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Committee Secretary
Senate Economics Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

Submission on National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020

Thank you for the opportunity to provide a submission to the Senate Economics Legislation Committee's inquiry on the *National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020* (**the Bill**). This submission is made on behalf of Consumer Action Law Centre (**Consumer Action**), Financial Rights Legal Centre (**Financial Rights**), Financial Counselling Australia, Consumer Credit Legal Service (WA) Inc (**CCLSWA**), CHOICE, Uniting Communities Consumer Credit Law Centre SA (**CCLCSA**), Care and Consumer Law Centre ACT (**CARE ACT**), Indigenous Consumer Assistance Network, Victorian Aboriginal Legal Service and Redfern Legal Centre (collectively, **our Organisations**).

A substantial part of the work of each of our Organisations is providing advice and assistance to people in relation to consumer credit in Australia, particularly people who are experiencing vulnerability or disadvantage. We have deep expertise in consumer credit laws, largely based upon the lived experiences of the people we assist, and our provision of free financial counselling and legal advice services. Further information about each of our Organisations is available at **Appendix B**.

Our Organisations strongly oppose the Bill, and urge the Committee to recommend that it be abandoned by the Government, and not passed. In summary, if enacted this Bill 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.

This Bill would leave the *National Consumer Credit Protection Act 2009* (**NCCP Act**) and wider consumer credit law framework in a state of disarray—a complex and ineffective regulatory regime that would remove critical consumer protections and legal rights, further tipping the scales in favour of banks and lenders. The Bill will result in harm to individuals, families and communities, and set Australia up for a household debt disaster as we seek to recover from the COVID-19 crisis.

Schedule 1 of the Bill would make disastrous amendments to the NCCP Act, by removing the application of responsible lending obligations (**RLOs**) that currently apply to consumer credit contracts. RLOs are central to Australia's consumer credit legal framework. The Bill would remove some of the most important legal rights of borrowers against lenders and brokers.

The proposal to dismantle the RLO regime is unsupported by evidence and lacks a clear policy rationale. Consultation on the repeal has been inadequate for such a significant change.[1] Repealing RLOs also directly contradicts Recommendation 1.1 of Commissioner Hayne's Final Report of the Financial Services Royal Commission. Commission Hayne recommended retaining the current test of suitability in the NCCP Act.[2] This Bill would remove that test altogether. This Bill would only serve to extend the impacts of the economic downturn—it risks prolonging or worsening the financial hardship of Australians through bad debt in the wake of the COVID-19 pandemic, just as Government supports such as JobKeeper and JobSeeker come to an end.

The other Schedules of the Bill would introduce new protections, or change existing laws, relating to small amount credit contracts (**SACCs or payday loans**) and consumer leases. This part of the Bill represents a broken promise and major failure by the Government to deliver the consumer protections it committed to over four years ago,[3] in response to the 2016 Final Report of the Review of Small Amount Credit Contracts (**SACC Review**).[4]

Key 'protections' in the Bill are merely watered-down versions of recommendations of the SACC Review, with some of these changes directly contradicting specific findings of the report. The protections in the Bill are not sufficient, and will continue to see people pushed into financial hardship through expensive, predatory payday loans and consumer leases.

The Financial Services Royal Commission and the SACC Review are the most recent and relevant sources of independent expert opinion on consumer credit. The Government commissioned both of these reviews, and accepted their findings. Yet this Bill directly contradicts, and fails to deliver on, these commitments. The Explanatory Memorandum to the Bill (**EM**) sheds little to no light on these deviations either—it misrepresents or disregards past commitments and simple facts, and largely reads more as a work of advertising than an informative document.

RECOMMENDATION 1. The Bill should not pass Parliament.

A summary of recommendations is available at **Appendix A**.

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[1] Treasury undertook a 2 week consultation process in November 2020 on content which is largely replicated in Schedule 1 of the Bill. The time between the consultation and the Bill being tabled would likely have made it impossible to properly consider all submissions, and only limited amendments were made to the Bill. By contrast, many years of consultation took place before the implementation of RLOs in the NCCP Act.

[2] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, 1 February 2019, https://financialservices.royalcommission.gov.au/Pages/reports.html (**Financial Services Royal Commission**).

[3] Per Government response 28 November 2016, available at https://ministers.treasury.gov.au/ministers/kelly-odwyer-2016/media-releases/government-response-final-report-review-small-amount.

[4] Treasury, *Review of the Small Amount Credit Contract Laws*, Final Report March 2016, available at https://treasury.gov.au/sites/default/files/2019-03/C2016-016_SACC-Final-Report.pdf.

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1. Schedule 1 of the Bill – A disastrous winding back of consumer protections

1.1. The laws Schedule 1 would amend current responsible lending obligations

The Explanatory Memorandum (**EM**) to the Bill simply and correctly summarises the very important and reasonable goal of RLOs, at paragraph 1.9: "*Responsible lending obligations are designed to prevent the provision of unsuitable credit to consumers*". This Bill seeks to remove these critical consumer protections.

RLOs help to stop people from becoming saddled with unaffordable or unsuitable debt—the obligations are like a handbrake on the harmful sales cultures highlighted by the Financial Services Royal Commission. While these laws have not stopped all predatory or unsuitable lending practices, RLOs have offered some redress for people when these obligations have been breached. The RLOs were implemented as a result of many years of consultation and negotiation, as well as a long history of varied state-based reforms across Australia before credit laws were introduced at the Commonwealth level. The introduction of RLOs in 2009 helped to address a wide range of improper, lax and predatory lending practices that were becoming increasingly common during the early 2000s. Their introduction and design were also motivated by lessons learned from the last global financial crisis in 2007-08. The sale of unaffordable credit across the world significantly contributed to the global downturn.[5] Hannah's story below describes some of the poor lending practices that occurred prior to RLOs being introduced:

Consumer Action Case study – Hannah's story

Hannah (name changed) contacted the National Debt Helpline in late 2020 because she was struggling to pay her credit card debts, totalling over $60,000. She told us that her doctor has deemed her unfit to work due a brain injury she suffered when she was a teenager. Hannah also suffers from depression and is struggling to support her son, while on JobSeeker.

Hannah told us that she got the three credit cards from two of the 'Big 4' banks years ago prior to 2009 (predating responsible lending laws), when she had no income. Her boyfriend at the time signed her up to them. This was before responsible lending laws were introduced. Hannah said she needed her boyfriend's help to fill out the paperwork as she didn't understand how to complete it herself. Hannah also remembers her boyfriend helping her take up unsolicited offers to increase her credit limit on the cards—she thinks this most recently happened around 5-7 years ago.

Hannah said that her boyfriend had made minimum repayments on the credit cards for years, but stopped paying them when he lost work due to the COVID-19 pandemic. They no longer live together. Hannah told us that the banks put her on hardship arrangements during 2020 as she had no way to meet the repayments, but now this has ended, the banks are seeking payments from her.

While Hannah's boyfriend was previously able to afford the credit cards, they are solely in her name, and she has been left with the debts. It is likely that issuing Hannah these credit cards would breach current responsible lending laws, as she was unable to make repayments herself without suffering substantial hardship. However, at the time, these protections were not in place. Hannah is now being assisted by a financial counsellor. Prior to contacting the National Debt Helpline, she said that she had felt helpless and thought there was no way out from her debts.

[5] For example, the USA sub prime mortgage crisis.

Responsible lending allows for scalable and flexible assessments

Under the current responsible lending laws, lenders and brokers that offer consumer credit must ensure they are not selling or recommending 'unsuitable' credit. The responsible lending obligations have never applied to credit that is predominantly for a business purpose—only consumer credit.

The obligation for credit licensees to ensure they are not selling unsuitable credit to people is contained in the NCCP Act. In short, credit will be unsuitable for a consumer, if:

- the consumer is unable to comply with the financial obligations under the contract, or if they could only comply with substantial hardship; or
- the contract does not meet the consumer's requirements and objectives.[6]

These are relatively simple questions, that do 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.[7] The laws simply require that people are not sold credit that would result in them facing financial hardship, or not meet their requirements or objectives.

