



Law Council
OF AUSTRALIA

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

Senate Standing Committee on Economics

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for contributions of the Australian Consumer Law Committee of the Law Council's Legal Practice Section, the Queensland Law Society and the Law Society of New South Wales in the preparation of this submission.

Executive summary

1. The Law Council welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee (**Committee**) regarding the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (Cth) (**Bill**).
2. It is appreciated that there is a diversity of views in relation to the appropriate balance to be struck when considering the extent to which lending practices are regulated for the purposes of consumer protection. Indeed, the legal profession itself has a notably broad range of opinions as to the appropriateness of existing responsible lending obligations (**RLOs**).
3. It is noted that in preparing this submission, the Law Council has relied primarily on the expertise and perspectives of legal practitioners with extensive experience in consumer protection law from a broad range of different practice types, including private legal practice, the independent bar, legal aid, community legal services, legal services in remote and regional communities and academia.
4. This submission is therefore reflective of the experiences of legal practitioners that represent the interests of consumers, and in particular, individuals and businesses that may be particularly vulnerable should there be relaxation of RLOs, as opposed to other sections of the legal profession, including those that work closely with financial service providers.
5. The Law Council acknowledges that the reforms are intended to promote the flow of credit in the wake of the COVID-19 pandemic by reducing the time that it takes consumers and businesses to access credit so that consumers can continue to spend, and business can invest and create jobs.¹
6. This is a worthy objective, and the Law Council is supportive of initiatives which will assist in the recovery of the Australian economy from the impacts of the COVID-19 pandemic. However, based on the experiences of legal practitioners representing consumers of financial products involving credit and debt, there are concerns that the potential benefits do not justify the winding back of responsible lending measures at this time.
7. With this in mind, the Law Council considers that the retention of RLOs is consistent with the recommendations in the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**). The permanent changes sought in the Bill cannot be warranted on the basis of being adjustments to respond to the recent exceptional market conditions that have been experienced as a result of the COVID-19 economic crisis.

¹ Explanatory Memorandum, National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (Cth) [1.1].

Introduction

8. Currently, all credit licensees must adhere to the responsible lending conduct obligations required by Chapter 3 of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) which apply to both credit providers and credit assistance providers. Schedule 1 to the Bill seeks to amend Chapter 3 of the NCCP Act so that from 1 March 2021 (or the day after Royal Assent), RLOs will apply only to small amount credit contracts and consumer leases and small amount credit contract-equivalent loans provided by authorised deposit-taking institutions (**ADIs**).
9. The Law Council, through its Legal Practice Section's Australian Consumer Law Committee provided a submission to the recent Treasury consultation in relation to the draft National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020, draft National Consumer Credit Protection Amendment (A New Regulatory Framework for the Provision of Consumer Credit) Regulations 2020 and draft National Consumer Credit Protection (Non-ADI Credit Standards) Determination 2020.² The Law Council provided a further supplementary submission containing several cases studies which highlighted the potential for the draft reforms to negatively impact on some Aboriginal and Torres Strait Islander persons.³ These case studies are provided for the information of the Committee at **Appendix A**.
10. The Law Council invites the Committee to have regard to these earlier submissions when considering the Bill, as many of the concerns raised remain relevant to the current inquiry.

Comment on the proposed reforms

Responsible lending

11. The proposed reforms are premised on the proposition that, under the existing NCCP Act, RLOs on consumer credit providers, 'impose burdensome and unnecessary processes on both lenders and borrowers'.⁴
12. The Law Council understands that the RLOs require a credit provider to consider the individual consumer's requirements, objectives and financial circumstances and to determine whether the proposed loan will meet those requirements and objectives and not cause substantial financial hardship to the consumer. These processes are not unnecessary and need not be burdensome, given the significant amount of individual consumer financial data available to credit providers in electronic form.
13. The protection that is given by the regime extends only to those who will be unable to meet their obligations at all or, or not without 'substantial hardship'. In *Australian Securities and Investments Commission v Westpac Banking Corporation*,⁵ the Full Court of the Federal Court of Australia made it clear that an irresponsible loan was one that would cause the borrower such hardship that the loss of the family home was inevitable or the financial burdens would impose 'severe toil, trial, oppression or need' on the borrower.

² Law Council of Australia, Submission to the Treasury, *Consumer Credit Reforms* (19 November 2020) <<https://www.lawcouncil.asn.au/resources/submissions/consumer-credit-reforms>>.

