on a credit licensee's assessment of what they can afford and what products are suitable. For brokers, providing credit assistance is the whole reason they exist. It is very reasonable that there should be a legal requirement that these licensees perform this role with a proper understanding of the finances of the person to whom they are providing advice or offering credit.

1.2. Credit has continued to flow under responsible lending

In the ten years since RLOs were introduced, consumer credit has continued to flow at high rates in Australia. Australia's level of household debt continues to be among the highest in the world,[21] and even in the last five years

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[17] NCCP Act, see for example, s 117(1).
[18] *Treasury Laws Amendment (Banking Measures No. 1) Act 2018* (Cth).
[19] *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111, [113]-[144].
[20] See, eg, ASIC Regtech responsible lending trials, https://asic.gov.au/for-business/innovation-hub/asic-and-regtech/asic-regtech-initiative-series-2019-20/regtech-responsible-lending-webinar//demonstrator-submissions.
[21] Jonathan Kearns, Mike Major and David Norman, *How Risky is Australian Household Debt?*, Reserve Bank of Australia Research Discussion Paper RDP 2020-05, August 2020, p 4 https://www.rba.gov.au/publications/rdp/2020/pdf/rdp2020-05.pdf.

the level of household debt has increased at a rate faster than the Reserve Bank of Australia (**RBA**) predicted.[22] This is despite RLOs being in place during this time, and the Financial Services Royal Commission leading to far greater interest and transparency in how the banks and other lenders are applying these laws.

In fact, the RBA has recently stated that any tightening in responsible lending standards over the past five years has improved the quality of household debt, which has helped reduce the risk posed by our high levels of household debt in the Australian financial system.[23] Further, while the COVID-19 pandemic caused an initial decrease in credit uptake, recent statistics indicate that the market has bounced back and demand is already increasing again, despite parts of the country being locked down for significant periods.[24]

The minimal impact of RLOs on the flow of credit has recently been referred to by numerous key finance experts and market players. Last month, ANZ CEO Shayne Elliot confirmed that he considered the risk appetite of banks was the key factor likely to impact the flow of credit, and that the repeal of RLOs was not going to have a major impact in this regard.[25]

UBS bank analyst expert Jonathan Mott has also expressed similar doubts about any real link between RLOs and the flow of credit in the market. He was recently quoted as saying, "*We have found little evidence that responsible lending obligations have constrained housing lending in Australia, given the rebound in credit flow over the last year*".[26]

The Australian Prudential Regulatory Authority's (**APRA**) Chairman Wayne Byres shared a similar view in his opening statement to the Senate Economic Legislation Committee last month. When asked whether APRA's 2018 view that the recent tightening in credit standards had not materially affected the overall availability of credit, had changed, Mr Byres said:

> "*The short is answer no. A slightly more nuanced answer is that, obviously in the COVID environment, there has been a contraction in credit, but I think that's reflective of the environment we're in, with the high degree of uncertainty, the caution that borrowers have about borrowing and the degree of caution banks have in lending. I don't think that's regulatory induced.*"[27]

In fact, the limited relationship between RLOs and credit flow was a view that Treasury also shared in 2017. Treasury's submission to the Financial Services Royal Commission's Interim Report stated:

> "*There is little evidence to suggest that the recent tightening in credit standards, including through APRA's prudential measures or the actions taken by ASIC in respect of RLOs, has materially affected the overall availability of credit.*"[28]

There does not appear to be any real evidence that supports the suggestion in the Government's Consumer Credit Reform factsheet that RLOs are causing excessive risk aversion.[29] At the same time, there is a real danger that any increase in lending as a result of the repeal of these laws will include unsustainable lending that is harmful to the individuals, and ultimately, for the economy as well.

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[22] Ibid, p 17.
[23] Reserve Bank of Australia, *Financial Stability Review – April 2020*, available at: https://rba.gov.au/publications/fsr/2020/apr/overview.html.
[24] See for example, APRA, *Quarterly authorised deposit-taking institution property exposure statistics – highlights June 2020*, (released 8 September 2020), https://www.apra.gov.au/sites/default/files/2020-09/Quarterly%20authorised%20deposit-taking%20institution%20property%20exposures%20statistics%20-%20Highlights%20June%202020.pdf, p 4; RBA, *Lending indicators September 2020*, https://www.abs.gov.au/statistics/economy/finance/lending-indicators/sep-2020.
[25] Australian Financial Review, *RBA easing doesn't really change anything: ANZ*, 30 October 2020, available at: https://www.afr.com/companies/financial-services/rba-easing-doesn-t-really-change-anything-anz-20201029-p569qb.
[26] Banking Day, *UBS says reforms unlikely to swell credit flows*, 21 October 2020, available at: https://www.bankingday.com/ubs-says-reforms-unlikely-to-swell-credit-flows.
[27] Hansard, Senate Economics Legislation Committee, Public Estimates, 27 October 2020, , p 78 https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/1403e6ab-f62d-4093-a7d6-db1c8f98177d/toc_pdf/Economics%20Legislation%20Committee_2020_10_27_8253.pdf;fileType=application%2Fpdf#search=%22Wayne%20Byres%20committees%202020s%22.
[28] Treasury, *Financial Services Royal Commission Submission – Interim Report*, At [174].
[29] Australian Government, *Consumer credit reforms*, p 3, https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-09/Consumer-credit-reforms-fact-sheet.pdf.

2. The impact of repealing responsible lending laws

The *National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020: A new regulatory framework for the provision of consumer credit 2020* (Cth) (**Draft Bill**) amends the NCCP Act to effectively remove the application of the entire RLO framework from the majority of credit contracts. This is largely done by amending the provisions in Chapter 3 of the NCCP Act that currently apply to all credit contracts. RLOs would only apply to low limit credit contracts (**LLCCs**) and consumer leases. LLCCs are defined to include small amount credit contracts (**SACCs**) as well as loans with the same characteristics as SACCs but issued by authorised deposit taking institutions (**ADIs**)—essentially unsecured credit of up to $2,000 for a term of 16 days to 12 months.

The current RLO regime would therefore be restricted to applying only to LLCCs and consumer leases. When selling or suggesting any other consumer credit product, all currently existing obligations on credit licensees to assess whether that product is 'not unsuitable' for a borrower would no longer apply.

In the place of RLOs, the Draft Materials introduce some different obligations that vary for particular licensees and credit products. However, all of these laws represent a reduction in the level of responsibility imposed on the credit providers and brokers, and crucially, in the protections provided to consumers. At a high level, the new laws that would apply if the Draft Materials were passed include:

- For Non-ADI lenders, the Minister is empowered to approve lending standards. These are contained in the draft *National Consumer Credit Protection (Non-ADI Credit Standards) Determination* 2020 (Cth) (**Draft Standards**);
- For ADI lenders, only existing APRA prudential standards would apply. The Draft Materials do not introduce any replacement obligations, though the Explanatory Memorandum to the Draft Standards (**Standards EM**) alludes to a proposed amendment to a relevant APRA prudential standard, without being clear about the nature and impact of this amendment;
- For brokers, only the best interests duty that currently applies to mortgage brokers would apply. The best interests duty would not apply to other credit assistance providers (for example, intermediaries that only provide credit assistance in relation to one loan product).

2.1. Complex changes that reduce borrower rights

The Draft Materials introduce significant regulatory inconsistencies and we discuss these later. However, at a high level, there are some clear themes that would be consistent across all parties and credit products impacted by the Draft Materials. None of them are good for consumers. They are that:

1. the proposals deliver a drastic reduction in the application and relevance of the penalty regime for credit licensees, with a large number of criminal and civil penalties removed, significantly reducing incentives for good lending standards;
2. many of the legal avenues available to borrowers to seek compensation if they are provided unsuitable loans will be removed;
3. obligations on licensees to verify the financial position of potential borrowers would only exist in certain circumstances, and the requirements to consider the true financial position of borrowers are reduced;
4. the whole system is far more complex and inconsistent. It muddies the waters between the role of ASIC and APRA, and the extent of licensee obligations and consumer rights will vary based on complex differences between lenders.

2.2. Disregard of Recommendation 1.1 of the Hayne Royal Commission

The removal of RLOs places a great deal more trust in the conduct of credit licensees when assessing what a consumer can afford, or in market forces to result in sensible lending. This is an extremely surprising and difficult approach to understand, considering the shocking conduct that was uncovered through the Financial Services Royal Commission.

The Royal Commission heard ample evidence relating to the misconduct of credit licensees including banks, other lenders and brokers, including evidence about irresponsible lending. There was widespread recognition that this conduct had long resulted in consumer harm. While the Royal Commission shone a light on this conduct, the Australian public still has few very reasons to trust that these same financial institutions are now operating to a far higher standard.

Recommendation 1.1 of the Royal Commission's Final Report was that the NCCP Act **should not** be amended to alter the obligation to assess unsuitability.[30] Commissioner Hayne recommended that the law continue to be applied as it stands.

The Draft Materials directly contradict Recommendation 1.1. This recommendation was made following the Royal Commission uncovering misconduct of credit licensees that caused significant harm to individuals and families. Much of this conduct was precisely of the kind that civil penalties for RLOs can be used to deter and punish. The final report by the Royal Commission was delivered to Government less than two years ago detailing widespread misconduct, yet the Government has proposed to actually reduce penalties rather than increase them.

There is still a significant need for there to be proper regulatory oversight of individual loans, by a regulator empowered to impose consequences for breaches. The economic fallout of COVID-19 does not make Commissioner Hayne's recommendations any less relevant—if anything, the increased economic vulnerability and uncertainty in the community means the need for a regulated credit sector that has incentives to comply with consumer protection standards is greater than ever.

2.3. The impact of unaffordable debt

Should lending standards reduce as a result of the repeal of the RLOs this is likely to create greater over-indebtedness.

The impact of unaffordable debt on individuals, families and communities is immense. Community lawyers and financial counsellors speak to people every day who are struggling to pay their debts, while trying to juggle other expenses like energy bills and groceries. Over-indebtedness can result in significant longer-term impacts on individuals as it affects their capacity to provide for housing, health, education and retirement. The Australian Government's Head to Health website notes:

> "*Mental health and financial safety are strongly linked. Experiencing a mental illness can add to financial stresses, and financial stresses can add to a mental illness.*[31]

Debt can also have a harmful effect on relationships with family and friends, increase isolation and exacerbate mental health issues.[32] Studies have found that people with unmet loan payments had suicidal ideation and suffered from depression more often than those without such financial problems.[33]

Irresponsible lending is also a major issue impacting Aboriginal and Torres Strait Islander communities across Australia. Consumer Action and the Victorian Aboriginal Legal Service released a joint report earlier this year that

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[30] Financial Services Royal Commission, *Final Report*, Volume 1, p 60.
[31] Australian Government Department of Health, *Head to Health 'Finances' page*, accessed 15/11/2020, available at: https://headtohealth.gov.au/meaningful-life/feeling-safe-stable-and-secure/finances.
[32] Step Change, Statistics Yearbook Personal Debt, 2014 p 24, available at: https://www.stepchange.org/Portals/0/documents/media/reports/statisticsyearbooks/StepChangeDebtCharityStatisticsYearbook2014.pdf.
[33] Turunen and Hiilamo, *Health effects of indebtedness: a systematic review*, BMC Public Health, 2014, available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4060868/#B31 .

gives some insight into the harm that irresponsible lending causes in Victorian Aboriginal communities. As set out in the report, irresponsible lending was the most common consumer issue raised in Consumer Action's community engagement sessions.[34]

Financial Rights' Case Study – point of sale finance – multiple clients

Thirteen Aboriginal men and women were referred to us by financial counsellors from Alice Springs after unwittingly incurring debts totalling more than $180,000 between them following visits to a major chain store. Many lived in remote communities. In several circumstances the victims went to the store to look around and not buy anything - but were convinced to purchase thousands of dollars' worth of goods on finance contracts and given credit cards with big spending limits. None of them had good English or could afford the goods and the contracts they were pressured to sign.