The RLOs do require lenders (or brokers in the case of a preliminary assessment) to make reasonable inquiries about the consumer's requirements 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.[8] These are entities (and their representatives) that hold an Australian credit 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 lender or broker's assessment of what they can afford and what products are suitable. However, the use of the term 'reasonable' makes clear that the level of inquiries required to meet these requirements varies and is scalable according to the circumstances.

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 introduced by the Coalition Government that only came into effect in 2019).[9]

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* (**RG209**), the legislation allows flexibility to determine what is appropriate in individual situations.[10]

RLOs do not impose a 'one-size-fits-all' approach to lending

The EM contains statements about the impact of the current RLO regime that are fundamentally wrong. Unfortunately, this misunderstanding of the role of RLOs appears to have formed the basis for the policy rationale behind Schedule 1 of the Bill. It is worth addressing some of the most obviously incorrect statements in the EM.

Firstly, paragraph 1.9 of the EM states:

> *"Over time, the 'one-size-fits-all' and prescriptive nature of the responsible lending obligations has imposed burdensome and unnecessary processes on both lenders and borrowers."*

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[6] NCCP Act, see for example, 118(2).
[7] 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.
[8] NCCP Act, s 130(1).
[9] *Treasury Laws Amendment (Banking Measures No. 1) Act 2018* (Cth).
[10] 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.

RLOs are neither prescriptive nor impose a one-size fits all approach to lending. As noted above, the use of the term 'reasonable' in the relevant provisions of the NCCP Act makes clear that RLOs do not impose a one-size-fits-all regiment. This is confirmed in RG209. Advances in 'reg tech' in recent years, in conjunction with the introduction of Open Banking and the Consumer Data Right, has made it easier than ever for lenders and brokers to assess loan applications accurately and in compliance with the law. Banks and other lenders that fail to adequately invest in their systems and processes result in slower processing times—not the law.

The recent decision of the Full Federal Court in *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111 (**ASIC v Westpac**) confirmed that RLOs do not require credit licensees to assess every detail of a consumer's expenses. That case confirmed that credit licensees do not necessarily need to complete a detailed individual assessment of a consumer's expenses.[11] 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 state that the current law dictates a 'one-size-fits-all' approach.

Other circular or illogical arguments against RLOs

The EM's explanation of the regulatory burden of RLOs is also particularly circular, and at times, illogical. In describing the regulatory burden of RLOs, the EM suggests that further guidance from ASIC came as a result of industry desire for greater clarity on RLOs.[12] Industry have apparently, in turn, introduced detailed and costly credit assessment processes (none of which are evidenced).[13] As a result, industry have now told Treasury that the process it too complex, and it should be scrapped. The EM then adopts the industry's grievances, suggesting that the guidance developed by ASIC (being RG209) imposes an onus on lenders to '*verify financial information provided by borrowers, down to a fine level of detail*'.[14] At no point in RG209 is a 'fine level of detail' mentioned—to the contrary, RG209 repeatedly talks of reasonable and proportionate assessments.

The EM then recounts that lenders have told Treasury that a consumer's actual income and debt levels are more important indicators of repayment capacity.[15] That is exactly what they are supposed to assess and verify under RLOs.

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,[16] and even in the last five years the level of household debt has increased at a rate faster than the Reserve Bank of Australia (**RBA**) predicted.[17] 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.[18]

This trend even appears strong enough to buck the economic impact of the COVID-19 pandemic, with the Australian Bureau of Statistics reporting that in November and December 2020 the total value of new home loan commitments (and also specifically owner-occupier home loan commitments) reached record highs.[19] With credit flowing so freely, it is very difficult to see RLOs as being a major burden on the economy. Experts also doubt the

[11] *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111, [113]-[144].
[12] EM, paragraph 2.14.
[13] Paragraphs 2.15-2.16.
[14] Paragraph 2.15.
[15] Paragraph 2.17.
[16] 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.
[17] Ibid, p 17.
[18] Reserve Bank of Australia, *Financial Stability Review – April 2020*, available at: https://rba.gov.au/publications/fsr/2020/apr/overview.html.
[19] https://www.abs.gov.au/media-centre/media-releases/record-housing-loan-commitments-november, accessed 15 January 2021; https://www.abs.gov.au/media-centre/media-releases/record-housing-loan-commitments-continue-december, accessed 1 February 2021.

claims in the EM that the RLO regime has caused a risk-averse stance among lenders.[20] When asked in October 2020 whether APRA's 2018 view that the recent tightening in credit standards had not materially affected the overall availability of credit, had changed, APRA Chairman 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.*"[21]

RLOs provide vital protections and legal rights to consumers

Perhaps most concerningly, the EM incorrectly states at paragraph 1.13:

> "*While both ADIs and non-ADIs are currently subject to the responsible lending obligations, ADIs must also comply with requirements under APRA's prudential framework. This has resulted in regulatory duplication for ADIs with little additional benefit to consumers.*"

As this submission will explain in detail later, this statement severely misrepresents the value of RLOs, as well as the role of the Australian Prudential Regulation Authority (**APRA**).

RLOs are the only laws that impose any consequences for issuing unsuitable credit at an individual level. They also provide the most useful and important legal rights for borrowers who are provided unaffordable or otherwise unsuitable credit. While APRA's regulatory standards may broadly promote safe lending, they do this on a portfolio level, directed at ensuring banks stay financially stable. These standards provide no legal rights to people in relation to individual loans nor impose penalties for individual breaches. The statement at paragraph 1.13 of the EM is hugely misinformed (and arguably misleading) in this regard.

APRA's standards focus on loans on a portfolio level because this approach can ensure the banks don't fail. One bad loan is not going to break the bank. However, RLOs exist because one bad loan can break the borrower. The practical impact of removing these protections is that consumers will be less able to trust their lender or broker to properly assess their financial situation, and will have fewer rights and options available when provided an unsuitable or unaffordable loan.

No evidentiary substance to support removing RLOs

The EM also states that there is not substantial evidence that the greater regulatory burden imposed by the RLO regime results in a commensurate reduction in consumer harms.[22] This statement is not based in reality.

RLOs are one of the most vital and common protections relied upon by financial counsellors and community lawyers when assisting people in hardship deal with unaffordable debts. Where people wind up in these positions because they were sold credit that was unaffordable in the first place, RLOs provide a lifeline out of from unfairly accrued debts. In many of these situations, borrowers have relied on the lender's assessment of what they can afford to repay. These laws can make a huge difference in the lives of people facing financial hardship, when it is clear the lender shouldn't have provided the credit in the first place. These are vital laws that do deliver a significant reduction in consumer harm.

Secondly, it is easy to claim there is no evidence of a commensurate reduction in consumer harms when Treasury has not had the time or resources to assess the impact of RLOs. The EM claims that the RLO regime is causing

[20] EM, paragraph 2.18.
[21] 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.
[22] Paragraph 2.11.

significant regulatory burden, but this is more of a vague statement than anything strongly supported by any evidence. There was no inquiry or detailed consultation process undertaken to test this theory.

The EM offers claims that removing the regulatory burden of verifying expenses would result in a $100 per mortgage saving—equating to about $63 million a year.[23] Even if this unsubstantiated estimated figure is correct, it is a drop in the ocean when you consider that the total value of mortgages for owner-occupied housing alone in Australia is in the trillions of dollars.[24] When the average home loan is over $450,000,[25] a $100 saving represents a 1/4500th saving on the average home loan. This $100 saving goes to the lender in the first place as well. For it to materialise for borrowers relies on the assumption that lenders will pass it onto consumers, which is placing a great deal of faith in the same institutions that were recently subject to a Royal Commission over their mistreatment of consumers.

The Government is putting an unverified and unsubstantiated$63 million a year saving for lenders forward as the economic basis for removing such important protections that could lead us to a debt disaster in coming years.

1.2. What the Bill does to responsible lending obligations

If passed, Schedule 1 of the Bill would effectively remove the application of the entire existing RLO framework from consumer credit contracts over $2,000. This is largely done by amending provisions in Chapter 3 of the NCCP Act that currently apply to all credit contracts, to only apply to 'low limit credit contracts' (**LLCCs**). 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**)—meaning LLCCs are essentially any loans under $2,000.

