



27 January 2021

Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Sent by email: economics.sen@aph.gov.au

Re: Submission: The National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020

WEstjustice appreciates an opportunity to submit on the above Bill, in its capacity as a community legal centre operating in the Western Suburbs of Melbourne.

For reasons outlined in further detail below, WEstjustice opposes the current Bill. We believe that its proposals on the removal or relaxation of responsible lending standards have the potential to cause significant harm to individuals, households and communities in our catchment area, without accomplishing the economic recovery Melbourne's West needs after the 2020 pandemic. Additionally, we believe the proposed caps and restrictions on small-amount credit contracts (SACCs) do not go far enough and present a missed opportunity for reform.

Who We Are

WEstjustice is a generalist CLC with offices in Werribee, Footscray and Sunshine. We provide free legal advice, representation and education to members of the community who would be unable to enforce their rights without our help. Relevantly, we deliver specialised consumer, debt and financial services legal clinics which combined have successfully challenged or waived over \$500,000 of debt in the past year.

We are a partner agency in the Mortgage Wellbeing Service, an integrated service model which involves a lawyer, financial counsellor and social worker assisting vulnerable clients in cases of mortgage stress and irresponsible lending. In the past year, we prevented 18 home repossessions which meant that 21 clients and their 45 children did not enter homelessness, in addition to a large number of timely earlier interventions.

The Local Government Areas (LGAs) we offer our services to have historically been among the most disadvantaged in Melbourne, characterised by low SEIFA Index scores and higher unemployment rates than the Victorian average. To September 2020, Wyndham, Maribyrnong, Melton and Brimbank had further Covid-related decreases in employment which significantly exceeded both the Greater Melbourne and state averages, even allowing for JobKeeper payments.¹

¹ Data obtained from .id community economic profiles for the Cities of Brimbank, Maribyrnong, Melton and Wyndham (including available Covid-19 economic impact measures for September quarter 2020 relative to September quarter 2019) at <https://economy.id.com.au/>. Accessed 28 January 2021.

Our Position: Changes to Responsible Lending

WEstjustice considers that the appropriate public policy position on responsible direct consumer lending remains that of the Hayne Royal Commission at Recommendation 1.1: that the *National Consumer Credit Protection Act* (NCCP) should not be amended to alter the obligation to assess unsuitability, and further to this, that relevant authorities ‘apply the law as it stands’.² Those obligations give substance to three of six norms of conduct the Commissioner identified: to act fairly; to provide services that are fit for purpose; and to deliver services with reasonable care and skill.³

We have no doubt that there are a number of financial institutions which overall comply with the NCCP for consumer lending, and indeed a number which have modified their systems to improve compliance (for example, by implementing mechanisms to better gauge a prospective borrower’s actual living expenses rather than deferring to benchmarks).

However, our work inevitably involves many circumstances where the NCCP as it stands is not being followed – either as an unfortunate oversight by a lender, or as a pattern of conduct by a marginal lender or intermediary that is reckless or ignorant as to its obligations. The clients who feature in our casework often face precarity as borrowers due to inconsistent or unstable incomes, language and cultural barriers, and limited access to information (particularly when relying on a broker for loans or mortgages). Many cases may involving economic abuse, mental illness or substance abuse where ‘red flags’ present at the stage where the prescribed inquiries and verification should be made.

In this respect, we feel our work shows the value and importance of increased enforcement of the existing legislation. It also offers a glimpse of the social impacts that could be writ large if responsible lending protections were removed – if there were no civil or criminal regime to penalise irresponsible lending, borrowers lost their legal and external dispute resolution remedies against such lending, the obligations to assess a loan’s suitability and understand the requirements and objectives of borrowers were removed, and banks no longer had to conduct an appropriate affordability assessment on ability to repay a credit card’s limit within a three-year window.

Case Study: John and Maureen

John and Maureen were a husband and wife residing in their family home in Point Cook. Both suffer from serious and ongoing mental health conditions, which affect both their ability to remain in steady employment and their ongoing day-to-day expenses. Over time, they had been overloaded with successive credit card and personal loan debts in addition to their mortgage, provided by **all four** of the major banks. The credit cards were issued prior to the 2019 amendments (post-Hayne Commission) which would have obliged the lenders to conduct an appropriate affordability assessment as to whether the couple could have paid back the limit on the cards within three years.