Many of the contracts signed were also incorrect: the number of dependents applicants had was underestimated and fortnightly income was listed as weekly. In all cases the same salesman was responsible. One of the women, Faith, went "window shopping" but left with a $2000 credit card and $16,000 worth of goods on a consumer lease contract. One item was a blu-ray player, which Faith threw away as she didn't know what it was. But by the time Financial Rights intervened, Faith had repaid $9000.

Our solicitor sent letters to the two finance companies involved alleging multiple breaches of the NCCP Act. Both agreed to our terms—waiving the debts, refunding amounts paid, removing default listings and gifting the goods. These remedies would not have been achieved without our current responsible lending provisions.

The lender has since embarked on a remediation program administered by an external consulting firm for 300 customer accounts, leading to an estimated $2.5 million write-off for a program that is only now nearing completion. In the media the lender confirmed that it has accepted all recommendations from the consultant to strengthen its sales processes, including increased monitoring and training of sales staff.

These 13 men and women who were our clients, along with hundreds of other customers fell through the cracks of our current protections. Had the finance companies complied with the responsible lending laws, none of these unsuitable credit products would have been approved. Part of the problem with these cases is the exemption in the NCCP Act for point of sale finance, a loophole which the Financial Services Royal Commission recommended should be closed and the Government is in the process of legislating. If responsible lending laws are repealed, predatory sales practices like these will only increase.

The impact of unaffordable debt is devastating for people on an individual level, and people ending up in these situations is also a terrible outcome for our economy and community as a whole. On top of the various ways that debt harms a person's wellbeing, being unable to pay debts breeds financial exclusion as well. This may manifest in people being at risk of bankruptcy, losing their home, or simply living from pay check to pay check. Once someone is caught in a debt spiral, it becomes harder and harder to get out. Beyond the personal harm, this also means these people are limited in their ability to contribute to the economy, and to pay for essentials such as health, education and housing.

CCLSWA Case study – Beverly's 'low doc' home loan

Beverly is an 80-year-old widow and pensioner who lives alone in her home. She previously owned a small business that suffered severely during the GFC. At the age of 69, Beverly entered into a 10-year interest only home loan. The loan refinanced her home loan and the balance of approximately $230,000 sat in an offset account as "available funds". Interest only repayments were taken by the bank from the "available funds" in the

[34] Victorian Aboriginal Legal Service and Consumer Action Law Centre, *Consumer Issues in Victorian Aboriginal Communities: Integrated Practice Project Final Report 2020*, February 2020, available at: https://consumeraction.org.au/consumer-issues-in-victorian-aboriginal-communities-integrated-practice-project-report-2020/, page 16.

offset account until the account was empty. Beverly contacted Consumer Credit Legal Service WA after she received a default notice from her bank. It was clear that Beverly did not understand the concept of 'interest only repayments', she did not understand her repayment obligations or the purpose of the offset account. Beverly's Low Doc loan application was filled in by a broker and approved by a big 4 bank on the basis of a 'Borrowers Income Declaration'. The information contained in her application was not verified. It was clear from CCLSWA's review of the application that her income, assets and liabilities were listed as being much higher than they truly were. The errors would have been obvious to the bank if it had made the necessary inquiries pursuant to current responsible lending laws. However, Beverly's loan pre-dated responsible lending laws. Beverly must now sell her home, with little or no equity, in order to repay her debt. Properly applied, responsible lending laws would have prevented Beverly's real risk of homelessness.

3. Removing incentives to comply – penalties and deterrence

The basic underlying principle of the current RLO regime in Chapter 3 of the NCCP Act is that credit licensees must not sign consumers up to unsuitable credit contracts. For credit providers, this means ensuring that any new credit contract, or any increase on a credit limit of an existing credit contract, is not unsuitable for the borrower. For licensees that provide credit assistance (like brokers), this means not suggesting a consumer apply for a credit product or credit increase under a credit contract that is unsuitable to them.

Under the current law, if a credit licensee breaches this fundamental rule and is involved in providing a consumer with an unsuitable credit product, the breach can attract both a criminal and civil penalty. Under the Draft Materials, this is no longer the case. Signing individual consumers up to unsuitable (non-LLCC) credit contracts or credit increases would no longer constitute a breach of a penalty provision.

For bank lenders, there are no civil and criminal penalties being proposed to replace those that have been removed. Banks would only be subject to existing APRA prudential standards. These standards are focused on credit risk policies, procedures and controls at a loan portfolio level, rather than individual loans. For example, paragraph 7 of Prudential Standard APS 220 Credit Quality (**APS 220**) makes it clear that these policies, procedures and controls are 'appropriate to the complexity, scope and scale of its business'; and have little to do with individual lending standards. APRA also publishes a guide on residential mortgage lending (APG 223) but it is only a regulatory guide on APRA's view of sound practice in particular areas. While it does provide more detailed guidance, including a 'loan origination' test, it is still primarily concerned with requiring ADIs to have policies and procedures to identify, measure, monitor and control material risk in their lending portfolio—it provides no obligation on a lender to not provide a loan in particular circumstances. As a guide, it has no legal effect on the mortgage lending practices of lenders, and it does not apply beyond mortgage lending.

For non-bank lenders, a penalty could only be imposed under the Draft Standards if a non-bank lender is found to not have the required policies and systems in place or 'repeatedly' fails to comply with its own systems and policies. Failures would need to be systemic—individual failures would not sustain a penalty. Despite being the experts in the lending situations, regulators would be hamstrung in relation to misconduct relating to individual loans, unless substantial problems arise across multiple contracts.

Removing the power of genuine regulatory oversight on an individual loan level is highly likely to reduce the level of care and attention that is taken by credit licensees toward ensuring that consumers are not sold harmful credit. Removing civil and criminal penalties also reduces the incentive for lenders to comply, and limits individuals' legal rights (see more at Part 4).

3.1. Non-ADI lenders

The Draft Standards that effectively replace RLOs for non-ADI lenders set requirements that must be met to engage in non-ADI credit conduct (where a non-ADI lender enters or offers to enter into credit contracts, or increases credit limits).[35]

Clauses 7 and 8 of the Draft Standards require that the lenders have systems, policies and processes in place that ensure they still assess whether a consumer can comply with the repayments for a credit product before engaging in non-ADI credit conduct. The assessments must consider certain factors and information.

However, if a non-ADI lender fails to follow these required systems, policies and processes in a given case, the failure will not amount to a breach attracting a civil penalty. Instead, non-ADI lenders will only breach a civil penalty provision where they either:

- have not established, maintained or documented the systems, policies and processes required by the Draft Standards at all;[36] or
- **repeatedly** fail to implement those systems, policies and processes.[37]

This creates real uncertainty about how enforcement would work. For example, there is no indication as to what would constitute a repeated failure to implement systems, policies and processes. Would five or ten individual failures amount to this? Would 100? How will repeated breaches be identified? What if each failure is for a different reason—must the failure be a systemic issue?

The Non-ADI lender market comprises a wide range of players, many of which have been subject to ASIC enforcement action in the past. Many also operate in the SACC credit market (that is, the same entity provides loans of a value higher and lower than $2,000), where the Government appears to recognise the need for increased oversight of lenders. We are particularly concerned that the Draft Materials send these lenders a message that they are getting a free pass on their individual dealings, leaving consumers at far greater risk of harm. Imposing substantial hurdles before regulatory action can be taken (for example, demonstrating 'repeated failure') limits the ability of the regulator to use enforcement action to create public deterrence.

3.2. ADI lenders

As noted, ADI lenders would only be subject to existing APRA standards. Civil and criminal penalties that currently apply under the RLO regime would be entirely removed. APRA would be responsible for enforcement, rather than ASIC. This completely disregards the fact that APRA's role is one directed at ensuring financial institution stability rather than addressing misconduct. Its purpose is not at all directed at protecting individual borrowers—beyond ensuring the banks don't collapse.

The relevant prudential standards do not contain a civil penalty framework and are focused on the ongoing risk across the whole portfolio of an ADI's loan book. The current standards are not focused on whether a particular loan was an appropriate credit risk at the time it was approved. For banks issuing thousands or millions of loans, this alone is not an adequate regulatory system to ensure suitable individual lending practices or to curtail the sales culture within banks. The Financial Services Royal Commission called for these laws to be better enforced, rather than amended. It criticised the sales culture and greed of the banks, which the RLOs helped to place a handbrake on.

As with non-ADI lenders, removing RLOs means that ADI lenders get what is close to a free pass from regulatory oversight for getting an individual credit assessment wrong. While the Standards EM may make reference to a likely future update to APS 220 specifically requiring ADIs to assess an individual's capacity to repay credit without

[35] Draft Bill, s 133EA(5).
[36] Draft Bill, s 133EB.
[37] Draft Bill, s 133EC.

substantial hardship,[38] this will operate in a prudential context and does not provide borrowers with rights. This amendment will not give APRA a mandate to effectively operate as a consumer protection regulator.

Further, APRA has historically displayed an unwillingness to bring matters before the courts, and undertake a lot of their interactions with regulated entities behind closed doors.[39] Taking this approach results in little public guidance and transparency, and does not act as a deterrent for other entities when breaches do occur as they are not publicised. A recent review of APRA's enforcement approach confirmed that its 'last resort' appetite for enforcement is insufficient, and it indicated a change to a 'constructively tough' approach.[40] It would seem, however, that without direct powers to take court action for breach of a prudential standard, and the improbability that APRA would ever take action unless the concern related to system stability, that this change will be insufficient to ensure individual borrower protection or achieve deterrence.

Financial Rights' Case Study – Diane's story – C173715 – domestic violence

Diane (name changed) is a single mother of two children (then 1 and 11), and called National Debt Helpline (NDH) in 2018. She contacted NDH as she had escaped from an abusive relationship that involved emotional and financial abuse. Diane had obtained a number of loans within a 12-month period with two of the big four banks (3 personal loans which she still owed over $36,000) and an additional loan with a second tier lender for over $11,000. Diane told Financial Rights these loans had been part of a pattern of financial abuse at the hands of her then partner. Her ex-partner had used the loans from the banks to fund an overseas holiday, and pay off a credit card that was in Diane's name but used by her ex-partner. When Diane called us, she was unable to meet repayments and had an Apprehended Domestic Violence Order in place over her ex-partner who was facing criminal charges.