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 existing obligations on credit licensees to assess whether that product is 'not unsuitable' for a borrower would no longer apply.

The Bill would introduce significant regulatory inconsistencies across credit products and for different types of lenders. However, at a high level, there are some clear themes that would be consistent across all parties and credit products impacted by Schedule 1 of the Bill. None of these are good for consumers. They are that:

1. the proposals deliver a drastic reduction in criminal and civil penalties for lending misconduct, significantly reducing incentives for complying with good lending standards;
2. many of the legal rights available to borrowers to seek compensation if they are provided unsuitable loans will be removed;
3. lenders and brokers will be subject to less requirements to understand the true financial position of borrowers;
4. the whole regulatory regime will be far more complex and inconsistent, with different rules and regulators for bank lenders, non-bank lenders, consumer lease providers and payday lenders; and
5. our world-leading 'twin peaks' regulatory regime will be dismantled, with the waters muddied between the role of ASIC and APRA.

[23] EM, paragraph 2.24.
[24] APRA Statistics, Monthly authorised deposit-taking institutions statistics – highlights, November 2020, p 4, https://www.apra.gov.au/sites/default/files/2021-01/Monthly%20authorised%20deposit-taking%20institution%20statistics%20highlights%20November%202020.pdf.
[25] https://www.echoice.com.au/guides/whats-the-average-australian-home-loan-size/.

1.3. Disregard of Recommendations 1.1 and 6.1 of the Hayne Royal Commission

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. Commissioner Hayne recommended that RLOs continue to be applied as they currently stand.

The Royal Commission heard ample evidence relating to the misconduct of credit licensees including banks 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.

The Bill directly contradicts Recommendation 1.1. This recommendation was made after the Royal Commission revealed credit licensees had 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 only two years ago detailing widespread misconduct, yet the Government has proposed to actually reduce penalties and lender obligations rather than increase them. The Bill also contradicts recommendation 6.1, which was to retain our twin peaks regulatory model whereby ASIC regulates misconduct, and APRA regulates prudential matters. The Bill would see bank lending conduct and prudential matters both regulated by APRA, while non-bank lenders would continue to have their conduct regulated by ASIC. This muddies the water between the two regulators, and dismantles our twin peaks system.

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.

1.4. 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.*[26]

Debt can also have a harmful effect on relationships with family and friends, increase isolation and exacerbate mental health issues.[27] Studies have found that people with unmet loan payments had suicidal ideation and suffered from depression more often than those without such financial problems.[28]

The impact of unaffordable debt is devastating for people on an individual level, and 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

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[26] 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.

[27] Step Change, Statistics Yearbook Personal Debt, 2014 p 24, available at: https://www.stepchange.org/Portals/0/documents/media/reports/statisticsyearbooks/StepChangeDebtCharityStatisticsYearbook2014.pdf.

[28] 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 .

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 (name changed) 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 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

1.5. Impact in Aboriginal and/or Torres Strait Islander communities

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 in February 2020 that gives some insight into the harm that irresponsible lending has had in Victorian Aboriginal communities. Consumer, credit and debt issues disproportionally affect Aboriginal communities in Victoria. Products like car loans, personal loans, credit cards, payday loans and consumer leases in Aboriginal communities can often leave families in considerable debt. As set out in the report, irresponsible lending was the most common consumer issue raised in Consumer Action's community engagement sessions in 2019.[29] Of the community engagement enquiries categorised as irresponsible lending, 40% related to car loans, 20% related to payday loans, and approximately 13% related to credit cards and personal loans respectively.

[29] 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.

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 consumers 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 but still has not been acted on. If responsible lending laws are repealed, predatory sales practices like these will only increase.

Consumer Action Case Study – David's story

David (name changed) is an Aboriginal man who was referred to us by another community service. We spoke with him in 2020 regarding a substantial credit card debt. David said that he also has some physical and mental disabilities and is also unable to read or write. David told our advice line that he is currently receiving the Disability Support Pension from Centrelink.

David said that he was struggling to pay back his credit card, which he was approved for about 15 years ago. The original debt was approximately $2,500. David told us that the debt has now gone up to $10,700. David said he had received an email from a debt collector, asking for the amount to be paid in full.

David said that he was unable to pay back this debt, as he had no assets, and is currently living in public housing. David also told us that with his health issues, he is in and out of hospital, and would prefer to seek a waiver.

With our assistance, David was able to seek a waiver for the debt.

1.6. Removing incentives to comply – penalties and deterrence

Under the current law, if a credit licensee provides (or recommends) an unsuitable credit product, this is a breach that can attract both a criminal and civil penalty. If the Bill passes, this will no longer be the case. By restricting the operation of RLOs to LLCCs and consumer leases, the Bill effectively removes the whole penalty regime for credit licensees involved in signing consumers up to any other form of unsuitable consumer credit contract or credit increase.

This is a dramatic change in the legal landscape that firmly places the blame for any bad credit issued solely on the borrower. It also removes all real regulatory oversight of individual loans, by taking ASIC's enforcement powers away in relation to individual loans. This would significantly worsen the existing imbalance of power between lenders and borrowers. If a borrower cannot pay their loan now, RLOs provide a legal framework to assess whether a loan was unsuitable, and if so, the fees and charges that should be refunded (noting that the principal amount still needs to be repaid). If the Bill passes, the borrower will simply be left without redress. Sometimes this may be the difference between giving up the family home or having a means to survive. While foreclosures may not be a desirable outcome for lenders either, there is still plenty of profit to be made for them by grabbing what they can from a bad debt, especially if it is secured over a house.

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 1.7).

ADI lenders

For bank lenders, there are no civil and criminal penalties at all being proposed to replace those that have been removed. Banks would only be subject to existing APRA prudential standards which are focused on the ongoing risk across the whole portfolio of an ADI's loan book and do not contain a civil penalty framework. For example, paragraph 7 of Prudential Standard APS 220 Credit Quality 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. Their standards are written to protect banks, not borrowers. While they may make some comments on lending practices, none of it is enforceable even if the banks get it completely wrong on an individual loan.

For banks issuing thousands of loans, this alone is not an adequate regulatory system to ensure suitable individual lending practices or to curtail the greed and sales culture within banks identified as been hugely harmful to consumers by the Financial Services Royal Commission. Instead, banks will get what is close to free pass from regulatory oversight for getting an individual credit assessment wrong.

APRA recently finalised a new prudential standard APS 220 Credit Risk Management (**APS 220**),[30] which will come into effect in January 2022, that requires ADIs to have sound credit assessment and approval criteria (though still will not be enforced at individual loan level). In response to this Bill, it is also currently consulting on a minor change to APS 220 to include a reference requiring banks to assess an individual's capacity to repay credit without substantial hardship.[31] This change is contingent upon this Bill passing, however, in reality this amendment would not create any individual legal rights, and no penalties will be applied for non-compliance. APRA has even gone far enough to clarify for banks that this will not change how APRA supervises or enforces APS 220.[32] In short, this is a cosmetic amendment designed to facilitate the Government's claim that lending will still be done responsibly

[30] https://www.apra.gov.au/sites/default/files/Prudential%20Standard%20APS%20220%20Credit%20Risk%20Management.pdf.
[31] https://www.apra.gov.au/consultation-on-revisions-to-new-prudential-standard-aps-220-credit-risk-management, accessed 15 January 2021.
[32] Ibid.

without RLOs and penalties. It replaces legally forcing banks to lend responsibly, with simply asking them politely to do so.

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.

Non-ADI lenders

In place of RLOs, non-bank lenders can be required to comply with standards made by the Minister under section 133EA of the NCCP Act (**non-ADI Standards**), that require them to introduce systems, policies and processes relating to 'non-ADI credit conduct' (essentially entering into credit contracts or increasing credit limits). In November 2020 Treasury released a copy of draft non-ADI Standards (**Treasury Draft Standards**), as part of the consultation preceding this Bill.[33] The Treasury Draft Standards contained requirements that 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. These requirements are far weaker than the existing RLOs.