Having fallen so far behind, they were sued by their mortgagee. Even having sold their family home, they had nowhere near enough equity left over to repay their unsecured debts. We have obtained nearly \$100,000 in compensation for the clients to date, but John and Maureen’s outcomes would have been much better if the credit card affordability assessments had always been in effect, if other responsible lending mechanisms had been observed and enforced, and if we had been able to assist them sooner.

² Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report Vol.1*, p.60. Accessed at <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf> on 28 January 2021.

³ *Ibid*, p.52.

WEstjustice believes that the substantive requirements in the present NCCP that lenders and credit assistance providers understand the requirements and objectives of borrowers (including each co-borrower) and verify the information provided to them (rather than simply rely on estimates and benchmarks) are of utmost importance to our client base. A “buyer beware” philosophy which anticipates a fully literate and independent individual proceeding into an agreement for credit with similarly principled providers may catch a small and capable share of the market, but is in no way representative of many of our clients or their circumstances.

Case Study: Elizabeth

Elizabeth arrived as an adult refugee in Australia, and she cannot read or write in English. She has 5 children, is on Centrelink, and has very limited financial and legal literacy.

Elizabeth had obtained a loan from a lender so she could purchase a vehicle to get her family to school and other appointments. Although she initially approached us with an Australian Consumer Law matter involving the car, her severe financial hardship caused her lawyer to review her loan documentation also.

We discovered multiple points in the loan documentation where the lender had failed to make reasonable enquiries into or verify the client’s financial circumstances:

- The only living expense recorded on the client’s application was for ‘rent’ (nothing for food, utilities or transport);
- A suitability assessment then recorded unrealistically low expenses for a family of six, including \$100.00 per week on food and \$50.00 on utilities;
- The client’s identified weekly income was \$300.00 below the poverty line, and at the time she obtained the loan she had savings of less than \$100.00 in the bank.

We negotiated with the lender and requested that all outstanding balance on the loan be waived, and Elizabeth be refunded any interest paid in excess of the principal. The lender eventually denied any allegations it had breached its responsible lending obligations. It took the leverage of a pending AFCA complaint for the lender to offer to eventually waive half, and then *all* of the total outstanding debt. This will be a major boon for the client’s financial stability and independence.

Language and cultural barriers will remain a challenge for consumer and credit transactions in Melbourne’s West, but if the bill is amended as proposed there will be fewer precautions before inappropriate lending occurs, and far fewer regulatory or legal remedies for low-income families in the case of a breach, particular in the case of non-ADI lenders.

These assessments also form the front line in preventing economic abuse, where an individual is coerced or pressured to go onto an application as a co-borrower or even sole borrower by an abusive family member. Forming an opinion as to whether an individual borrower’s actual requirements and objectives would be met by the significant financial decision to take out credit can quickly identify those situations where credit is being used to enable financial abuse.

Case Study: Tina

Tina was in a highly physically, sexually and economically abusive relationship with her ex-partner for several years. As he had a very bad credit record himself, he pressured Tina to take out a credit card solely in her name, the purpose of which was a combination of new appliances he wanted to get and modifications to their car. He proceeded to use the card for his own purposes, including spending money at the pub and on gambling.

Tina personally tried to pay down the debt as long as she could before falling into default. We wrote to the company which had purchased the debt outlining the apparent failure of the lender to have taken reasonable steps to determine whether the contract would have actually met Tina's requirements and objectives (and not her ex's). We also flagged the apparent failure of the lender to appropriately inquire into or verify her financial situation – her expenses for rent had been recorded as 'nil' at a time when she was paying rent under a tenancy agreement. The lender ended up waiving the debt and agreeing not to list any default on her credit file so she could rebuild her life.

Overwhelmingly, the clients who come to WEstjustice in cases like Tina's are women. In spite of debts having arisen in their name in circumstances that were unjust and under coercion, they attempt to honour payments as long as they can to support their household and try to prevent making a bad situation worse.

Once again, removal of these protections in the current NCCP would mean that economic abuse goes unchecked and is aggravated. Victim-survivors and their dependents will be left without appropriate paths to challenge debts and costs they should not have been made to bear in the first place – they would have much more limited basis to go to AFCA with the current responsible lending rules gone, and would be unlikely to have any right to go to court unless they as an individual could prove 'systemic breaches' by the lender. The remaining alternatives, such as seeking legal redress by way of compensation from the perpetrator themselves, are both far-fetched and unsafe.