We lodged an internal dispute with all three lenders arguing that the credit providers had failed in their responsible lending obligations and provided unsuitable loans. Whilst the NCCP Act also includes protections against "unjust loans", those provisions require the lender to be on notice of the unjustness (i.e. they needed to have seen something that indicated that abuse was taking place). Given the way financial services products are now largely online, there would be very little evidence of unjustness the lender would have been on notice to. The responsible lending provision, however, did assist Diane as the bank was required to make inquiries as to the loans purpose and its affordability beyond what the unjustness provisions require. Verification of Diane's income would have showed that it had been inflated on application.

Financial Rights was able to help Diane reach positive outcomes with her lenders after making these arguments. Had responsible lending laws not been in place it would have been much harder to assist Diane with these debts. We may not have been able to help her at all.

4. Removal of individual borrower legal rights

By removing the civil penalties attached to individual RLO breaches, the Draft Materials would also effectively extinguish the main legal bases by which consumers could seek remedies when provided with unsuitable credit.

Section 178 of the NCCP Act enables a court to compensate a plaintiff if they suffer loss or damage as a result of another party's breach of a civil penalty provision in the Act. Via this provision, consumers can currently seek compensation for losses caused by unsuitable loans they receive in breach of the relevant RLO provisions. Without the civil penalty provisions that apply to an individual loan, consumers lose their clear legal rights—and therefore

[38] Standards EM, p 2.
[39] Financial Services Royal Commission, *Final Report*, Volume 1, p 452.
[40] APRA, Enforcement Strategy Review, March 2019, https://www.apra.gov.au/enforcement.

ability to go to court—in relation to a defective assessment by a credit licensee, that led to them being provided with unsuitable credit.

To remove these civil penalties and accordingly the rights of consumers to contest these loans will only worsen the imbalance of power between banks and borrowers. It will mean banks, other lenders and brokers can profit from irresponsible conduct and consumer harm with far less concern for the consequences.

4.1. No legal basis to seek compensation from lenders

While the Draft Standards (for non-ADI lenders) and APRA prudential standards (for ADI lenders) may arguably still impose obligations on lenders to undertake suitability assessments for individual loans, they are not requirements that consumers appear to have any ability to enforce.

The civil penalty provisions that would apply to non-ADI lenders in the Draft Bill are not designed to provide effective legal rights to individual consumers. Individuals would find it extremely difficult to establish the evidence required to prove a non-ADI lender has not met the requirements in section 133EB of the Draft Bill, by failing to have or document the relevant systems, policies and processes required under the Draft Standards. The civil penalty provision in section 133EC of the Draft Bill that applies if there are repeated failures by a non-ADI to implement systems, policies and processes offers little in terms of recourse for an individual consumer. A one-off failure to meet the assessment requirements in the Draft Standards does not give rise to any consumer rights, despite the conduct potentially being hugely detrimental to them individually.

Similarly, there would be no avenues that would allow consumers to commence legal action for unsuitable loans from ADI lenders. The relevant APRA Standards are not written in a way that will have any impact upon the legal rights of individual borrowers.

This is a huge shift in the way the lender-customer relationship works. It goes much further than just imposing 'borrower responsibility'. Borrowers are already responsible for the amounts borrowed, even if a lender is found to have provided them with unsuitable credit. A finding that a lender has breached RLOs does not leave the lender holding all the responsibility—it normally just means they do not profit from the transaction. Borrowers are still left to repay the principal, but they are generally relieved of fees and interest.

Furthermore, there is an obligation on all parties to a credit transaction—including consumers and brokers, as well as lenders and their representatives—not to make a false or misleading representation in relation to matters that are material to entry into the credit product or in attempting to induce another person to enter a credit product. These obligations are in s154 and 179U of the National Credit Code, Schedule 1 to the NCCP Act. They provide protection for the lender, because the consumer or broker may be liable for loss or damage caused, and any compensation to the consumer or other order in relation to loss or damage can be mitigated, if the consumer or broker made a false or misleading representation in order to obtain the credit product.

Borrowers will have far fewer legal rights against lenders, lacking any clear basis for seeking compensation for any loss from unsuitable loans. Despite the lender being licensed and holding a position as an expert in finance, these reforms would allow lenders to retain the profits from any unsuitable loan, even when it was abundantly clear to the lender from the outset that the loan was unsuitable. Consumers could realistically only commence legal proceedings under much more complex grounds such as the unjust contract provisions of the National Consumer Credit Code or unconscionable conduct, which require a much higher threshold to be met. Neither impose any positive duties on lenders.

Consumer Action Case study – Silvia's story

Silvia's (name changed) only source of income is the pension and she has no savings. Silvia told us that:

She suffers from depression and has had issues with different forms of addiction. Silvia told us that she had done all her banking for the last 20 years with the same big 4 bank.

Earlier this year, Silvia went into her bank branch in the outer suburbs of Melbourne and took out a $25,000 loan, which was secured over her home (which she previously owned outright). Silvia says that she had originally asked for $20,000 and told the bank representative that she wanted it to pay off $5,000 she owed on her credit card, and to do some home improvements.

Silvia recounted that the bank representative asked her some questions about her finances, and then the representative told her she was going to receive a $25,000 loan—$5,000 more than she asked for. She felt that they didn't really give her a choice about getting a loan for a lower amount.

The mortgage required Silvia to repay $133 a fortnight—or around 14% of her pension. Silvia told us that she was already having trouble affording her utilities, groceries, home and contents insurance and health insurance on the pension before taking out the loan. She also owed money to her son, but the bank didn't ask her about other liabilities like this. She was already living pay check to pay check.

While Silvia managed to make the repayments, the loan was causing her a great deal of stress. She has attempted suicide because of stress. The loan repayments were direct debited from her account a few days after her pension is paid each fortnight. The real reason Silvia didn't miss any repayments is because she still had the loan funds to pay for things. She spent most of the loan funds already, and she only has $7,000 left.

Silvia complained to the bank, claiming the loan was provided in breach of responsible lending laws as it was larger than the loan she requested and the repayments were causing her financial hardship. The bank acknowledged that it could have been more prudent in advancing the funds, and offered to waive all future interest on the loan, and refund any interest already paid. Silvia was very happy with the bank's acknowledgement and this resolution. Without responsible lending laws, Silvia would have been unlikely to have been able to reach this settlement.

4.2. Unclear how AFCA complaints would work – if at all

Paragraph 1.60 of the Bill EM states that where a failure of a non-ADI lender to follow systems, policies and processes does not amount to a breach of a civil penalty provision, consumers will retain access to redress through other mechanisms, such as the Australian Financial Complaints Authority (**AFCA**) scheme. While consumers may still be able to lodge complaints in AFCA if the Draft Materials are enacted, the rights of individuals will be significantly reduced and this will limit the value of AFCA for consumers.

AFCA aims to resolve complaints based on the law, relevant codes, good industry practice and what is fair, in all the circumstances.[41] In relation to fairness, this is a process which is heavily influenced by how the law would apply to the situation, and AFCA is required to have regard to legal principles.[42] When handling a complaint related to compliance with RLOs, AFCA considers what legal grounds are likely available to the complainant and aims to determine outcomes in accordance with the law. AFCA currently applies the unambiguous legal right for borrowers to seek compensation for breaches of the RLO provisions under s178 of the NCCP Act. This hook will no longer be available.

In relation to non-ADI lenders, it is not clear how AFCA would apply the Draft Standards. Their application would likely require that AFCA undertake some level of analysis not only of the credit transaction, but also of the systems,

[41] AFCA, *Operational Guidelines to the Rules*, April 2020, p 87.
[42] AFCA, *Complaint Resolution Scheme* Rules, 25 April 2020, Rule A.14.2.

policies and processes behind them. The proposed section 133EB of the Draft Bill requires lenders to retain records of systems, policies and processes for a period of 7 years. Paragraph 1.62 of the Bill EM seems to imply that AFCA could obtain these written plans, but consumers would seemingly have no way of obtaining them—certainly not before deciding whether to lodge a dispute in AFCA. There is no legal right for consumers to obtain copies of these written plans, and indeed they would likely be deemed 'commercially sensitive material' and not obtainable via AFCA.[43]

Compared with RLOs, the Draft Standards regime would reduce the value of protections in the following ways (in addition to the loss of the civil penalty regime):

- the assessment and verification obligations of non-ADI lenders are greatly reduced (discussed in Part 5);
- non-ADI lenders need to have regard to the purpose of the credit, rather than needing to ensure the credit meets the needs and objectives of the consumer (a lower bar to meet);[44]
- the assessment can be proportionate to the nature, type and size of credit (likely to be used by lenders to justify fewer checks for smaller amounts of credit in particular);[45] and
- the adequacy of systems, policies and processes is also to be determined with regard to the complexity of the non-ADI credit conduct engaged in by the licensee (potentially giving lenders that only engage in more straightforward (but still costly) lending another reason for doing less detailed assessments).[46]

The Bill EM is silent on whether the AFCA scheme would be available for complaints about a failure by ADIs to follow the relevant APRA prudential standards. The application of APRA standards to individual lending situations appears even more doubtful, as the APRA standards are drafted to operate in a way aimed at achieving systems level compliance. In particular, we do not consider APS 220 to provide an effective lending standard that can be meaningfully applied at the time the credit contract is entered into. Adding one sentence that specifically refers to ensuring consumers are not placed in substantial hardship is highly unlikely to clarify how these standards apply to individual loans. It is altogether unclear what kind of tests AFCA would apply to assess whether credit advanced by an ADI was unsuitable.

Moreover, in relation to both ADIs and non-ADIs, AFCA must exclude complaints about a lender's assessment of the credit risk posed by a borrower (or the security required for a loan) unless it is a complaint about maladministration.[47] Maladministration is defined as a failure to meet a legal duty or obligation—if legal duties and obligations are removed (such as RLOs), there is a real question about whether AFCA can consider a complaint. This is particularly so for ADIs, given APRA standards relate directly to concerns of credit risk.

Finally, as is generally common for all EDR services, AFCA was not designed to be the single source of redress available to consumers against financial service providers. The AFCA scheme is designed to operate as an alternative and more accessible avenue to traditional legal avenues, such as tribunals and courts.[48] Also, a key check and balance on the EDR process is that consumers retain the right to go to court, lenders have the potential to request a matter be litigated as a test case, and the evolving law is reflected in AFCA decisions as new court decisions are handed down. As the Draft Materials do not provide a legal cause of action for consumers for individual instances of irresponsible lending, even if AFCA can properly hear a complaint about a failure by a lender to adhere to the Draft Standards or APRA prudential standards, it would then function as the final decision maker

[43] AFCA, *Complaint Resolution Scheme* Rules, 25 April 2020, see for example, Rule A.10.5.
[44] Draft Standards, cl 7(2)(a).
[45] Draft Standards, cl 7(1)(b).
[46] Draft Standards cl 11.
[47] AFCA Rule C.1.3
[48] AFCA, *Operational Guidelines to the Rules*, April 2020, p 8.

on the issue; the sole interpreter of this law as it applies to individuals, including determining appropriate remedies. This is not desirable from any stakeholder's perspective.

Most individual consumer credit advances are going to have very little impact alone on the financial stability of a credit licensee, which is where the APRA standards focus. One bad loan is not going to break the bank. However, RLOs exist because one bad loan can break the borrower. RLOs protect people from unsuitable loans that are likely to cause them substantial hardship. The practical impact of removing these protections is that consumers have fewer rights and options available when facing financial disaster.