However, just like with the APRA standards for banks, replacing RLOs with the non-ADI Standards would change the law from requiring non-ADI lenders to lend responsibly to every consumer, to a weaker focus on 'systems, policies and procedures'. Under the Bill, penalties can only be imposed if the lender either:

- fails to have (and have documented) systems, policies and processes prescribed by the non-ADI Standards in place at all; or
- 'repeatedly' fails to comply with its own systems, policies or processes.[34]

[33] https://treasury.gov.au/consultation/c2020-124502.
[34] Schedule 1, Item 67 of the Bill.

This drastically lowers the bar for compliance and effectively again removes the operation of RLOs for individual loans. It also creates real uncertainty about how enforcement would work. For example, the EM doesn't offer any real guidance on what constitutes repeated failures to follow systems, polices or processes, beyond that it must not mean a single failure. It does (rather unhelpfully) state these failures could happen all in a day or over a long period of time, or could be by one employee or many, or could be the same kind of breach or all different ones.[35] In reality, the only ways in which the meaning of this provision may be clarified over time is through ASIC guidance or jurisprudence as a result of litigation. Ironically, this leaves us in the exact same situation that the EM blames for having made RLOs unclear and unreasonably prescriptive in the first place. This is another example of how the Bill fails to improve or clarify the legal framework in this area, but instead just lowers the bar for lending standards and increases confusion.

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). We have seen systemic irresponsible lending conduct, despite the existing protections, among many of these lenders and their associated brokers over many years. We are extremely concerned that the Bill will facilitate predatory lending practices, and allow fringe lenders to take advantage of people seeking to recover financially from the COVID-19 crisis.

1.7. Removal of individual borrower legal rights

By removing the civil penalties attached to individual RLO breaches, the Bill would also effectively extinguish the main legal avenues available to consumers to 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 legal rights—and therefore ability to go to court—in relation to an unsuitable credit contract.

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.

<u>No legal basis to seek compensation from lenders</u>

The civil penalty provisions that would apply to non-ADI lenders in the 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 breached the civil penalty provisions in sections 133EB or 133EC of the NCCP Act proposed by the Bill, in relation to the non-ADI Standards. They will not have access to the written systems, policies and processes of lenders, and the repeated breach provision is a hurdle that excludes individual claimants by design. A one-off failure to meet the assessment requirements in the non-ADI Standards does not give rise to any consumer rights, despite the conduct potentially being hugely detrimental to them individually.

Similarly, there would be less avenues that would allow consumers to commence legal action for unsuitable loans from ADI lenders.

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

[35] EM, paragraphs 1.72-1.76.

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.

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 contract law, the unjust contract provisions of the NCC 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.

Removes the underlying law for AFCA complaints

Where these changes leave the rights of consumers seeking redress through the Australian Financial Complaints Authority (**AFCA**) scheme is seriously doubtful as well. The EM states that consumers will retain access to redress through the AFCA scheme for relevant breaches of any obligations in the NCCP Act by both ADIs and non-ADI

lenders, even if they do not involve breaches of civil penalties.[36] While borrowers may still be able to lodge complaints in AFCA if the Bill is passed, their rights will be significantly reduced and this will limit the value of AFCA for consumers who are sold unsuitable credit.

AFCA aims to resolve complaints based on the law, relevant codes, good industry practice and what is fair, in all the circumstances.[37] 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.[38] 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. If the Bill is passed, the legal obligations of all lenders in relation to lending assessments will be significantly reduced, and the protections consumers can invoke in AFCA when they are sold unsuitable credit will be far weaker. Moreover, 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.[39] 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 the complaint.

In terms of accessing AFCA for complaints involving non-ADI lenders, the EM states that a borrower will have access to redress via AFCA if the lender has failed to meet the non-ADI Standards in their particular dealing, as this will constitute a (non-civil penalty) breach of the NCCP Act.[40] However, for a consumer to assess whether a breach has occurred, and the questions AFCA can ask in this situation, are less clear and likely more complex. Instead of assessing whether a breach of RLOs has occurred, AFCA would need to consider if the non-ADI Standards had been breached—which will also require an assessment of the lender's policies, systems and processes. The EM indicates that these will be accessible to AFCA,[41] but there is no legal right for consumers to obtain copies of these written plans. They would likely also be deemed 'commercially sensitive material' and not obtainable by consumers via AFCA.[42] The likelihood of unfair outcomes is obvious.

Paragraph 1.77 of the EM also seems to indicate that the proposed sections 133EA-EC of the NCCP Act would also give borrowers a hook to take ADIs to AFCA if necessary, although it is not clear how this would work, as these provisions only relate to non-ADIs. For ADIs, there would be no breach of the NCCP Act—any arguable failure to meet a legal duty or obligation would be of APRA Prudential Standards, which are generally not applied by AFCA, and their application to individual lending situations by AFCA appears even more doubtful. The proposed amendment to APS 220 referencing the need to assess a consumer's ability to repay without substantial hardship does not provide clarity to this situation. It is altogether unclear what kind of tests AFCA would apply to assess whether credit advanced by an ADI was unsuitable.

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.[43] 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 Bill does 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 non-ADI Standards or APRA prudential standards, it would then function as the final decision maker on the

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[36] EM, pparagraphs 1.76-1.77.
[37] AFCA, *Operational Guidelines to the Rules*, April 2020, p 87.
[38] AFCA, *Complaint Resolution Scheme* Rules, 25 April 2020, Rule A.14.2.
[39] AFCA Rule C.1.3
[40] At paragraph 1.76.
[41] At paragraph 1.80.
[42] AFCA, *Complaint Resolution Scheme Rules*, 25 April 2020, see for example, Rule A.10.5.
[43] AFCA, *Operational Guidelines to the Rules*, April 2020, p 8.

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.

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 a 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.

Best interests duty for brokers no replacement for irresponsible lending

While the 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 almost all brokers,[44] 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.*"[45]

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. It cannot be thought of as a replacement for RLOs—the two complement, rather than overlap with, one another.

This is recognised in the EM to some extent, at paragraph 1.32. Beyond avoiding or resolving conflicts in favour the borrower, the EM offers an example of how the duty would work when 'critical information' is not obtained when inquiring about a consumer's circumstances. At present, RLOs make it very likely that a broker will have all relevant information available to them before recommending a form of credit. This statement in the EM recognises without RLOs, there may be a significant shortcoming in the ability of the broker to do their job and make informed recommendations. The best way to resolve this would be to retain the requirements that brokers make these recommendations after being fully informed about the consumer's requirements, objectives and financial situation.

[44] See Schedule 1, Item 71 of the Bill.
[45] Financial Services Royal Commission, *Final Report*, Volume 1, p 72.

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 an issue that arose in the evidence before the Financial Services Royal Commission.[46]

1.8. The impact of removing assessment and verification obligations

Assessment and verification requirements are a key factor in the effectiveness of the current RLOs, and provide numerous benefits to consumers and credit licensees. Having less information about a consumer (and, particularly, less confirmed information) creates more risk for numerous reasons. This will be the impact of removing RLOs—offers and recommendations of various credit products will be made more freely, by licensees who know less about the circumstances of the borrower.

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.

Proposed non-ADI Standards allow for loose, risky affordability assessments

Even if the affordability assessments required under the non-ADI Standards were enforceable on individual loans, they could still be met by far less detailed and more problematic affordability assessments by licensees.

If the non-ADI Standards made are similar to the Treasury Draft Standards, they will allow non-ADI lenders:

[46] Financial Services Royal Commission, *Interim Report*, Volume 1, p 24-27.

- 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.[47]

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 Explanatory Material produced with the Treasury Draft Standards provided an 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.[48] 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.

Just as concerning is the lack of proposed verification of expenses, which disregards the unique circumstances of consumers. Making an estimate of a consumer's expenses will increase the likelihood of significantly underestimating a person's true expenses. Recently, the Household Expenditure Measure (**HEM**) has been the most common measure used by credit licensees. 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."*[49]

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.

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[47] Treasury Exposure Draft, *National Consumer Credit Protection (Non-ADI Credit Standards) Determination 2020* (Cth), clause 8(2), https://treasury.gov.au/sites/default/files/2020-11/124502_non-adicreditstandards.pdf.