³ Law Council of Australian, Supplementary Submission to the Treasury, *Consumer Credit Reforms* (24 November 2020) <<https://www.lawcouncil.asn.au/resources/submissions/ss-consumer-credit-reforms>> .

⁴ Explanatory Memorandum, National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (Cth) [1.9].

⁵ [2020] FCAFC 111 (26 June 2020).

14. The first recommendation of the Royal Commission presented on 1 February 2019 was that the NCCP Act should not be amended to alter the obligation to assess unsuitability.⁶

15. The first response of the Government to the recommendations of the Financial Services Royal Commission was:

*The Government agrees to this recommendation and the Commissioner's findings that 'not unsuitable' remains the appropriate standard for responsible lending obligations within the National Consumer Credit Protection Act 2009.*⁷

16. There were sound reasons for the Royal Commission recommendation and sound reasons for the acceptance by the Australian Government of the recommendation that RLOs should not be changed. While it is appreciated that the COVID-19 pandemic has changed the economic circumstances in Australia, the Bill does not represent a temporary adjustment to exceptional conditions. Rather, it seeks to make permanent changes that will not expire when the crisis has passed. The Law Council is concerned that the reforms proposed under the Bill may impact consumers in the long term and urges the Committee to consider the potential long-term impact of the Bill.

17. It is further noted that since the Bill was proposed, borrowing from banks for owner occupied housing has continued to increase unaffected by COVID-19 and bank lending for investment in housing has increased since August 2020 following a slight decline.⁸ Credit appears to be flowing freely under existing RLOs, and Australia's level of household debt continues to be among the highest in the world.⁹

18. The NCCP Act was originally enacted in 2009 in the context of another economic crisis, the global financial crisis precipitated in 2007-08. The Explanatory Memorandum accompanying the National Consumer Credit Protection Bill 2009 commented on the regulatory impact on business arising from the reforms, noting:

*While broader enforcement powers carry some potential additional compliance costs for industry participants, this outcome is expected to deliver greater net benefits for consumers particularly over time, through overall improvements to standards of industry behaviour.*¹⁰

19. Importantly, the 2009 Explanatory Memorandum also provides the following context for the responsible lending provisions:

The primary obligations in relation to the provision of credit (for example, lending); or the provision of credit assistance (for example, suggesting a particular credit contract or assisting with a particular credit contract) are: to make an assessment that the loan is not unsuitable for the consumer;

⁶ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report (1 February 2019), 20.

⁷ Australian Government, *Restoring trust in Australia's financial system: The Government response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (4 February 2019) 6 (Emphasis in original).

⁸ Australian Prudential Regulation Authority, *Monthly authorised deposit-taking institution statistics – highlights November 2020* (released 4 January 2021) 3-4.

⁹ Jonathan Kearns, Mike Major and David Norman, 'How Risky is Australian Household Debt?' (Research Discussion Paper, Reserve Bank of Australia, August 2020) 4

<<https://www.rba.gov.au/publications/rdp/2020/pdf/rdp2020-05.pdf>>.

¹⁰ Explanatory Memorandum, National Consumer Credit Protection Bill 2009 (Cth) 9.

*and to assess that the consumer has the capacity to meet the financial obligations under the contract without substantial hardship.*¹¹

20. The considerations that underpinned the enactment of the RLOs have not changed. The economic impact of COVID-19 has not changed fundamental issues. The RLOs were enacted following extensive research, consultation with the states and territories and input from consumer and industry advocates. As the Explanatory Memorandum shows, the RLOs also derive from an understanding of the economic impacts of household debt, which are not limited to risk of default but include the diversion of available household funds from expenditure on other goods and services into loan repayments.
21. The Royal Commission found that lending decisions being made with reference to credit risk rather than the individual consumer's risk of default, prioritised bank profits over the interests of consumers to the detriment of consumers. As noted by Basten JA in 2011:

*To engage in pure asset lending, namely to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default, is to engage in a potentially fruitless enterprise, simply because there is no risk of loss. At least where the security is the sole residence of the borrower, there is a public interest in treating such contracts as unjust, at least in circumstances where the borrowers can be said to have demonstrated an inability reasonably to protect their own interests.*¹²

22. The Bill proposes to substitute the Australian Prudential Regulation Authority (**APRA**) prudential requirements for the RLOs. Prudential requirements are imposed to safeguard the lender and may be satisfied with asset-based lending because defaults within the lender's risk appetite will not harm the lender. The defaulting borrower is not so comfortable with such an outcome.
23. The evidence considered by the Royal Commission showed repeated instances where banks did not appropriately have regard to the interests of consumers. The Law Council remains concerned that a removal of consumer focussed RLOs is likely to lead to a growth in unsuitable lending and financial hardship in the community.