4.3. No access to remedies post default judgment

Many debtors seek assistance from financial counsellors and legal assistance services after the creditor has already obtained a default judgment. This is particularly likely when there has been some serious upheaval in the person's life, like serious illness or injury which has made it difficult to manage their affairs, or where there has been a debt incurred in the context of relationship which has since ended and the other partner took the asset or was otherwise taking responsibility for a loan. In some cases, the first the debtor knows about the debt being unpaid is when their wages are garnisheed or the sheriff arrives to seize their goods.

Currently in such circumstances, if the person has a defence, it can be argued as part of an application to set aside the judgment. The alleged debtor can then lodge a complaint in AFCA, or argue their defence in court at a hearing.

The lack of any legal right for borrowers to allege a breach of the APRA or non-ADI standards effectively removes any opportunity for a borrower to apply to set aside the judgment on those grounds. As AFCA is not available post judgment (unless the judgment has been set aside), these debtors will have no opportunity at all for redress for breaches of these standards. Further, lenders who have breached the standards will have an incentive to pursue judgment debts more hastily in order to oust AFCA's jurisdiction. This represents a major step backwards in access to justice.

4.4. Best interests duty for brokers no replacement for irresponsible lending

While the Draft Bill would extend the best interests duty for mortgage brokers (a civil penalty provision) in Part 3-5A, Division 2 of the NCCP Act to apply to all brokers, this would offer inadequate protection for borrowers compared to the current RLO regime. The best interests duty has no explicit requirements for brokers to assess suitability or affordability of loans.

The best interests duty was introduced for mortgage brokers following Recommendation 1.2 of the Final Report of the Financial Services Royal Commission. In explaining what the obligation would do, Commissioner Hayne described it as:

> "…*statutory recognition to what borrowers currently expect of brokers. It is not an obligation that should affect the practices of lenders and, accordingly, it is not a change that should affect the price or the availability of credit, whether to consumers, small business borrowers or others.*"[49]

This statement, coupled with the recommendation directly following Recommendation 1.1 (to retain the current RLOs), leaves little doubt that Commissioner Hayne did not intend the best interests duty to be a protection that should replace RLOs. The recommendation of a best interests duty was largely aimed at addressing inherent conflicts that existed in remuneration systems used for brokers, and conflicts of interest in product selection.

The best interests duty alone will not provide an equivalent basis for claims by consumers to that which RLOs currently provides. ASIC's Regulatory Guide 273 specifically describes the obligations as additional and complementary to responsible lending.

[49] Financial Services Royal Commission, *Final Report*, Volume 1, p 72.

> "*The best interests duty introduces requirements and steps that are additional to the responsible lending obligations. The obligations are complementary…*"[50]

The broad nature of the obligation could see the best interests duty provide a means for consumers to seek compensation from a broker for recommending unsuitable credit in some situations, and it may cover additional forms of conduct that cause consumer harm. However, the vague language of the provisions at sections 158LA and 158LE of the NCCP Act, and the uncertain legal meaning of the duty, is another barrier to their use. For example, these provisions do not specifically require brokers to only recommend loans where repayments are affordable. RLOs provide a clear framework that makes it far easier to determine whether a broker has failed to meet their obligations, and recognises the significant role brokers play in a credit transaction.

Removing RLOs from credit assistance providers would substantially decrease any benefit a consumer derives from engaging with a broker—they are supposed to be experts and, accordingly, should be required to ensure they are providing advice appropriate to the consumer's situation. While we support a broad interpretation of the best interest obligations, it is unreasonable to assume that it will be sufficient to resolve the tension between a customer's interest in successfully securing a loan with their long term interest in being able to sustain it, particularly as it is also in the broker's financial interest to secure the loan. The RLOs put the resolution of these competing interests beyond doubt, at the same time prescribing the nature and extent of enquiry that should be applied to making that assessment.

The loss of RLOs for brokers is a real concern, particularly considering the failure of brokers to properly obtain and verify finances from loan applicants was a common issue that arose in the evidence before the Financial Services Royal Commission.[51]

CCLSWA Case Study – Claire's story – domestic violence & broker conflict

Claire was referred to the CCLSWA by a specialist domestic violence unit in Perth in June 2019. All of the parties' names have been changed to protect confidentiality.

Claire is a single mum raising 5 children. Claire was born overseas and came to Australia a few years ago. Claire does not read or write English, and her spoken English is very limited. We used the services of interpreters to communicate with her. Claire was married to Andy. Andy would physically and emotionally abuse Claire. In 2013, Andy forced Claire to see a friend of his, a broker, and Claire signed documents in English without understanding what she had signed. She had become the sole borrower on a $400,000 home loan to purchase a home for Andy, her and the children. At the time, they had one child and another on the way. Claire was 6-months pregnant which would have been obvious to the broker, yet Andy presented the broker with forged payslips showing that Claire worked for Andy's business and received a monthly income from the business of $6,000. Despite Claire's obvious pregnancy the broker ticked "no expected change in circumstances" on the home loan application. The loan was granted without the lender taking any steps to contact Claire directly. Claire separated from Andy in 2017 and has violence restraining orders in place against him.

Should the responsible lending reforms take place, Claire's story demonstrates that leaving brokers with only a best interests duty is unlikely to prevent this type of financial abuse. It would be impossible for a broker to resolve the conflict between Claire's best interests and those of her abusive partner.

[50] ASIC, *Regulatory Guide 273: Mortgage brokers: Best interests duty,* June 2020, p8.
[51] Financial Services Royal Commission, *Interim Report*, Volume 1, p 24-27.

5. Fewer assessment and verification obligations

The Government's removal or substantial reduction in the obligations of credit licensees to assess their financial situation and verify expenses of RLOs equates to prioritising a minor saving in costs and time for banks and other licensees over the safety of consumers, particularly those who are more vulnerable.

Assessment and verification requirements are a key factor in the effectiveness of the current RLOs, and provide numerous benefits to consumers and even to credit licensees. As stated before, licensees occupy a position of expertise in these transactions. All that reputation and expertise will be worthless if it is not based on an accurate understanding of the circumstances of the consumer.

The Draft Standards provide two key concessions from current RLOs for non-ADI lenders under clause 8(2), by allowing lenders (at their discretion):

- to rely on information provided by the consumer unless there are reasonable grounds to believe it is unreliable, in regard to the consumer's income, cash flow, and overall risk profile; and
- to make reasonable estimates of the expenses of consumers, rather than making inquiries about, and verifying, expenses.

In regard to the first point, there is also no guidance on what might constitute reasonable grounds for believing information provided by a consumer is unreliable. The Standards EM only provides a largely unhelpful vague statement about potentially relevant factors, as well as an example that essentially says information might be unreliable if the lender has directed the borrower to provide particular information for the purposes of securing a more favourable loan.[52] When the only example provided refers to a situation where the lender has encouraged the borrower to lie, it is hard to imagine this as a provision that requires lenders to demonstrate a high standard of vigilance.

Essentially, we see two key likely outcomes to lending transactions that will result from this:

1. credit providers will simply know less about the circumstances of a consumer; and
2. credit providers are likely to use general estimate measures of expenses when assessing affordability, instead of uncovering the real financial situations of consumers.

5.1. Licensees will know less about the circumstances of a consumer

Having less information about a consumer (and, particularly, less confirmed information) creates more risk for numerous reasons. For the most part, this risk is more likely to impact consumers who are experiencing vulnerability of some kind.

We all have behavioural biases that lead us to overestimate income and underestimate expenses, which often leads to incorrect information being included in credit applications.

There are other scenarios where information on applications is inaccurate—for example, a consumer desperate for credit due to compelling compassionate circumstances might inflate income in order to be approved, or an intermediary or loan manager might encourage inaccurate information to increases chances of approval, or indeed supply it. The concept of 'borrower responsibility' does not lend itself well to these situations. Fewer inquiries and verifications across the credit industry removes a valuable protection that can help stop people falling further into debt spirals.

[52] Standard EM, p 6.

Financial Rights' Case Study – Ellen's story – C204203 – caryard finance

In 2015, Ellen (name changed) went to a car dealership. The salesperson told her that she could purchase a car using finance and the salesperson could complete the application for her. Ellen told the salesperson about her financial situation, including that she had recently started a new job and was on a six-month probation period. The salesperson said that he would not include that she was in a probation period on the finance application form. The salesperson had given Ellen a deal on the purchase price of the car and said that she had to purchase the car that day in order to get that price. Ellen felt pressured by these sales tactics and did not know whether her probation period had to be disclosed on the application form.

The loan from the far finance company was for $29,000 but the value of the car was only $24,000. Unfortunately, Ellen failed her probation period and started receiving Centrelink as her sole source of income. She put the majority of her Centrelink payments towards the loan and relied on family to meet her basic living expenses. Since then she has struggled to make the loan repayments and has requested hardship variations on three separate occasions. Ellen estimates that she has paid approximately $31,000 to the lender but her account statement says she still owes another $14,000.

When Financial Rights started assisting Ellen, we asked for a copy of the responsible lending assessment. The application form and final assessment showed that Ellen had a monthly surplus of $335 before adding the loan repayments, however the loan repayments were $550 per month. The application form completed by the salesperson had a number of errors, including that she had been at her employer for five months (she advised the salesperson that she had only recently started that job) and that she owned $15,000 worth of furniture (she was living with her mother, as noted on the form, and did not own any furniture).

Financial Rights argued the lender failed to comply with its responsible lending obligations under the NCCP Act by providing Ellen with a loan where the monthly loan repayments exceeded her monthly surplus disclosed in the finance application form by over $200. Had the lender properly assessed Ellen's capacity to pay the loan it would have been clear that she could not afford to repay the loan without substantial hardship, even if she had not failed her probation period.

5.2. No requirement to consider a borrower requirements and objectives

The current RLO provisions include an obligation to consider the borrower's requirements and objectives. While affordability is a key element of the assessment of whether a loan is unsuitable, it is not the only element. Cases involving loans that do not meet a borrower's requirements and objectives include where a borrower is given a line of credit loan, or interest only loan, without sufficient consideration of its appropriateness to their circumstances. Such loans often cost more than their principle and interest counterparts, and involve greater risk (of negative equity for example because they do not reduce over time leaving borrowers more vulnerable to movements in house prices). Line of credit loans also require considerable discipline to operate because of the risk of redrawing repayments made but up to the limit, rather than paying down the loan over time. We have provided an example of where this type of loan is likely to cost a woman her house below. Prior to the enactment of the RLO obligations, the inappropriate granting of line of credit loans was rife.

Another example of an unsuitable loan is where a borrower is seeking to take advantage of an interest-free promotion is provided with a credit limit that may be up to several multiples of the amount required to secure their purchase, and then encouraged through personalised marketing to drawn down the remaining limit at high interest.

While the new standards include a reference to the structure, purpose and proposed terms, there is no clear obligation to match these features for any individual borrower, and importantly, no remedy for the consumer upon breach. Similar arguments can be made in relation to the APRA standards.