[48] Treasury Exposure Draft, Explanatory Material for *National Consumer Credit Protection (Non-ADI Credit Standards) Determination 2020* (Cth), p 6, https://treasury.gov.au/sites/default/files/2020-11/124502_explanatorymaterialsfornon-adicreditstandards.pdf.

[49] Financial Services Royal Commission, *Interim Report*, Volume 1, p 27-28.

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 principal 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 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.

<u>No legal obligation to consider a borrower's requirements and objectives</u>

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 principal 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, issuing inappropriate line of credit loans was rife.

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 pay-out 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.

<u>Removing responsible lending obligations will hurt people experiencing financial abuse</u>

Consumer and domestic violence advocates are particularly concerned about the harm these changes will cause people, predominantly women, fleeing or experiencing family 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. 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.

The requirement for lenders or brokers to consider a borrower's requirements and objectives is a key protection for victims of domestic violence and financial abuse where it should be apparent the borrower, or one of the borrowers, will get no benefit from the loan.

The Bill will reduce obligations 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.

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 NCC 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.

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.

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 crisis. 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.

1.9. RLOs and specific protections removed for high-risk credit products

While RLOs would still apply to SACCs and consumer leases, there are still a range of other credit products that would not be subject to RLOs that are also high-risk and extremely harmful. When these credit products are inappropriately sold, they can have a devastating impact upon the financial wellbeing of borrowers very quickly.

Credit cards

Credit cards have long been one of the most expensive and harmful forms of credit available. Our Organisations routinely hear from people stuck with mountains of debt accrued via credit cards. In recognition of their potential harm, 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 Bill does away with the additional protections for bank credit cards that relate to RLOs. Primarily, the Bill would remove the requirement that a bank credit card is unsuitable for a consumer if they could not repay the credit limit on the card within three years.[50]

While the Treasury Draft Standards replicated this protection for non-ADI lenders, the protection would be removed altogether for ADIs if the Bill passes. As credit cards issued by ADI lenders make up the vast majority of the market,[51] this is not just a glaring inconsistency, but also a significant concern. To dispense with these important protections (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.

Despite introducing this protection so recently, the EM simply describes the assessment as redundant, because unsuitability assessments no longer apply for credit card contracts. While repealing RLOs would mean an unsuitability assessment need no longer legally be undertaken, the significant risk of borrowers becoming overindebted via credit cards means the underlying need for this protection is far from redundant.

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.

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.

[50] ASIC Credit (Unsuitability—Credit Cards) Instrument 2018/753.
[51] 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.

The Bill retains 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 objectives and financial circumstances (as is required under RLOs), the Bill introduces a requirement that the licensee must also show the consumer a comparison of the 'consumer's stated expected aged care costs' with the equity projections. The licensee need only ask the consumer for their estimate of the future costs. The licensee does not need to form its own view (EM 1.49).

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.

The prohibition on providing reverse mortgages in particular circumstances (for example, where the loan to value ration exceeds to prescribed amount) also includes a gaping hole. The exception to this prohibition if the licensee reasonably believes that the reverse mortgage, or the increase to the credit limit of a reverse mortgage, is appropriate because of the applicant's 'special circumstances'.[52] The EM provides very limited guidance as to what would be considered 'special circumstances', beyond terminal illness.

1.10. Overlapping and confused roles of ASIC and APRA

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.[53]

The Bill would confuse and undermine 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. Though based on APRA's public statements in regard to the amendment to APS 220, it appears the most likely outcome is that there will be no proactive regulator of ADI lending conduct. 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, but not lending 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.[54] 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.[55] This commits

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[52] Schedule 1, item 66, section 133DF(4)
[53] Financial Services Royal Commission, *Final Report,* Volume 1, p 414.
[54] Financial Services Royal Commission, *Final Report,* Volume 1, Recommendation 6.1, p 423.
[55] See https://www.apra.gov.au/news-and-publications/asic-and-apra-issue-updated-mou.

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.

1.11. The small business exclusion

The Bill creates a complex and an absurd regulatory regime for small business lending. The Bill would remove the existing 'predominant purpose' test for responsible lending, which ensures that loans that are predominantly for household or domestic purposes are subject to responsible lending protections. We strongly oppose these changes.

According to EM 2.55, under the new regime, the Non-ADI Standards would not apply to lending which is 'in part' for a small business purpose.[56] However, remaining obligations in the NCCP Act, including licensing requirements and disclosure obligations, would continue to apply to all lending (by both ADIs and non-ADIs) where the lending is 'predominantly' for a consumer purpose. The Non-ADI Standards *would* apply if the small business purpose is 'not minor or incidental to the overall purpose of the credit.' APRA standards would continue to apply ADI lending.

This convoluted legislative drafting will only lead to an increase in 'sham' business loans that are set up to avoid complying with the Non-ADI Standards, and confuse both borrowers and lenders.

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 Non-ADI 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 Non-ADI Standards provide, despite largely being a consumer contract. This is not a good or appropriate outcome.

The provision is highly susceptible to misuse by lenders, to avoid the operation of the Non-ADI Standards. Under the current law, we already see sham business loans used by fringe lenders to avoid falling under the consumer credit laws.[57] 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 Non-ADI Standards.

2. Schedules 2-6 of the Bill – inadequate protections for SACCs and leases

Schedules 2-6 of the Bill apply to SACCs (also known as payday loans) and consumer leases. The EM states that Schedules 2-6 of the Bill would implement the Government's response to the SACC Review.[58] This is only partially true. The Bill actually represents a sizeable departure from the commitments the Government made in 2016 to implement the majority of recommendations made by the SACC Review.[59] Crucially, the Bill would water down or substantially alter some of the most important consumer protections the Government committed to introducing. These changes would drastically reduce the value of the protections that this reform would provide consumers, so

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[56] In essence, this will make permanent the temporary relief that was extend following the start of the pandemic.
[57] See, e.g., ABC 730, 'This couple went to a small busines lender—within two years they had lost their house', 28 November 2019, https://www.abc.net.au/news/2019-11-28/borrowers-burnt-by-unregulated-small-business-lenders/11718220
[58] At paragraph 3.2.
[59] Government response to the final report of the review of the small amount credit contract laws, 28 November 2016, https://ministers.treasury.gov.au/ministers/kelly-odwyer-2016/media-releases/government-response-final-report-review-small-amount.

much so that the Government's claim that this reform delivers upon its committed response to the SACC Review should be considered as directly misleading.

The SACC Review Final Report was a well-informed, well-researched and independent expert report on an area of the credit market that has long been known to cause significant harm to Australians in financial hardship. There has been no subsequent expert review and we are not aware of any other research or similar that supports the Government's departure from the SACC Review recommendations. Some of the Government's changes directly contradict comments in the final report of the SACC Review. Rather than explain the policy rationale for these changes, the Government is pretending that they are delivering on their longstanding commitments.

While Schedules 2-6 would deliver upon some of the SACC Review recommendations the Government committed to implementing, these are low hanging fruit. The most effective reforms have been abandoned. The reforms to SACCs and consumer leases, if passed, would not effectively protect people properly from predatory lending. Accordingly, we reiterate our first recommendation that this Bill not be passed. Instead, we recommend a separate Bill be introduced that actually delivers on the Government's promised SACC Review reforms.

RECOMMENDATION 2. The Government should legislate to deliver on its 2016 commitments to implement the recommendations of the SACC Review, separately to this Bill.

The SACC Review commitments the Bill fails to deliver on are addressed in turn below.

2.1. Protected earnings amount caps

Recommendations 1 and 15 of the SACC Review were to introduce 10% 'protected earnings amount caps' (**PEA Caps**) for both payday loans and consumer leases. PEA Caps would limit the proportion of a person's income they could be required to repay in any pay cycle for either payday loans or consumer leases. The PEA Caps are two of the most important consumer protections recommended by the SACC Review. They would help significantly reduce the risk of people falling into debt spirals, where they progressively commit more and more of their income to repayments on payday loans or consumer leases.