Non-ADI credit providers

24. The proposed reforms, if enacted, will replace the current system requiring banks and non-banks alike to assess whether a proposed loan is suitable for a consumer having regard to the consumer's financial situation, requirements and objectives, with a system for banks based on APRA prudential requirements and a system for non-banks that requires them to have systems and processes consistent with standards to be set by regulatory declaration.
25. Under this regime, non-bank lending to consumers will not be judged by whether unsuitable outcomes for consumers result but rather by whether:

¹¹ Ibid [3.25].

¹² *Fast Fix Loans Pty Ltd v Samardzic* [2011] NSWCA 260 (2 September 2011) (Basten JA) [116].

- (a) the systems and processes conform to the criteria in the regulatory declaration; and
- (b) the assessment of suitability was made in accordance with those systems and processes.

26. Respectfully, the Law Council submits that this does not represent a simplification of RLOs, but rather makes enforcement of the standards complex and difficult. It would also make it highly difficult for a consumer to assess whether or not their own lender has breached the non-ADI standards.

Australian Financial Complaints Authority

27. The Australian Financial Complaints Authority (**AFCA**) Annual Review arises from the reporting requirements for external dispute resolution (**EDR**) schemes set out in Australian Securities and Investments Commission (**ASIC**) Regulatory Guide 139 and Regulatory Guide 267.

28. In the 2019-20 financial year, credit, in its various forms, comprised approximately 21 per cent of the 76,880 complaints which AFCA received. Of these, only 1.2 per cent of all complaints were about small amount credit contracts or consumer leases or, approximately, 5.5 per cent of those about credit.¹³ It is these products to which the RLOs under the Bill will continue to apply. In effect, this means that the Bill will remove the RLOs from credit products which account for 97 percent of all credit complaints to AFCA. AFCA will not be able to refer to them when resolving consumer complaints.

29. While ADIs will still be subject to a prudential regulatory framework, including standards which are enforced by APRA, it is understood that the RLOs provide a more robust compliance framework of consumer protection.

30. For example, ASIC Regulatory Guide 209 '*Credit licensing: Responsible lending conduct*' provides for a presumption of substantial hardship where:

*It is presumed that if a consumer will only be able to comply with their financial obligations under the credit product by selling their principal place of residence, then the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.*¹⁴

31. It is understood that there is no analogous presumption in the APRA Prudential Practice Guide *APG 223 Responsible Mortgage Lending*.

32. There is a concern that the APRA standards proposed in the Bill are less prescriptive and, therefore, less determinative than the RLOs in the NCCP Act. This is likely to make the resolution of consumer disputes more difficult for AFCA, and may lead to fewer positive outcomes for consumers.

33. The Explanatory Memorandum to the Bill 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.¹⁵ However, 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.

¹³ Australian Financial Complaints Authority, *Datacube* (22 September 2020) <<https://data.afca.org.au/>>.

¹⁴ Australian Investments and Securities Commission, *Credit licensing: Responsible lending conduct* (Regulatory Guide 209, December 2019), 76.

¹⁵ Explanatory Memorandum, National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (Cth) [1.76].

The Explanatory Memorandum indicates that these will be accessible to AFCA, however, 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.¹⁶

Consumer remedies

34. In addition to taking risk to the consumer out of consideration for ADIs, there are concerns that the proposed reforms will have the effect of depriving consumers of accessible individual remedies for unsuitable lending.
35. Sections 179 to 184 of the NCCP Act empower courts to grant remedies, including injunctions and compensation orders, to prevent or compensate for loss or damage suffered, or likely to be suffered, by consumers as a consequence of conduct of licensed credit providers and credit assistance providers in breach of the NCCP Act. Removing RLOs of banks would mean that these remedial powers of the courts would no longer apply to decisions taken by banks about loan suitability.
36. Borrowers from non-bank licensed credit providers would not have recourse for unsuitable lending unless they could show that the non-ADI credit provider had systems and processes that were not in accordance with the regulatory determination or that that the irresponsible lending to the consumer was an instance of repeated failures by the credit provider to apply its systems and processes correctly. This would likely be highly unworkable. Borrowers 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.
37. The availability of consumer remedies is an essential part of promoting compliance with legislation. Without consumer remedies, RLOs would be of very little practical use.