Financial Rights' Case Study – Chloe's story – C201268

In 2008 Chloe was injured in a workplace accident. She is permanently disabled as a result and does not expect to work in the future as a result of her injury. In 2012 Chloe purchased a home outright in the Central Coast using the personal injury payout she received. In 2013 Chloe asked her bank for a loan to pay for legal fees associated with the custody of her daughter. Chloe was approved for a $50,000 line of credit secured against her home. The limit was subsequently increased three times in a period of less than 2 years totalling over $100,000. Then in 2015 Chloe's bank granted her a $150,000 home loan to pay off the line of credit, and then topped up that loan twice. Chloe now owes nearly $200,000 and she is at risk of losing her home. She is in constant financial stress because of this debt and struggles to make the required repayments. In order to make the repayments for her loan, she has fallen behind on her other bills, such as her energy bills, water bills and council rates. The only way she can make payments at this point is to neglect bills or borrow money from her adult son.

Financial Rights has lodged a dispute on Chloe's behalf alleging that these loans were neither affordable by Chloe, nor did they meet her requirements and objectives. The line of credit loan, including subsequent increases, had no fixed repayments and was repayable on demand. It would take enormous discipline to manage such a loan on a fixed income to ensure that sufficient payments were made to pay the amounts withdrawn plus interest, and without making any further withdrawals. As Chloe's capacity to repay the loan was borderline at best and she was on a permanently low income, she was constantly paying money into the loan and withdrawing it again to meet her essential living expenses. When she reached the limit each time, she no capacity to pay down the balance and had become reliant on the withdrawals to make ends meet. Each time she approached the bank with this dilemma, they increased the limit. Had the loan been recalled at any time, she would have had no means to repay except selling her home. Now her only hope of saving her home is to successfully argue that the bank has breached the responsible lending provisions of the NCCP Act and use any consequent damages to pay down the loan to an affordable amount.

5.3. Removing responsible lending obligations will hurt people experiencing financial abuse

Consumer and domestic violence advocates are particularly concerned about the harm these changes will cause people, predominantly women, fleeing or experiencing domestic violence and economic abuse. Coerced debt is a common factor in the inability for victim survivors to leave a violent or abusive relationship and re-establish their lives. We are similarly concerned these reforms will hurt older people experiencing financial abuse. Financial abuse is a serious and far reaching problem that can happen to anyone, however some people, such as the elderly, or vulnerable and isolated people (like newly arrived migrants) are at greater risk, as they often depend on others for assistance with financial tasks or decisions.

Compliance with RLOs, if done correctly, can identify red flags in financial abuse. RLOs require the lender to make inquiries as to the loan's purpose, suitability and affordability beyond what the unjustness provisions under the Act require. RLOs also require the lender to verify this information.

When lenders and intermediaries like brokers undertake proper responsible lending assessments they will often be put on notice when loans should not be approved, an important role in preventing financial abuse. Importantly, the responsible lending provisions also provide a remedy for women or people suffering from elder abuse when lenders do not undertake the required steps or ignore these red flags.

Financial Rights' Case Study – Jess's story – C164355 – domestic violence

Jess (name changed) is a young single mum, who recently had to move from Sydney to the South Coast to flee from her former partner who was abusive towards her.

In 2013, when she was 18 years old, her partner convinced her to purchase a manual car and take out a car loan for him (as he had a bad credit rating). At the time, she only had a provisional license & could not drive manual.

She was working part-time at a fast-food chain and lived with her parents. Her partner took the car, and it was repossessed three months later. She never drove it. Her partner was physically and emotionally abusive throughout their relationship. She was repeatedly contacted by the lender to pay the shortfall of $18,000.

Financial Rights lodged an internal dispute arguing that the lender had failed in its responsible lending obligations and provided an unsuitable loan. The lender offered to reduce the debt to $10,000 but Financial Rights sought a full waiver. After being shown an affidavit that had been filed in family court proceedings as evidence of the domestic violence Jess survived the lender agreed to a full waiver of the shortfall debt.

Responsible lending, if done correctly, can identify red flags in domestic and family abuse. It provides both a remedy, but additionally should put lenders on notice when loans should not be approved.

Impact of the Draft Materials on people experiencing financial abuse

The Draft Materials include no requirement for lenders or brokers to consider a borrower's requirements and objectives. This is a key protection for victims of domestic violence and financial abuse in the current RLOs where it should be apparent the borrower, or one of the borrowers, will get no benefit from the loan. While the purpose of credit is a factor that must be considered in credit assessment systems, policies and processes for non-ADIs under the Draft Standards, this does not appear to require an assessment of whether each loan will meet the requirements and objectives of the borrower.

The Draft Materials will remove any obligation on intermediaries (like brokers or car dealers) to make inquiries or verify information being supplied for a credit application. These intermediaries are often the ones face-to-face with a couple (or an older person and their caretaker) where financial abuse is taking place and have a unique opportunity to identify financial abuse. Removal of RLOs for brokers (even though they will have a best interest duty) creates a big risk that red flags of domestic violence or financial abuse will be missed by the broker and will not be seen at all by the lender.

Allowing non-ADI lenders to rely at face value on information provided by borrowers in some circumstances creates ambiguity that presents particular risks for applications that might be completed by abusive partners or caretakers, risks that are even more acute when lending is conducted solely online or through mobile apps. Perpetrators of financial abuse will be able to manipulate information on credit applications in order to get access to funds, and the victims get left holding the debt.

Credit licensees may not be directly causing this harm, but providing credit without due care can help perpetuate and enable abuse. Reducing the amount of information a licensee is required to obtain directly reduces the likelihood that abuse situations will be identified.

The negative impact of weakened individual rights to redress are also likely to disproportionately affect those experiencing financial abuse, making it harder for victim survivors to get back on their feet after unsuitable loans have been provided.

While consumers and their advocates will still have access to section 76 of the *National Credit Code*[53] which relates to unjust loans, over the years the courts have interpreted these provisions to require that a lender be aware of any pressure or undue influence being exerted over a borrower. Since so many loans are applied for and granted online, it is almost impossible for victims to establish that the lender should have known they were being coerced when they applied for credit. These principles are also reactive and do not drive systemic improvements in lending. For these reasons, the unjust contract provisions are used much less frequently than the RLOs to provide redress to victim survivors of financial abuse, and are not an appropriate alternative to the RLOs.

[53] The *National Credit Code* is a schedule to the *National Consumer Credit Protections Act (2009)*. The unjust provisions have been in force for several decades and, while often useful, are far less effective in practice than RLOs for preventing and compensating financial abuse.

Removing these laws will reduce the ability of advocates such as financial counsellors and community lawyers to assist survivors with debts that they accrued during abusive relationships or because of elder abuse.

It has been well documented that rates of family violence and financial abuse have risen sharply during the COVID-19 pandemic. Removing these critical protections at a time when so many women and older persons are more vulnerable to financial abuse than ever would have devastating results.

Specifically, when considering the effects of these reforms on elder abuse, we want to note social isolation is a driver of elder abuse—and the COVID-19 pandemic has increased social isolation for many older people. Financial pressures on adult children are a driver of financial elder abuse—and the economic fallout of COVID-19 has increased those too.

Financial Rights' Case Study – Adrian's story – elder abuse - C138746

Adrian, a disability pensioner, had a default judgment and order for possession of his home entered against him in the Supreme Court of NSW. While Adrian knew he had signed a mortgage over the property, he was duped to do so at the request of his (now estranged) grandson, who told him it was to secure a joint loan so he and his grandson could purchase an investment property together. Adrian was told the loan would be secured by the investment property, and that the mortgage over his house was just a "back-up". In fact, there was no joint purchase of an investment property and no other security for the loan, and Adrian had transferred a 15% interest in his property to his grandson for no consideration. Adrian had no capacity to pay the loan, and thought his grandson was taking care of it. He wasn't. Adrian's grandson had drawn down on the loan and spent the money himself (while pretending to our client they had purchased an investment property) and then disappeared.

Financial Rights raised a defence for Adrian in the Supreme Court arguing that the loan breached responsible lending laws and the loan process was riddled with red flags of financial abuse. Neither the bank nor the broker had properly assessed Adrian's capacity to pay the loan (he had no capacity to pay at all). Under the loan contract Adrian was liable to pay the monthly payments of $1400. At the time Adrian's gross monthly income was $1750 and his living expenses were $1250. The broker who arranged the loan had never even met Adrian (the grandson had falsified the loan application documents, including forging Adrian's signature). Adrian's home was his only asset worth more than $2000.

Neither the bank nor the broker had picked up that Adrian had received no independent advice (legal or financial) about the transaction – the same solicitor purported to act for both parties, despite the transaction clearly being improvident from Adrian's perspective.

Finally the loan clearly did not meet Adrian's requirements and objectives, which were to obtain funds to jointly purchase an investment property. The proposed investment property should have been security for the loan, but instead the bank took Adrian's personal residence as the only security.

Financial Rights made an application to set aside the bank's default judgment. We then entered into negotiations with the bank which agreed to set aside the judgement and discharge the mortgage. Had the bank and the broker complied with responsible lending laws the red flags of financial abuse would have been apparent. Should these laws be reformed in the way the Government proposes, the broker would not have a responsibility to verify the loan documents which were falsified by Adrian's grandson, and the bank would have had no requirement to ensure the loan met Adrian's requirements and objectives. Both of these are key protections in financial abuse cases like Adrian's.

In addition to our comments above, we also strongly encourage Treasury to consider the Economic Abuse Reference Group's (**EARG**) submission to this consultation when considering the impact that the reform would have on economic abuse. EARG's submission provides further detail from a range of specialist community service workers that have real insight into the causes and impacts of domestic and family violence.

5.4. Using estimates disregards important circumstances of consumers

Verification of expenses is an area where banks have reportedly made significant efforts to improve in recent years,[54] and one that is only likely to become easier with open banking, which would allow lenders to access banking transaction data from other institutions with the informed consent of customers.

The Draft Materials would broadly give a green light to non-ADI lenders, and seemingly all other credit licensees, to make reasonable estimates of consumer's expenses, rather than verifying their true expenses. While the *ASIC v Westpac* decision does suggest that expense estimates or benchmarks, such as the Household Expenditure Measure (**HEM**), can play a role in meeting RLOs, the Draft Standards appear to go much further, by doing away with any need to consider the true expenses of consumers altogether. That decision was labelled 'an unusual case' by Lee J, 'being a case … divorced from consideration of any facts about any specific consumers'; it may be that the use of benchmarks would not suffice if a particular loan was unsuitable.[55]

Making an estimate of a consumer's expenses will increase the likelihood of significantly underestimating a person's true expenses. Recently, HEM has been the most common measure used by credit licensees. In reality, by specifically allowing the use of an estimate of reasonable expenses, the Draft Standards are practically endorsing the use of HEM. The use of this measure demonstrates the inherent problems that are involved in allowing the use of estimates, rather than verifying true expenses. As described by Commissioner Hayne in the Financial Services Royal Commission Interim Report:

> "*HEM represents the median spend on absolute basics, but only the 25th percentile spend on discretionary basics. Three out of four households spend more on things like alcohol and tobacco, adult clothing and childcare than HEM includes in its result. And, HEM takes no account of spending on 'non-basics'. Together, these considerations show why it is right to describe HEM as being used to calculate only 'modest expenditure'.*
>
> *Further, and obviously, HEM takes no account of whether a particular borrower has unusual household expenditures as may well be the case, for example, if a member of the household has special needs or an aged parent lives with, or is otherwise cared for, by the family.*"[56]

Commissioner Hayne's statements reflect the inherent problem with estimates—that there is a variation in the way people save and spend money, even if you take into account their basic demographics, such as the number of dependents they have and where they live. Relying on estimates to determine the repayments a person can afford to put toward debt is going to result in people winding up with loans they cannot afford.