These PEA Caps would form part of the responsible lending affordability assessment, and would require payday lenders or consumer lessors to ensure that borrowers or lessees are not committing an unsustainable amount of their income to payday loans or consumer leases at any time. Recommendation 1 of the SACC Review was that payday lenders should be required to ensure that by issuing a loan to a borrower, the borrower would not be required to repay more than a total of **10% of their net income** to meet repayments for all their payday loans at any time.[60] Recommendation 15 recommended introducing an identical but separate 10% cap for consumer leases.[61]

A PEA Cap already exists for payday loans, but it is currently set at 20% of a person's gross income, and only applies to people who receive over 50% of their income from social security payments. This restriction operates under section 133CC of the NCCP Act, though the details of the limit itself is set out via regulation, at reg 28S of the NCCP Regulations.

In our experience, this 20% limit has not been a sufficient protection for borrowers on low incomes to leave them with enough of their income to manage their other expenses, or prevent them from falling into a debt spiral, particularly as people taking out payday loans will often have numerous other debts. Nobody needs to commit 20% of their income to payday loans or consumer leases.

[60] SACC Review Final Report, p 11.
[61] SACC Review Final Report, p 59.

The Government's departure from the SACC Review Recommendations

The Bill sets up the framework to introduce PEA Caps for payday loans and consumer leases via the NCCP Regulations, by amending section 133CC of the NCCP Act for the payday loans cap,[62] and introducing the new section 156B for consumer leases.[63] However, the EM makes clear that the Government does not intend on implementing the 10% PEA Caps recommended in the SACC Review, as had also been flagged in the Government's prior announcements about this reform.[64]

Paragraph 3.19 of the EM addresses the PEA Cap for payday loans, and notes that the Government anticipates introducing a different PEA Cap for people who receive 50% or more of their income from social security payments, than for the remainder of the population. While the Government would introduce the recommended PEA Cap for those whose income predominantly comes from social security payments, the intention is to double the cap, to 20%, for all other borrowers.

Paragraph 4.59 of the EM addresses the PEA Cap for consumer leases, and indicates that the Government intends on introducing regulations that would double the consumer lease PEA Cap to 20% for everyone. For people who predominantly receive their income from social security payments, the 20% income cap would be combined with payday loans repayments, but if they don't have any payday loans, the full 20% could be put committed to consumer leases.

Directly contradicting the intent of the SACC Review

The PEA Caps the Government intends to introduce via the NCCP Regulations if the Bill passes would not deliver on Recommendations 1 and 15 of the SACC Review. The PEA Caps would be set at 20% for each of payday loans and consumer leases for the majority of the population, double the amount recommended by the SACC Review. The EM incorrectly states that these changes would give effect to the SACC Review recommendations, when they do not.[65]

There are parts of the SACC Review that directly consider the figure that the PEA Caps should be set at, and explain their reasoning for picking 10% for each cap. For example, in regard to the payday loan cap, in the report it says:

> *"The Panel considers that SACC repayments which consume more than 10 per cent of net income have the potential to be unaffordable or cause harm particularly for low income earners and can exacerbate financial exclusion."*[66]

In regard to consumer leases, at page 66 of the SACC Review it says:

> "*It is the view of the Panel that a cap on total lease payments of 10 per cent of a consumer's net income strikes the right balance between enabling consumers to continue accessing essential items via consumer leases and ensuring that they have the opportunity to improve their financial situation over time by avoiding over commitment to leased household goods*".[67]

There has been no attempt by the Government to explain the policy rationale for this change, making it appear that the change is simply the result of successful lobbying by the consumer lease and payday loan industries.

Further, it also means the Bill contradicts recommendation 2 of the SACC Review—which was to remove the rebuttable presumption that a payday loan is unaffordable for a person who is in default under another payday loan, or has had two or more payday loans in the past 90 days. The SACC Review made this recommendation on

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[62] Schedule 2, Item 10 of the Bill.
[63] Schedule 3, Item 7 of the Bill.
[64] Australian Government, *Consumer Credit Reforms*, p 5, https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-09/Consumer-credit-reforms-fact-sheet.pdf, .
[65] See paragraphs 3.26 and 4.70.
[66] SACC Review Final Report, page 16.
[67] SACC Review Final Report, page 66.

the condition that Recommendation 1 was implemented. The Bill would remove this presumption, but not actually deliver on Recommendation 1.

Under these laws, most people could still have up to 40% of their income taken to repay payday loans and consumer leases collectively. Doubling these limits will result in payday loans and consumer leases continuing to cause low-income earners significant financial hardship. People will continue to fall into debt spirals where an unsustainable amount of their income is committed to repaying high-cost credit, which will breed financial exclusion. It greatly reduces the value of this protection, and puts the interests of these predatory lenders ahead of people who are financially vulnerable.

RECOMMENDATION 3. A 10% protected earnings amount cap for each of payday loans and consumer leases should be adopted that applies to all borrowers regardless of their source of income, consistent with the Government's commitment to implement Recommendations 1 and 15 of the SACC Review.

Consumer Action Case Study – Georgia's story

Georgia (name changed) supports her three young children and partner (whose visa does not permit him to work here). As a full-time carer, she currently relies upon government support. Before going on maternity leave in the middle of 2019, Georgia worked part time at a bank, but she is ineligible for JobKeeper.

Throughout the second half of 2019, Georgia was consistently repaying at least one payday loan. She told us that she took these out when she was experiencing financial hardship, and had used lenders that she found gave out loans easily in the past. She told us that she found the payments for these loans difficult to make from the outset, but this got even harder when the combined repayments on multiple loans reached well over $400 a fortnight for 3 months. Making these repayments required approximately 15 to 20% of her combined maternity leave and Centrelink income around this time, and eventually forced her to contest some of the debts through the Australian Financial Complaints Authority.

In late 2019 (while still repaying one payday loan), Georgia leased a fridge and washing machine for her family. She only later realised the lease requires her to pay about triple the price of the products in total. In early 2020 Georgia also desperately needed a phone, and applied to lease a phone and tablet. She told us she was very surprised she got approved for a 12-month lease, but particularly disappointed when she later realised that the total cost was going to be nearly $3,800. Under fortnightly repayments for the phone and tablet, Georgia was being charged an equivalent annual interest rate of more than 150%. Meeting the combined repayments under both these leases requires over 14% of Georgia's current income. Even with the coronavirus supplement, it is near impossible for Georgia to keep up with the payments for these products, while keeping her family housed and fed.

2.2. Consumer lease cost cap

The next failure is in relation to the consumer lease cost cap. The Bill proposes to significantly increase the cost cap from the amount recommended by the SACC Review. Recommendations 11-13 of the SACC Review addressed the implementation of a cost cap, as well as how particular additional fees should be treated in relation to the cap.

The proposed section 175AA of the NCC in the Bill[68] would give effect to the cost cap. There are a number of concessions to industry evident in this section, particularly the significant increase in allowable fees and charges under the cap. Put simply, the departures from the SACC Review's recommended consumer lease cost cap will tip the balance of leases to put more money in the pockets of lessors, to the detriment of financially vulnerable consumers.

[68] See Schedule 3, Item 31 of the Bill.

The Bill and EM also do not give clarity about how the base price of goods being leased will be determined, as this is to be set via regulation.[69] As this has a significant impact on what can be charged under the 4% per month cost cap, it is difficult to make a real assessment of the value of the cost cap at all. Recommendation 12 of the SACC Review was that the base price for new goods should be the recommended retail price (**RRP**), unless a lower price is agreed.[70] While paragraph 4.48 of the EM indicates that the Government intends to give effect to Recommendation 12 of the SACC Review, this needs to be taken with a grain of salt, as the Bill clearly diverges from other recommendations to which it claims to be giving effect.

The known aspects of the consumer lease cost cap that are clearly inconsistent with the SACC Review recommendations are each addressed in turn below.

Allowing monthly fees to be calculated including delivery or installation fees

The permitted monthly fee that can be charged under a consumer lease would be imposed by section 175AA(5) of the NCC. Consistent with the SACC Review recommendation, it uses the 4% per month rate. However, rather than this 4% fee being calculated based solely on the base price (as recommended), the Bill allows the monthly fee to be calculated to include any delivery and installation fees charged.