Our Position: Changes to Small-Amount Credit Contracts

WEstjustice **opposes** these proposed changes to small-amount credit contracts. They represent a missed opportunity to make meaningful changes to protect low-income earners in Melbourne's West, and the amendments as they stand do not offset the harm by the relaxation and/or removal of responsible lending standards. We believe that representatives that want better regulation of short-term credit or 'payday loans' should not settle for weak changes which are coupled by other damaging reforms, and should advocate for a better and more comprehensive set of SACC amendments for their constituents.

WEstjustice is of the view that the bill's changes to small-amount credit contracts (SACCs) are a heavily diluted version of recommendations originally made by the 2016 SACC Review. At that time, the three panel members involved in the review concluded:

"[Our] recommendations are designed to increase financial inclusion...The intention of these proposals is to reduce the risk that consumers may be unable to pay for basic needs or default on

other necessary commitments. Mitigating these outcomes can be expected to improve a consumer's financial position through, for example, smoothing expenditure, limiting shortfalls in paying utilities or rent, creating a modest level of savings and reducing dependency on higher cost forms of finance.”⁴

In reaching its recommendations for the caps on protected earnings for both payday loans and consumer leases (a 10% cap on net income for payday loans, with a separate 10% cap applying to consumer leases), the reviewers explained their determination sought to “strike an appropriate balance between enabling consumers to access emergency finance when required, optimising their opportunity to improve their financial situation over time, and the viability of an efficient industry”⁵. It was based on modelling for a range of waged and unwaged earners and it was identified that it would encourage longer loan terms with smaller and more affordable fortnightly payments⁶.

The proposed amendment totally upsets that balance by doubling the caps and creating situations where up to 40% of an employed person's net income may be taken up. A percentage cap, by its nature, will extend more or less protection to low-income earners depending on where it is set. For our client base, this greatly reduces their opportunity to improve their financial situation over time and instead threatens to place them in debt cycles which at best leave them treading water, and at worst perpetuate spirals where debt leads to detrimental long-term impacts on housing and physical and mental health.

Similarly, the 2016 SACC Review established a recommended cap on consumer leases of 4% of the Base Price of the goods for each whole month of the lease term to a maximum of 48 months. In doing so it factored in that consumer leases may involve costs for a lessor should the lessor provide services in respect of the lease goods, and that this justifies a different cap from that of a credit contract. It was not convinced about the true nature and availability of additional services that would justify either an increase on a 4% gap or a separate establishment fee. It also proposed that any costs associated with delivery of a leased consumer good be allowed as a discrete, reasonable and identifiable one-off cost. Including delivery and installation fees in the monthly cost cap may lead to abuse or overestimation of delivery fees⁷. There appears to be no clear explanation for why the bill has departed from the Review's findings.

While other aspects of the proposed SACC changes represent an improvement, we note the possible perverse consequences of an enhanced regime for loans of up to \$2,000 while loans above that threshold will see a significant relaxation of responsible lending standards and remedies. We are concerned we will see clients come to us in future who have been 'upsold' into the next 'tier' of lending despite being in a poor financial situation, with an accompanying loss of rights and protections.

Conclusion

WEstjustice continues to support amendments to the law on consumer credit in Melbourne's West and across Australia where they strike an appropriate balance between protecting vulnerable consumers and allowing appropriate access to credit for significant life purchases. In particular, we believe much could be done to improve the NCCP's protections against economic abuse in all its

⁴ The Australian Government, The Treasury. *Review of the Small Amount Contract Laws, Final Report*, March 2016, p. 3. Accessed at https://cdn.treasury.gov.au/uploads/sites/1/2017/06/C2016-016_SACC-Final-Report.pdf on 29 January 2021.

⁵ *Ibid*, p. 6.

⁶ *Ibid*, p.19.

⁷ *Ibid*, pp.57-8.

forms, including adapting the Australian Banking Association's Industry Guideline on financial abuse to set out expectations for non-ADI lenders. However, the Bill in its current form will not achieve these outcomes, leaving us with no choice but to oppose it and ask that Parliament vote against it in its entirety.

Please contact Joseph Nunweek at WEstjustice on (03)9749-7720 or joe@westjustice.org.au if you have any questions about this submission.

Yours sincerely,

A handwritten signature in blue ink that reads "Melissa Hardham". The signature is written in a cursive style with a large initial "M".

Melissa Hardham
CEO
WEstjustice