Financial Rights' Case Study – Jack & Rhonda's story – C181494

Jack and Rhonda (names changed) were granted two home loans in April 2015 by the same bank to purchase a home and land package. One was a construction loan with an interest only period and the other was a principle and interest loan. Together the loans totalled just over $515,000. There were question marks over the income figure used for one borrower and a low-ball benchmark figure was used to estimate their expenses. At the time of the application the couple had some limited savings and combined non-mortgage debt of about $74,000 including a $20,000 car loan. When they were rejected by one bank their mortgage broker advised them to redraw funds on their car loan to indicate they had savings. After the loan was granted, they owed $590,600. They could not afford this loan.

Two years later in June 2017, the couple successfully applied for another home loan with the same bank for a further $61,500. By this time, they accumulated combined non-mortgage debt of over $112,000, including a $25,000 car loan. This debt was symptomatic of their inability to afford the original loan as they used credit

[54] Financial Services Royal Commission, *Final Report*, Volume 1, p 55.
[55] *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111, [173].
[56] Financial Services Royal Commission, *Interim Report*, Volume 1, p 27-28.

cards to supplement their income and make ends meet. Their total indebtedness was now $643,100.

Later that year the couple applied for a repayment pause with their mortgage lender due to the impending arrival of their first child (a feature which had been a key attraction to them in taking on the loan and was something the mortgage broker had suggested). This was refused on a number of grounds, including that they could not demonstrate that they had savings to cover 6 months of the intended 12 month maternity leave period— condition of the feature that was never explained to them.

The following May (2018), Jack received an offer to apply for a personal loan from the same bank. Their first child had been born the previous December and he was unable to make ends meet despite having taken on extra work. Feeling completely desperate, he applied for and was granted another $50,000 personal loan. The information was inconsistent with what the bank already had on file, but was approved nonetheless. While this amount enabled Jack and Rhonda to pay out some of their credit card debt and supplement their income for a short time during her maternity leave it has now left them with over $655,000 in net debt, which they cannot realistically service.

They had not missed a mortgage payment, but their marriage became strained, they do without many essentials including food from time to time, and they are highly reliant on other family members to survive.

The bank subsequently admitted the 3rd mortgage, unsecured loan, a credit card and the personal loan were unsuitable and ought not to have been granted. Jack and Rhonda will still need to pay back the loans, but the bank has refunded the interest they have paid on the unsuitable credit. Using these funds to reduce the debt, the couple now have the capacity to save their home with a negotiated agreement.

5.5. Reverse mortgages

Reverse mortgages are complex credit contracts that are commonly entered into by older Australians. If they are not suitably structured for an older person's specific financial situation, they can see people lose their family homes, or be left without enough money in retirement.

For non-ADI lenders, the Draft Bill does retain some (but not all) existing obligations imposed on licensees when recommending or entering into reverse mortgages under Part 3-2D of the NCCP Act, including the requirement to provide consumers with equity projections that estimate and explain the value of the property subject to the reverse mortgage, and their level of indebtedness over time. However, the removal of the obligations to make reasonable inquiries about consumer's finances, and verify their situation, make the value of the equity projection questionable. Rather than requiring the credit licensee to ensure they have a complete and verified understanding of the consumer's requirements and objects and financial circumstances (as is required under RLOs), the Draft Bill introduces a requirement that the licensee make inquiries about:

> *the consumer's requirements and objectives in meeting possible future aged care accommodation needs including the time (if any) at which the consumer is likely to incur costs for future aged care accommodation and the likely amount of those costs.*[57]

Combined with the Draft Standards, this process now relies upon the consumer having a strong understanding of their possible future aged care accommodation costs and needs, a variable which is particularly complex and would be difficult for anyone without the requisite expertise to estimate. Accordingly, the equity projections could now be made based upon an older consumer's estimate of what aged care might cost them, as well as their recall of their finances and a generic estimate of their expenses. For non-ADI lenders at least, there is not even a requirement that the lender forms their own view on the likely costs of future aged care accommodation.

[57] Draft Bill, item 59.

More concerningly, key presumptions of unsuitability that currently exist at reg 28LC of the National Consumer Credit Protection Regulations 2010 (Cth) (**NCCP Regulations**) would be repealed by the Draft National Consumer Credit Protection Amendment (A New Regulatory Framework for the Provision of Consumer Credit) Regulations 2020 (Cth).[58] These presumptions currently apply where particular loan-to-value ratios exist, affected by the age of the youngest borrower, and were introduced to prevent people being signed up to poor value reverse mortgages. While these presumptions are drafted to comply with a RLO assessment, they are extremely important and appropriate protections that reflect the complexity and risk involved in reverse mortgages. They effectively impose a positive obligation to show why a reverse mortgage is suitable, despite the loan-to-value ratios being breached.[59] This takes the existing protections beyond disclosure. The Draft Materials appear to dispense with this protection altogether.

Moreover, none of the retained rules relating to reverse mortgages apply to ADIs, that is banks—the vast majority of home lenders in the marketplace. This is a huge gap in the proposals. Even if these rules were amended to apply to ADIs, the lax approach to assessment and verification the Draft Materials allow would greatly increase the risk of consumer harm occurring, particularly for older Australians.

5.6. Credit cards

Passing the Draft Materials would also create a glaring inconsistency between the level of protections provided to consumers in relation to credit cards issued by ADI and non-ADI lenders.

This Government recently introduced additional consumer protections to the NCCP Act in relation to credit cards, via the *Treasury Laws Amendment (Banking Measures No. 1) Act 2018* (Cth), which only came into effect in 2019. The Draft Materials do away with the additional protections from that amending Act that are tied to RLOs. Primarily, this is the assumption that a credit card is unsuitable for a consumer if they could not repay the credit limit on the card within three years.[60]

However, this assumption is replicated via clause 9(4) of the Draft Standards for non-ADI lenders. The Draft Materials do not contain a like protection that would apply to ADI lenders, and no such protection currently exists in any relevant APRA prudential standards. This is a significant concern, particularly as credit cards issued by ADI lenders make up the vast majority of the market.[61]

Credit cards are one of the forms of credit that commonly involve higher interest rates and represent significant risk to consumers. To dispense with these important protections that were introduced by this Government only last year (yet retain them for non-ADI lenders who issue fewer credit cards) would be a major concession to the banks, and a significant loss of rights for consumers.

There are not many ways we see available to the Government to preserve this requirement for ADIs under the new model. APS 220 is not written in a way that would easily allow a slight amendment to include an obligation for ADIs to assess the affordability of credit cards at the time of approval in the same manner. Accordingly, it appears the most likely way this requirement would be imposed on banks would be via the relevant codes of conduct. In accordance with Recommendation 1.15 in the Final Report of the Financial Services Royal Commission, the *Financial Sector Reform Hayne Royal Commission Response) Bill 2020* (Cth) (the **Hayne Bill**) introduced to the House

[58] Item 2.

[59] A reverse mortgage will be presumed unsuitable, unless proved to the contrary, where (a) the youngest borrower under the reverse mortgage is 55 or younger, and the loan-to-value ratio of the mortgage is higher than 15%; or (b) the youngest borrower under the reverse mortgage is older than 55, and the loan-to-value ratio of the mortgage is higher than the sum of 15% and 1% for each year that the borrower is older than 55: see reg 28LC of the NCCP Regulations.

[60] ASIC Credit (Unsuitability—Credit Cards) Instrument 2018/753.

[61] Senate Economics References Committee, *Interest rates and informed choice in the Australian credit card market*, 16 December 2015, at 2.21-2.22, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Credit_Card_Interest/Report.

of Representatives this month contains a power for ASIC to approve codes of conduct for APRA regulated entities, and identify provisions of an approved code that become enforceable.[62]

This appears to be the most appropriate way this important protection could be retained for consumers, assuming the banks are willing to consent to the inclusion of a like provision in their codes. However, under the proposed code enforceability regime, any enforceable provisions of a relevant code of conduct would fall under the remit of ASIC. This means that, despite the apparent goal of the Draft Materials to remove the oversight of individual lending decisions by ADIs from ASIC, the oversight of suitability assessments by ADIs when issuing credit cards would (at least in part) remain with ASIC, further complicating the division of roles between ASIC and APRA. The more general confusion and overlap the Draft Materials create between the roles of ASIC and APRA is discussed at Part 6.

In addition, the penalty regime will be wildly inconsistent. Under the Hayne Bill, the civil penalty applicable to a breach of an enforceable code provision is 300 penalty units ($66,000). There does not appear to be any civil penalty applicable to an individual breach of the Draft Standards. Breach of existing RLOs, including that relating to credit cards, attracts 5,000 penalty units ($1.1m). Inconsistency of this nature is not only poor regulatory design but will create inconsistent compliance incentives, risking consumer protection standards.

CARE ACT Case Study- Amy's story

Amy was a young mum of three children. She moved from interstate to escape her violent ex-partner. She was unemployed and struggling to support her children.

When they were together her ex-partner had taken out a credit card in Amy's name without her knowledge. When she found out she was too scared to do anything about it. Now the lender was chasing her to repay the debt and wouldn't accept her explanation of what had happened. Amy was very stressed and upset as she couldn't afford to make repayments.

Amy approached a financial counsellor for support. When we requested copies of documents related to the loan, we discovered information in the application did not match the supporting documents provided. Despite this Amy had never received a call from the lender to verify the details in the application. The financial counsellor argued on behalf of Amy, that this did not meet Responsible Lending requirements, and with this advocacy Amy's debt was waived. Without Responsible Lending Laws this outcome would not likely have been achieved and Amy would have spent many years burdened by debt.

6. A more complex, confused and inconsistent regulatory system

The Draft Materials also manage to significantly complicate many aspects of the existing regulatory system, muddying the waters between the roles of ASIC as conduct regulator and APRA as prudential regulator.

6.1. The Wallis inquiry and the 'twin peaks' model

Australia's financial regulatory system is often said to be a 'twin peaks' model. Two principles inform its structure:

- Prudential regulation is (largely) separated from conduct regulation and is the province of APRA; and
- Conduct regulation of the financial services industry is separated from conduct regulation of other parts of trade and commerce and is (largely) the province of ASIC.[63]

The twin peaks model originated in the Wallis Inquiry in 1996. The Inquiry was to analyse factors driving change in the financial system and make recommendations on regulatory arrangements. The inquiry is responsible for the

[62] Schedule 1, Item 4, (inserts section 1101A to the *Corporations Act 2001*).
[63] Financial Services Royal Commission, *Final Report,* Volume 1, p 414.

dual regulatory system today, having recommended: a single regulator for conduct and disclosure, and a single prudential regulator. These roles are currently carried out by ASIC and APRA respectively.