This is contrary to Recommendation 13 of the SACC Review, which the Government accepted. The recommendation was that a one-off delivery fee could be charged separately to the cap – but not that it should be counted in the calculation of the monthly fees. The SACC Review stated:

> *"To prevent the cap from causing lessors to no longer to offer goods (particularly, large costly to move goods such as fridges) to individuals living in remote areas, the Panel recommends that a reasonable one-off delivery fee be allowed outside the cap."*[71]

Instead, by allowing lessors to charge 4% per month on top of delivery, and installation (which was not mentioned at all in the SACC Review),the Bill turns these services into an additional source of profit for lessors. Rather than just ensuring consumer leases are available to people in remote areas, this means they pay considerably more than they should for the service. For example, if a person is charged $200 for the delivery of a fridge on a 4 year lease, they could end up paying $584 total for that delivery across the life of the lease.[72]

This change provides lessors in the industry a massive financial incentive to upsell expensive delivery and installation 'services'. It also harms more vulnerable people who must rely on the delivery or installation services, for whatever reason. Considering the misleading explanations of fees that are common in the consumer lease industry already, there is a real risk that the true cost of accepting delivery and installation will not be explained at the point of sale, and people will sign up without understanding that they will be paying extra for delivery for the life of the loan.

RECOMMENDATION 4. Section 175AA(5)(d) of the NCC contained in the Bill should be amended so that the 4% cost cap is calculated based **only** upon the base price of the goods hired under the consumer lease. Fees should not be charged on top of delivery and installation fees, consistent with Recommendation 13 of the SACC Review.

20% establishment fee

Under the proposed new section 175AA(4) of the NCC in the Bill, consumer lessors would also be permitted to charge an additional 20% establishment fee as part of a consumer lease. This significant establishment fee was specifically **not recommended** in the SACC Review:

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[69] See subsection 175AA(6) NCCP Act at Schedule 3, Item 31 of the Bill.
[70] SACC Review Final Report, p 54.
[71] SACC Review Final Report, p 57.
[72] The lessor could charge to recoup the $200 delivery fee, plus 4% ($8) of this amount each month under the lease, adding $384 to the total paid.

"While the Panel has recommended that the cap be determined by a formula which allows a return of 4 per cent of the Base Price of the goods per month of the lease, akin to the 4 per cent monthly fee allowed for SACCs, the Panel has not proposed mirroring the 20 per cent establishment fee allowed for SACCs. The SACC cap includes a 20 per cent establishment fee because SACCs are for short term and low amounts. For example, if a lease is for $500 for 90 days the fixed business costs associated with the loan application (including credit checks and to meet responsible lending requirements) could not be recouped if only three 4 per cent monthly fees of $20 could be charged. Consumer leases however are for longer terms. Information provided to the Panel suggests 12-36 months are currently the most common lease terms."[73]

Again, the EM incorrectly claims that the Bill would give effect to the Government's response to recommendation 11 of the SACC Review (which it accepted).[74] Again, this is clearly incorrect—the Bill explicitly allows consumer lessors to reach into the pockets of their customers for an additional 20% of the base price of the leased good, on top of that recommended by the SACC Review. This would mean that the cost cap amounts to an equivalent annual interest rate of around 108% for a 1-year contract, and 73% for a 4-year contract. This is simply too high and is exploitative.

Not only is this unnecessary for the reasons set out in the SACC Review recounted above, it also disregards the fact that lessors still make additional profit on the 4% monthly fees they charge. This 4% fee is to be calculated based on the base price (plus any delivery and installation fees), which, if SACC Review Recommendation 12 is followed, is likely to be recommended retail price or similar—a price already allowing for profit on the price that a retailer will obtain these goods. Allowing an additional 20% on this profit will just ensure that consumer leases can continue to be the worst value, most expensive form of regulated credit available to consumers.

Paragraph 4.35 of the EM states that a lessor should be able to charge these amounts separate to the cap because they are confined and reasonable in the circumstances. However, the EM goes no further to explain how charging an additional 20% in an agreement that already allows for 4% per month in fees is 'reasonable', or why the move away from the SACC Review recommendation is warranted.

RECOMMENDATION 5. Consistent with Recommendation 11 of the SACC Review, a consumer lease cost cap should not permit any establishment fees.

2.3. Door-to-door selling ban for consumer leases leaves major loopholes

Another extremely concerning concession to the consumer lease industry comes via the Bill's ban on the unsolicited selling of consumer leases, which does not deliver on the intent of Recommendation 18 of the SACC Review.

The proposed section 179VA of the NCC in the Bill[75] bans lessors from visiting a place of residence for the purpose of inducing someone to apply for or obtain a consumer lease, except by prior arrangement. While we recognise that the Government only accepted Recommendation 18 in part, there are serious shortcomings with this proposal that need to be recognised.

<u>The 'prior arrangement' exception</u>

The proposed provision is unlikely to stop the door-to-door selling the Government committed to preventing, due to the 'except by prior arrangement' with a resident exemption contained in both subsections of the proposed section 179VA of the NCC. This is a significant loophole that does not align with the Review Panel's recommendations or the Government's response. It will allow considerable scope for consumer lease providers to circumvent the reforms.

[73] SACC Review Final Report, p 53.
[74] At paragraph 4.48.
[75] Schedule 3, Item 34 of the Bill.

Lessons can be learned from the experience of regulating door-to-door sales under the Australian Consumer Law.[76] Amendments were ultimately made to the definition of 'unsolicited consumer agreement' due to businesses obtaining 'invitations' through surreptitious means to avoid the consumer protections relating to unsolicited sales.[77]

Similarly, the history of harmful pressure selling and avoidance in insurance and superannuation uncovered by the Financial Services Royal Commission led to the passing of detailed provisions preventing the unsolicited selling of financial products,[78] despite there already being multiple restrictions in the *Corporations Act 2001* addressing similar conduct.

Unsolicited selling is an outdated and abusive practice with a significant risk of mis-selling people products they don't want or need. The proposed section 179VA of the NCC is a copy of the stock standard starting point for a ban that has failed in numerous other industries. The consumer lease industry is known for poor conduct that results in adverse outcomes for consumers. To offer an obvious loophole via a 'prior arrangement' exemption to this ban is giving unscrupulous lessors a clear means of continuing to find ways to undertake door-to-door sales. This exemption needs to be removed, or at least, drastically beefed up so it is harder for lessors to game.

Ban will not impact specific conduct identified in SACC Review

The discussion relating to Recommendation 18 in the SACC Review makes specific reference to a number of forms of unsolicited selling practices that are being used to sell consumer leases, which are unfair and causing harm. The list from the SACC Review included:

- "*a lessor driving a van through an Indigenous community, and honking the horn to attract customers;*
- *a lessor offering free goods, cash, vouchers or other benefits to a member of an Indigenous community, in return for being introduced by them to other community members;*
- *hosting a barbeque in Indigenous communities to attract consumers; and*
- *offering consumers rewards (including small cash payments) to provide the names of other people who the lessor can approach.*"[79]

These are specific predatory forms of unsolicited selling that are known to result in people being signed up to costly inappropriate leases, and which are most often used to target vulnerable people. While the Government may not have committed to Recommendation 18 of the SACC Review in full, it is important for context to note that by restricting this ban to door-to-door sales only, the Bill would do nothing to stop these forms of conduct. This is a bitterly disappointing policy position and it is important that this is recognised as a serious shortcoming of the Bill.

RECOMMENDATION 6. Expand the ban on door-to-door selling of consumer leases to cover all forms of unsolicited selling.