Small account credit contracts and consumer leases

38. The proposed reforms to small amount credit contracts and consumer leases appear to fall short of the recommendations of the Final Report of the Review of Small Amount Credit Contracts (**SACC Final Review**).¹⁷
39. Small account credit contracts (payday lending) and consumer leases are areas of consumer credit which disproportionately impact on the most vulnerable members of the Australian community. In the Law Council's view, the proposed reforms do not go far enough to protect disadvantaged consumers from potentially predatory practices.
40. In the Law Council's view, consideration should be given to implementing the recommendations of the SACC Final Review rather than pursuing the reforms contained in the Bill.

¹⁶ Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (13 January 2021). See, eg, Rule A.10.5.

¹⁷ The Treasury (Cth), *Review of the Small Amount Credit Contract Laws* (Final Report, March 2016) <https://treasury.gov.au/sites/default/files/2019-03/C2016-016_SACC-Final-Report.pdf>.

Appendix A: Potential Impact on Aboriginal and Torres Strait Islander Borrowers – Case Studies

41. The Law Council provides the following case studies to provide additional context to the proposed reforms, and in particular, the potential effects of the reforms proposed in the Bill on Aboriginal and Torres Strait Islander borrowers.
42. The following case studies have been provided to the Law Council by the Law Society of New South Wales (**Law Society**). The Law Society advises that these case studies are examples provided by a community legal centre (**the Centre**) which assists Aboriginal and Torres Strait Islander clients experiencing substantial financial hardship due to potentially irresponsible lending practices.

Case Study 1: Point of sale finance – multiple clients

43. Thirteen Aboriginal men and women were referred to the Centre 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 men and women went to the store with the intention to only browse, however, they were convinced to purchase thousands of dollars' worth of goods on finance contracts and offered credit cards with large spending limits. None of individuals had strong English, nor could they afford the goods or meet the terms of the contracts they were pressured to sign.
44. Many of the contracts signed were also incorrect. For example, the number of dependants the men and women had was underestimated or fortnightly income was listed as weekly. In all cases the same salesperson was responsible. One of the women went 'window shopping' but left with a \$2,000 credit card and \$16,000 worth of goods on a consumer lease contract. One item was a blu-ray player, which was later discarded as she did not know what it was. By the time the Centre intervened, she had repaid \$9,000.
45. A solicitor from the Centre sent letters to the two lenders involved, alleging multiple breaches of the NCCPA. Both lenders agreed to the settlement terms in these letters. The lenders waived the debts, refunded amounts paid, removed default listings and gifted the goods. These remedies would not have been achieved without existing current responsible lending obligations.
46. One of these lenders 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.
47. In this example, two lenders engaged in predatory lending practices despite the existence of responsible lending obligations. In addition to the 13 individuals noted in this example, it is understood that hundreds of other customers were affected. Had the lenders complied with the responsible lending laws, none of these unsuitable credit products would have been approved.

Case Study 2: Eva's Story

48. Eva (name changed) is a 47-year-old single woman with two children living in New England, who identifies as Aboriginal. Approximately two years ago, Eva went to a car dealer to purchase a car. To finance the purchase, a non-bank lender approved a loan of approximately \$5,000 for her. At the time, Eva had limited income as she was on income support (as carer for her disabled brother) and received family tax benefits.
49. After trying to keep up with the repayments for a period of time and paying approximately \$1,500 towards the loan, Eva defaulted as she was simply unable to afford the loan. She requested a hardship variation to pay \$50 per week which was rejected. When she tried to have the lender take the car to sell it, they refused to do so.
50. Around August 2020, Eva had around \$7,000 owing to the lender due to non-payment, interest, and fees that had accrued. It appears Eva was also sold junk insurance with the car, adding to the total of the debt but providing no protection against her default.
51. Had the car yard finance provider undertaken an effective responsible lending assessment, Eva would not have been given an unsuitable car loan, with its accompanying insurance product of little utility. Eva tried repeatedly to give the car back to the lender and address the shortfall, but the lender has refused. Eva is unable to use the car as it is currently unregistered and does not function as it needs a new battery.