The inquiry recommended that a single conduct and disclosure regulator be formed to better respond to the broadening structure of markets and reduce inefficiencies and regulatory gaps. A single prudential regulator, independent from the RBA, was recommended to provide greater flexibility, responsiveness and efficiency. The inquiry recommended that the two regulators would be independent but work closely together. The underlying reason for this recommendation was that regulators operate inefficiently when faced with conflicting regulatory objectives. Separating these functions would contribute to greater efficiency.

The Howard government accepted the inquiry's recommendations. Peter Costello, then Treasurer, told Parliament that having several agencies providing prudential oversight was "outdated and inefficient". Mr Costello argued that having a single prudential regulator and a single conduct regulator would create a more efficient and competitively neutral regulation across all of the prudentially regulated sectors. Once implemented, he believed the twin peaks model would mean "*Australia will be a world leader with best practice, leading edge financial sector regulation*."[64]

6.2. Overlapping and confused roles of ASIC and APRA

The Government now wants to confuse and contaminate the twin peaks model. APRA will now be required to act as the prudential regulator for all ADIs and also act as a conduct regulator for the lending conduct of those institutions. ASIC, on the other hand, is now tasked with regulating non-ADI credit providers and brokers. Confusingly, ASIC would remain the regulator for bank misconduct such as unconscionable conduct and misleading and deceptive conduct. This overlap of conduct and prudential oversight will be confusing and inefficient. It will not be competitively neutral, and it will create conflicting regulatory objectives for APRA.

This also reflects a departure from recommendation 6.1 by Commissioner Hayne—being that the current roles of ASIC and APRA be retained, in the Final Report of the Financial Services Royal Commission.[65] It is also likely to result in inconsistent application of similar laws. It is very unlikely ASIC and APRA will apply the same compliance and enforcement tools. As such, conduct by different lenders will not be treated the same, and in turn, consumers will not be afforded the same protections when dealing with different lenders.

We are aware that there are efforts for improved cooperation between ASIC and APRA, which are welcome. Recommendation 6.10 of the Final Report of the Financial Services Royal Commission proposed a new Memorandum of Understanding between the agencies, which was agreed and published in 2019.[66] This commits the agencies to share information of concern to the other, including as part of monitoring and supervision. However, if ASIC no longer has responsibility for oversight of ADI lending, then there is little point in APRA referring matters to ASIC which relate to misconduct that does not also bring about prudential concerns—for example, where the amounts in question might be small as part of an overall banks' portfolio, but the conduct is systemic from a consumer harm perspective. This is because ASIC will no longer have powers over RLOs in relation to ADIs.

6.3. Obvious opportunities for regulatory avoidance

Small business exclusion in the Draft Standards

Clause 6(2) of the Draft Standards exclude their application to any non-ADI credit conduct that relates to credit that is in part for the purposes of a small business operated by the consumer, provided that purpose is genuine and not merely minor or incidental in relation to the overall purpose of the credit contract (or increase). This is similar

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[64] Peter Costello, MP; *Australian Prudential Regulation Authority Bill*, Second Reading, 26 March 1998: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/1998-03-26/0002%22;src1=sm1.

[65] Financial Services Royal Commission, *Final Report*, Volume 1, Recommendation 6.1, p 423.

[66] See https://www.apra.gov.au/news-and-publications/asic-and-apra-issue-updated-mou.

to the exclusion for all credit contracts that exists at regulation 28RB of the NCCP Regulations, introduced by the Government earlier this year, that is due to sunset in April 2021.

We strongly oppose the use of this exclusion in the NCCP Regulations, and its inclusion in any future laws, including the Draft Standards. Where it applies, this provision effectively reduces the scope of what is considered a consumer contract. Rather than applying to all credit that is obtained predominantly for a personal, domestic or household purpose, any credit that meets the partial small business purpose test will be excluded altogether from the protections of the Draft Standards. This is an extremely concerning change that risks excluding a range of credit contracts that definitely should be wholly treated as consumer contracts.

The provision creates further uncertainty about where the Draft Standards would apply (and currently as it appears in the regulations, whether RLOs apply at all). The requirement that a small business purpose be minor or incidental is a complex question that may not be entirely clear based on the facts. However, what is clear is that it definitely means that some credit contracts obtained predominantly for a personal, domestic or household purpose could be excluded from the operation of the Draft Standards.

For example, if a borrower tells a lender they want to obtain a car loan, and will mainly use the car for personal purposes, but they will also use it to make deliveries for a business they operate from home one day per fortnight, this could constitute a genuine partial small business purpose. They would then lose all the protections the Draft Standards provide, despite largely being a consumer contract. This is not a good or appropriate outcome.

We strongly endorse retaining the predominant purpose test across the whole of the NCCP Act, rather than reducing the type of loans the Draft Standards would apply to, if passed. The small business exclusion further complicates the interaction between the Draft Standards and the NCCP Act.

The provision is also highly susceptible to misuse by lenders, to avoid the operation of the Draft Standards. Under the current law, we already see sham business loans used by fringe lenders to avoid falling under the consumer credit laws. This change makes it a lot easier for credit contracts to meet this requirement. When any person who operates a small business approaches a non-ADI lender for a credit product, the lender could quite easily arrange for a small business purpose to be recognised as part of the loan's purpose, in order to avoid the obligations contained in the Draft Standards.

This change is complex and inappropriate. A credit contract that is predominantly for a personal, domestic or household purpose, should be provided all relevant consumer protections. This change is vulnerable to exploitation, and unlikely to deliver any real substantial benefit to the flow of credit to small businesses.

<u>Medium amount credit contracts as a less regulated alternative to SACCs</u>

Finally, there is an additional issue created by imposing a vastly different level of regulation over credit contracts worth up to $2000, and credit contracts worth more than $2000. We hold significant concerns that in order to avoid existing RLOs, lenders that sell SACCs might attempt to upsell people to medium amount credit contracts (**MACCs**). Many SACC providers already also provide MACCs (including Cash Converters, the largest SACC market player). If the Draft Materials pass, the law would give these providers a significant incentive to upsell to avoid RLOs. As detailed above, it would greatly reduce the risk of them facing any real regulatory action for irresponsible lending (by avoiding civil penalty provisions) and would mean that borrowers would have far fewer avenues to contest debts.

<u>Proposals in relation to SACCs and consumer leases</u>

We understand that the actual Bill containing the Draft Bill provisions that will be put before Parliament will also include reform addressing SACCs and consumer leases. We note that the Government's proposed provisions in relation to SACCs and consumer leases would also represent a significant reduction in consumer protections to that promised by the Government in 2016. While not included in the Draft Materials, we consider that the proposals in the Consumer Credit Reforms Factsheet to:

- apply differentiated 'protected earnings amount' for borrowers who rely predominately on Centrelink income versus those that do not; and
- allow a large establishment fee, of 20 percent of the value of goods, to be included in the cap on total payments for consumer lease contracts

to be reducing consumer protection standards to such a degree as to allow these contracts to create a substantial risk of significant detriment to very vulnerable borrowers. This is because low-income waged consumers will be put at great risk—repayments can be up to 40% of their income (across higher cost products), blunting the intended effect of the reforms to address problematic repeat borrowing. The proposal to allow a large establishment fee for consumer leases means that the cost cap amounts to an APR of around 108% for a 1-year contract, and 73% for a 4-year contract. This is simply too high and is exploitative. These proposals also represent a deeply regrettable backflip on the Federal Government's previous commitments in relation to the Final Report of the Independent Review of Small Amount Credit Contracts.[67]

[67] The Hon Kelly O'Dwyer MP, *Media release—Government response to the final report of the review of small amount credit contracts*, 28 November 2016, available at: https://ministers.treasury.gov.au/ministers/kelly-odwyer-2016/media-releases/government-response-final-report-review-small-amount

7. Conclusion

RLOs are one of the most important consumer protections in financial services and credit. Their removal would be disastrous. Passing the Draft Materials would likely result in more unaffordable debt sold to struggling families, which would put their financial and general wellbeing at risk. It would take legal rights away from people that help to keep the banks honest, and which act as a vital disincentive against irresponsible lending. Unaffordable debt is not the solution to a recession – this would be a bad economic decision for the country as a whole. The Government has got this aspect of its response to the COVID-19 pandemic fundamentally wrong.

Financial counsellors and community lawyers working in this area see this proposed reform as a disaster. As bank deferrals come to an end, and income support is wound back, the Government is setting us up for a debt disaster by proposing to axe our responsible lending protections.

We implore the Government to abandon this legislation, and retain our current RLO protections.

Please contact Policy Officer **Tom Abourizk** at **Consumer Action Law Centre** on 03 9670 5088 or at tom.a@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

Gerard Brody | CEO
CONSUMER ACTION LAW CENTRE

Karen Cox | CEO
FINANCIAL RIGHTS LEGAL CENTRE

Fiona Guthrie | CEO
FINANCIAL COUNSELLING AUSTRALIA

Gemma Mitchell | Managing Solicitor
CONSUMER CREDIT LAW SERVICE (WA) INC

David Ferrero | Managing Lawyer
UNITING COMMUNITIES CONSUMER CREDIT LAW CENTRE SA

Erin Turner | Director Campaigns & Communications
CHOICE

Carmel Franklin | CEO
CARE AND CONSUMER LAW CENTRE ACT

John Hooper | CEO
NILS NETWORK OF TASMANIA

Jillian Williams | Operations Manager
INDIGENOUS CONSUMER ASSISTANCE NETWORK LTD

APPENDIX A – ADDITIONAL CASE STUDIES

CARE ACT Case Study- Maria's story

Maria was only 20yrs old when she sought assistance from a financial counsellor. She had been in an abusive relationship which had ended and was left with several debts as a result.

Her ex-partner had threatened to kill himself if she didn't help him buy a car. He was unable to get credit as he had a negative credit listing. She wasn't sure that she could afford the loan at the time as she was only 18yrs old with a part time job. Under duress she applied for the loan in her name only and to her surprise it was approved. Not long after the car was purchased, her partner registered it in his name, took the car and moved out. She had never driven it. He said he would contribute to the loan but didn't pay a cent towards it.

After they broke up, she struggled for a couple of years paying the loan. She came to a point when she couldn't afford the loan anymore. The lender had been contacting regularly to chase up payments and didn't seem interested in her explanation of the circumstances around the loan. She was very distressed when she came to see a financial counsellor at the suggestion of a friend. The financial counsellor requested copies of documents relating to the contract and discovered that the assessment to check her serviceability of the loan was not accurate. The client said she never received a call from the lender to verify the details in the application.

The client suffered financial abuse, was coerced into taking out the loan and did not receive any benefit from the loan. The financial counsellor argued that the loan did not meet Responsible Lending Obligations and consequently the debt was waived. Without Responsible Lending Laws it may not have been possible to achieve this outcome and the client would have been saddled with paying the debt for many years.