2.4. Unreasonably high bar for some penalties

There are also serious problems with the way the loss of charges mechanism would operate for some of the key protections provided to consumers in the Bill. Part of Recommendation 23 of the SACC Review was to provide for the automatic loss of the right to all charges under the contract by payday lenders and consumer lessors where they had contravened particular obligations. Specifically, the SACC Review recommended that this should apply to breaches of the following protections:

- leases in contravention of the consumer lease cost cap;
- entering into a payday loan or consumer lease that is in breach of the PEA Cap; and

[76] *Competition and Consumer Act 2010* (Cth) Schedule 2.
[77] See section 69(1A), Australian Consumer Law.
[78] *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth), Schedule 5.
[79] SACC Review Final Report, p 72. [note case study referenced in line has been omitted]

- entering into a payday loan or consumer lease in breach of a prohibition on unsolicited sales.[80]

For breaches of the consumer lease cost cap, the Bill provides a reasonable mechanism for this via the proposed section 175AC of the NCC,[81] which adopts a form used by similar existing provisions in the NCC (see for example, section 31B(3)). This reflects what would be the most logical and expected way of delivering on this recommendation.

However, if a lender or lessor enters into a loan or lease in breach of the PEA Caps,[82] or where unsolicited selling of payday loans has occurred,[83] the equivalent provisions in the Bill that impose the forfeiture of all charges require a either court order in favour of the consumer or a finding of guilt against the lender or lessee, before fees are forfeited. The loss of charges for unsolicited sales of payday loans would also only apply to loans entered into within 30 days of receiving the unsolicited communication.

There is no explanation in the EM as to why this additional requirement has been included for these provisions. It is also contrary to the intention of Recommendation 23 of the SACC Review, which recommended introducing the automatic forfeiture provisions to further incentivise payday lenders and consumer lessors to comply with the law, "*noting that ASIC has limited resources and cannot prosecute every breach of the law.*"[84] The intent behind this recommendation was to make legal remedies more accessible and practical for those wronged by breaches. This is a major additional hurdle that will likely make this remedy beyond reach to many of the people who need the protection. The practicality of this protection would render it close to worthless.

These automatic loss of charges mechanisms should all follow the same format as that in the proposed section 175AC of the NCC. The breaches are clear and easy to identify, and consumers should not have to go to court or rely on ASIC prosecuting the lender or lessee to enforce these rights.

RECOMMENDATION 7. Breaches of the protected earnings amount caps or unsolicited selling of SACCs should automatically trigger loss of charges provisions, without any need for a court order or finding of guilt.

Further, the Bill does not insert a loss of charge provision at all in relation to the door-to-door selling of consumer leases. As noted above, it was recommended by the SACC Review that consumer lessors that breach an unsolicited selling prohibition should also be subject to a loss of charges provision. While the Bill disappointingly reduces the breadth of this prohibition to door-to-door selling only, breaching this provision should still lead to the automatic loss of charges. By failing to insert such a provision, the Bill again diverges from the recommendations and true intent of the SACC Review.

RECOMMENDATION 8. Introduce an automatic loss of charges penalty for breaches of the ban on door-to-door selling of consumer leases.

2.5. Real risk of upselling on loans to avoid RLOs

There is also one final significant issue that the removal of RLOs for other forms of credit is likely to create in the payday loan market. 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, one of the largest SACC market players). If the Bill passes, 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.

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[80] SACC Review Final Report, p 91.
[81] Schedule 3, Item 31 of the Bill.
[82] See Schedule 2, Item 11 of the Bill (proposed section 133CC(3)(b) NCCP Act), and Schedule 3, Item 7 of the Bill (proposed section 156B(3)(b) NCCP Act).
[83] See Schedule 2, Item 12 of the Bill (proposed section 133CF(4)(c) NCCP Act.
[84] SACC Review Final Report, p 92.

We are not convinced that the anti-avoidance provisions in Schedule 4 of the Bill would capture such conduct either, as the outcome would be that borrowers would be getting a marginally different amount of credit.

Consumer Action Case Study – Sara's story

Sara (name changed) is a single parent who receives the Disability Support Pension as her primary source of income. In early 2019, Sara and her child both needed a computer to study and access course materials at home for courses for which they were enrolled. Sara tells us she went into her local Cash Converters and saw a computer advertised for just under $1000. Sara advised us that she did not have the funds to purchase the computer outright for that price and asked if there was a lay-buy option, Sara told us that the Cash Converters staff member said this wasn't possible but advised Sara that she could apply for a loan to buy the computer. Taking that advice, Sara told us that she applied for a $1000 small amount credit contract (payday loan). Sara informed us that this application was rejected however the Cash Converters representative advised that Sara would have a greater likelihood of obtaining a loan if she applied for a higher amount. Sara told us that her application for a larger loan was approved.

The assessment of suitability is problematic. For example, the assessment of suitability describes Sara's monthly expenditure on groceries is just over $220 for her and her child and there is no mention of rent obligations. In the documents, Cash Converters recorded the borrower's purpose was to buy a computer and accessories for a little over $1350 despite Sally telling us that it was advertised as just under $1,000 and having a sticker on it stating that price. The loan document also says that a commission of approximately $200 was to be paid by Cash Converters to a Cash Converters entity for introducing Sara's credit business. The loan documents state the total amount payable under the loan was a little over $2,300.

3. Conclusion

This Bill, if passed, will lead to significant harm to borrowers, their families and the community. It will lead to riskier lending conduct by lenders and brokers, and see more Australians saddled with unaffordable and unsuitable debt. The risks to individuals, and the economy, as we seek to recover from the COVID-19 crisis is clear: this Bill would lead us to a debt disaster.

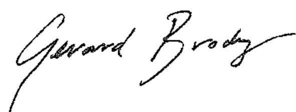
The Bill seeks to strip away vital consumer protections and legal rights for borrowers. It represents a win for the banks, and a devastating loss for borrowers, only 2 years since the Financial Services Royal Commission Final Report was handed down. Indeed, the Bill directly contradicts Commissioner Hayne's very first recommendation, which was to retain the current test of suitability in our responsible lending laws. The Bill also contradicts recommendation 6.1 in relation to our 'twin peaks' regulatory regime by confusing the roles of ASIC and APRA.

The provisions in the Bill relating to payday loans and consumer leases are watered down versions of reforms the Government committed to over 4 years ago. The Bill represents a major concession to the consumer lease industry in particular, and will not effectively protect people from predatory conduct.

We call on the Committee to recommend Parliament not pass this Bill.

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,



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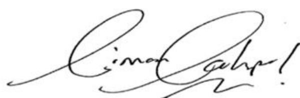

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APPENDIX A - SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. The Bill should not pass Parliament.

RECOMMENDATION 2. The Government should legislate to deliver on its 2016 commitments to implement the recommendations of the SACC Review, separately to this Bill.

RECOMMENDATION 3. A 10% protected earnings amount cap for each of payday loans and consumer leases should be adopted that applies to all borrowers regardless of their source of income, consistent with the Government's commitment to implement Recommendations 1 and 15 of the SACC Review.

RECOMMENDATION 4. Section 175AA(5)(d) of the NCC contained in the Bill should be amended so that the 4% cost cap is calculated based **only** upon the base price of the goods hired under the consumer lease. Fees should not be charged on top of delivery and installation fees, consistent with Recommendation 13 of the SACC Review.

RECOMMENDATION 5. Consistent with Recommendation 11 of the SACC Review, a consumer lease cost cap should not permit any establishment fees.

RECOMMENDATION 6. Expand the ban on door-to-door selling of consumer leases to cover all forms of unsolicited selling.

RECOMMENDATION 7. Breaches of the protected earnings amount caps or unsolicited selling of SACCs should automatically trigger loss of charges provisions, without any need for a court order or finding of guilt.

RECOMMENDATION 8. Introduce an automatic loss of charges penalty for breaches of the ban on door-to-door selling of consumer leases.

APPENDIX B – ABOUT THE SUBMITTING ORGANISATIONS

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.

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.

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.

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. From 1 January 2019 to 1 January 2021, CCLSWA delivered 196 services, including one-off telephone advice as well as lengthy and complex case file work, which dealt specifically with breaches of responsible lending obligations.

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.

Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as a community controlled Co-operative Society in 1973. VALS plays an important role in providing referrals, advice/information, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria. Solicitors at VALS specialise in one of three areas of law, being Criminal Law, Family Law and Civil Law.

VALS maintains a strong client service focus which is achieved through the role of Client Service Officers (CSOs) who act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community.

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.

RLC's work in consumer credit

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.