CCLSWA Case Study – Tina's unaffordable home loan

Tina is a 40yo single professional woman who contacted Consumer Credit Legal Service WA in early 2019 when she had multiple credit card debts and had a home loan of about $350,000 over a unit in suburban Perth that was worth about $200,000. The home loan was secured by a guarantee given by Tina's parents over their family home. At the time that Tina was approved for the home loan in 2012, she was living with her parents and had credit card debts. A mobile lender for a big four bank visited Tina and her parents at their home, and gave Tina a loan of $400,000 to buy a unit that cost $330,000, and her parents guaranteed the loan. The extra loan money was used to repay her credit card debts. The mobile lender from the bank performed an assessment of suitability for the loan, but falsely included "projected rental income" to make the numbers add up, although Tina had bought the house to live in and it was not an investment loan. When Tina contacted us, she had been living off credit cards because her salary was not enough to meet the home loan repayments, and the Perth property market had dropped so her unit was now worth much less than the loan amount. Tina was facing a shortfall debt of about $150,000 and her parents were at risk of losing their family home which would have to be sold to pay the shortfall. Tina also had $58,000 in credit card debts, all due to her trying to live on credit cards while her salary went towards her unaffordable home loan.

CCLCSA Case Study – Kelly's story – domestic violence

Kelly was receiving the Disability Support Pension and living in Adelaide with her husband and three children. Kelly has lived with disability all of her life and her marriage was impacted by family violence.

Kelly depended on her husband to access financial service providers due to her disability. Over time, Kelly experienced financial abuse. Kelly's husband became interested in purchasing a new car. Kelly objected to buying a new car and told her husband that they were struggling to meet the home loan repayments and could not afford a car loan. Kelly and her husband owned their car outright. However, they traded in their vehicle in order to purchase a new car. The finance broker at the car dealership filled in the car loan application and Kelly had little control over the process or opportunity to see or understand what was submitted. The car loan was later found to be unsuitable as Kelly and her husband could not make repayments without substantial hardship.

The financial pressure exacerbated the family violence Kelly experienced at home. Kelly attempted to leave the situation of abuse. Kelly's family were living below the poverty line and getting assistance from the Smith Family and emergency food relief hampers. The car loan came to the end of its term but had a balloon balance that Kelly and her husband could not afford. The car loan provider again contacted her husband to enter into a new credit contract to finance the outstanding balloon balance. Kelly did not want to sign the new credit contract as she knew this would mean they would struggle to meet their home loan repayments. However, Kelly and her husband still owed money on the car her husband was driving. Kelly was afraid for what might happen to her safety as when she protested, the domestic abuse would escalate. Kelly signed the credit offer under duress. The matrimonial money was directed to making the car loan repayments. Prioritising the car loan, in turn resulted with the home loan going into default. The home loan went into arrears as payments were not being made and Kelly received a Notice of Default.

The home loan lender obtained a Possession Order and Kelly found herself homeless. The home lender eventually sold the house for a shortfall. Kelly was jointly liable for the shortfall debt on the home loan. The shortfall was much larger due to matrimonial funds being prioritised to make car loan repayments.

Financial Rights' Case Study – Tina's story – S257135- domestic violence

Our young female client was married to a man with a serious drug addiction back in 2014. In 2020, more than 5 years after they had separated, her wages started to be garnisheed because of an old car loan. While our client had no memory of signing up to a car loan, when we told her the date of the loan and the type of car, she realised it had been taken out just two weeks before she gave birth to the couple's child, and related to a luxury car her ex got for himself. Our client never used the car (her ex crashed while driving it under the influence within a week of obtaining it) and could never have afforded the loan. Our client's ex had a business in his name, so our client suspects (we are still waiting for the credit company to provide documents) he has falsely stated that she is an employee of that business in order to qualify for the loan.

Had proper inquiries been made of our client directly, it would have been apparent that she was pregnant, due to give birth in less than a fortnight with no maternity leave entitlements, and had no need for a luxury vehicle. We are hopeful of using the credit company's responsible lending obligations to take positive steps to inquire about and verify a customer's needs and financial capacity to challenge this clearly unsuitable loan.

CCLSWA Case Study – Sandra's unaffordable car loan

Sandra is an Aboriginal woman, and a single mother of three children, one with special needs, living in Perth. Sandra contacted Consumer Credit Legal Service WA when she was in default on her car loan. Sandra's car loan was arranged by a broker at a car yard when she was desperate to replace her car that had been written off in an accident. Sandra's sole income was from Centrelink, and she could not afford the loan repayments and pay for her family's basic expenses. CCLSWA negotiated on Sandra's behalf with the lender, on the basis that it had breached responsible lending laws. During that work CCLSWA discovered that Sandra had also taken out 14 separate payday loans over three years while she was struggling to repay the car loan, as she was in such financial hardship because of the car loan. After looking at the documents for these payday loans, it was clear that each of these payday loans was in breach of the responsible lending laws too.

Financial Rights' Case Study – Elise's story – C201980

Elise (name changed) had entered into three credit contracts over the past 5 years. When she was 24 years old, she attended the Travel Agent to book a trip overseas to attend a friend's wedding with her partner. She applied online, with the Travel Agent, for a $5,000 interest free loan for 12 months to finance the cost of the trip. The application process happened very quickly. Elise doesn't recall being asked for any details or documents about her financial circumstances. She was only required to provide her Driver's License and Medicare card. Elise got an email the same day saying she was approved for $15,000 in credit. She told the Travel Agent that she didn't want the $15,000 credit but was met with a sharp reply that that's what she got and she had to accept it. At the time Elise's daughter was 5 years old and her son was 7 months old. She received Family Tax Benefit, was working part-time in Aged Care, and had a $16,000 car loan and another $5,000 credit card. In order to make ends meet she and her family lived with her father and paid board of $100 per week.

With a very tight budget based on her income and liabilities, the temptation of using the funds available on the credit card was difficult to resist. Eventually the credit limit of $15,000 had been reached, Elise could no longer afford the minimum repayments and defaulted. The debt was then sold to a debt collector.

We were able to help Elise negotiate an affordable plan to pay off the outstanding balance of the debt in affordable payments. Elise now has a terrible credit report with the repayment history information recorded against her for a debt she should never have been given. Had the lender made reasonable enquiries at the time it would have been clear that Elise could not repay $15,000 of credit without substantial hardship.

Financial Rights' Case Study – Eva's story – C190413

Eva (name changed) is a 47-year-old single woman with 2 children living in New England, who identifies as Aboriginal. Around two years ago, Eva went to a car dealer to purchase a car. To finance the purchase, a non-bank lender approved a loan of about $5,000 for her. At the time, Eva had limited income as she was on a Carer's payment, caring for her disabled brother, and received family tax benefits.

After trying to keep up with the repayments for a period of time and paying around $1500 towards the loan, Eva could not afford to meet the repayments and defaulted. She requested a hardship variation to pay $50 per week which was rejected. When she tried to have the lender take the car to sell it, they refused to do so.

Around August 2020, she had around $7,000 owing to the lender due to non-payment, interest, and fees that had accrued. It appears Eva was also sold junk insurance with the car, adding to the total of the debt but providing no protection against her default.

Had the car yard finance provider done a proper responsible lending assessment Eva would not have been given an unsuitable car loan (with useless add-on insurance). She has tried repeatedly to give the car back to the lender and just deal with the shortfall but the lender refuses. The car is not currently working (it needs a new battery) and is out of rego.

APPENDIX B – ABOUT THE CONTRIBUTORS

Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Financial Rights

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.

Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We are the voice for the financial counselling profession and provide support to financial counsellors including by sharing information and providing training and resources. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.

CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

Consumer Credit Legal Service (WA) Inc

Consumer Credit Legal Service (WA) is a not-for-profit community legal centre based in Perth and servicing the State of Western Australia. CCLSWA provides legal advice, representation, advocacy, and community legal education to consumers in Western Australia. CCLSWA specialises in the areas of credit, banking and finance, and consumer law. In the 2 years from 1 October 2018 to 1 October 2020, CCLSWA provided over 200 services that dealt with breaches of responsible lending.

Indigenous Consumer Assistance Network

The Indigenous Consumer Assistance Network Ltd (ICAN) provides consumer education, advocacy and financial counselling services to Indigenous consumers across the nation, with a vision of "Empowering Indigenous Consumers".

Aboriginal and Torres Strait Islander peoples living in regional and remote communities often experience heightened consumer disadvantage. Structural barriers and an uncompetitive marketplace create conditions in which consumer and financial exploitation occur. In its ten years of service delivery, ICAN has assisted people through a range of consumer and financial issues including: dealing with unscrupulous used car dealers, finance companies, payday lenders, telemarketers and door-to-door salesmen. In line with its vision to empower Indigenous consumers, ICAN provides Indigenous consumers with assistance to alleviate consumer detriment, education to make informed consumer choices and consumer advocacy services to highlight and tackle consumer disadvantage experienced by Indigenous peoples.

Uniting Communities Consumer Credit Law Centre SA

The Consumer Credit Law Centre South Australia (CCLCSA) was established in 2014 to provide free legal advice and financial counselling to consumers in South Australia in the areas of credit, banking and finance. The Centre also provides legal education and advocacy in the areas of credit, banking and financial services. The CCLCSA is managed by Uniting Communities who also provide an extensive range of financial counselling and community legal services as well as a large number of services to low income and disadvantaged people including mental health, drug and alcohol and disability services.

Care ACT

Care Financial Counselling Service (Care) has been the main provider of financial counselling for low to moderate income consumers in the ACT since 1983. Care's core service activities include the provision of information, advice, advocacy and support for people in financial difficulty. Care also provides a Community Education program, makes policy comment on issues of importance to its client group and operates a No Interest Loan Program.

Care runs the Consumer Law Centre (CLC), a community legal centre, which provides consumer credit and debt advice to vulnerable clients in the ACT. The CLC has operated for over 20 years and is the only specialist consumer law centre in the ACT. The CLC has experience in Australian Consumer Law, credit and debt issues, insurance, telecommunications issues, fair trading, bankruptcy, and financial abuse.

NILS Network of Tasmania

The NILS (No Interest Loans Scheme) Network of Tasmania Inc. is a not-for-profit community organisation and is Tasmania's own community lending service. We make small loans to low income Tasmanians to help the purchase essential household items and services. There are no fees, charges or interest – ever. NILS loans are accessed through a State-wide network of 96 community organisation access points, provided by over 350 volunteer loan officers. Since 2002 NILS Tasmania has issued over 25 000 loans valued at over $23 million.

Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent community legal centre providing access to justice for disadvantaged individuals in the Redfern area and across NSW. RLC has a particular focus on human rights and social justice, with specialised practices in credit and debt, financial abuse, tenancy, employment, discrimination and complaints about police and other governmental agencies.

By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education, prepare publications and submissions and advocate for law reform. RLC works towards reforming our legal system for the benefit of the community.

<u>RLC's work in consumer credit</u>

Since 1977, RLC has provided specialist assistance to people who have credit, debt and consumer law problems. In addition to RLC's Credit and Debt practice which services the local community, RLC provides consumer credit advice and representation through their state-wide Financial Abuse Service NSW, state-wide International Student Legal Service NSW, and Health Justice Partnership where they have lawyers based at Royal Prince Alfred Hospital and Sydney Dental Hospital.

In addition to being a member of various community, industry and regulator consumer advocacy groups, Redfern Legal Centre coordinates the Economic Abuse Reference Group NSW which is an informal group of community organisations which work collectively to influence government and industry responses to reduce the financial impact of family violence. Members include Domestic and Family Violence services, community legal services and financial counselling services.