April 2010

Submission in response to

National Consumer Credit Registration & Licensing Requirements - Lenders with Pre-Existing Credit Contracts

by

Consumer Credit Legal Centre (NSW) Inc

Consumer Action Law Centre

National Legal Aid

Thank you for the opportunity to respond to the Government's proposed approach to the treatment of lenders who are no longer lending and yet have a book of loans that will continue to be managed and collected beyond 1 July 2010.

We appreciate that the Government considers it has a Constitutional barrier to requiring these credit providers to be subject to the entire National Consumer Credit Protection Act 2009 licensing regime. In the circumstances, we also appreciate that steps are being taken to minimise the practical differences in consumer protection for consumers in contracts with *COI lenders* by subjecting them to a statutory regime.

Despite this, we are very concerned about the fate of consumers indebted to *COI lenders* who face financial hardship and other related issues. Lenders who are no longer offering new loans, are in our experience, the most difficult to deal with in relation to hardship relief. This is because they:

- are no longer lending and have no brand to protect;
- are trying to wind up their books as quickly as possible, and therefore resist any arrangement that will inevitably lengthen this process by extending the terms of current loans; and

- tend to have less staff and fairly fixed revenue, making it more difficult to dedicate resources to providing tailored responses to the individual circumstances of borrowers.

While we appreciate the unique circumstances of these lenders, the impact on consumers is potentially very harsh. Many of these loan contracts involve above market interest rates because they were originally perceived as higher risk or because the lenders are dependent on the international credit market for funding and are therefore subject to higher costs of borrowing, or both. Further, they are not subject to any real competitive pressure to reduce their interest rates because, as noted above, they are not trying to attract new customers and have no brand to protect, while consumers who try to refinance out of these loans may find themselves subject to significant exit fees. While these fees may be charged in accordance with the contract, consumers are entitled to dispute these fees if they do not reflect the contract, are arguably unconscionable under section 78 of the National Credit Code or are otherwise unlawful (e.g. they constitute an unlawful penalty at common law).

Consumers in financial hardship are often, by definition, unlikely to be able to refinance to a more reasonable rate. As a result, a hardship variation is their only option. These consumers face a double jeopardy if they are, firstly, required to pay above market rates and secondly, not proffered the same flexibility in hardship as their counterparts in cheaper loans.

External Dispute Resolution

We are particularly concerned that *COI lenders,* who are already members of EDR schemes on a voluntary basis, may withdraw their membership as a result of the new arrangements. Lenders such as RHG and GE Mortgages (a separate business as we understand it to the GE Money loans and credit card arm which will continue lending) have significant mortgage loan books and are currently in EDR on a voluntary basis.

We request that the Government give consideration to:

1. Requiring COI lenders to be members of an EDR scheme for post 1 July 2010 hardship applications, enforcement fees and exit fee issues only. This does not require any alteration of rights between the parties, it simply provides an avenue for the resolution of disputes involving those rights; or

2. Providing an incentive within the statutory scheme for lenders who wish to join EDR, or maintain their voluntary membership of EDR, but do not want to undergo the full licensing process, to do so. Some dispensation from the proposed statutory requirements for lenders who are members of EDR would perhaps be appropriate.

We appreciate that the small claims procedure will be available for hardship variation applications in relation to these lenders. However, this system is completely untested and the Courts do not have the expertise and experience of EDR schemes who are currently dealing with these matters. Further, the small claims procedure will not be available for the majority of unconscionable fee or other disputes because the value of these loans (particularly mortgages) will be over $40,000. In addition, as EDR schemes are accessible via

telephone and internet, and have processes already in place to deal with significant numbers of unrepresented consumers, the differences in access are likely to be significant.

ASIC Oversight

ASIC oversight of lenders in this area is also particularly vital for the reasons stated above. While we are happy to exchange some of the features of the proposed statutory scheme in return for access to EDR, we do not wish to suggest that ASIC should not have a role in monitoring the conduct of these lenders and in responding to complaints about systemic conduct. Indeed, we would submit that ASIC should be both proactive and responsive to complaints in this area.

Penalties for non-compliance

We note that removing or placing conditions on a license will not be an option for responding to poor conduct by COI lenders under the statutory scheme. We are therefore concerned to ensure that any penalties for non-compliance are both serious enough to deter poor conduct and not so serious as to never be applied. In short we have a preference for civil penalties and compensation for affected consumers over criminal penalties that are unlikely to be used in all but the most egregious of circumstances. The option of requiring lenders to manage their customer contact via a licensee (mentioned in the context of lenders who may be subject to State government control orders) should also be available to ASIC as a tool to manage poor compliance after the implementation of the scheme.

If you have any questions about this submission, please contact Karen Cox at Consumer Credit Legal Centre NSW in the first instance on (02) 8204 1340.

Case Study 1

A COI lender sought possession of the home of an elderly woman (about 80 years of age). The woman, a client of legal aid, had been wheelchair bound for over a decade and had not left her home, which had been modified for her use, for 4 years except to go to hospital. She suffered from an extremely debilitating medical condition, the management of which was entirely set up to occur in the home. She was not the borrower under the loan, having transferred the home to her children without consideration, but she had a possible claim in equity.

Medical evidence presented to the lender suggested that her forcible removal would lead to inadequate care, and possibly death, given her fragile condition. Despite this, the lender aggressively pursued possession of the property.

While the hardship of the client in this case was acute, the response of the lender is typical of the attitude encountered by the services making this submission in dealing with some COI lenders.

Case Study 2

An Aboriginal woman from Western Sydney sought assistance from a CCLC financial counsellor. She was in serious financial difficulty as a result of an injury which prevented her from working. She also had the responsibility for caring for an adult child with a mental illness. When the financial counsellor first met the client she had not opened her mail in months as a result of anxiety.

The financial counsellor supported the client to open all her mail and take stock of her financial situation. One of the many urgent problems was that she was in serious arrears on her home loan.

A CCLC financial counsellor immediately tried to negotiate a hardship variation. The COI lender would not negotiate. An application was filed in the Consumer Tenancy & Trader Tribunal ("the Tribunal"). The COI lender opposed conciliation of the matter, even though this was part of the standard Tribunal procedure. When the Tribunal insisted that the lender participate in a conciliation conference, the lender instructed both a law firm and counsel to attend the conference with their representative. The matter, which eventually settled, was hotly contested at all stages of the process and the client would not have been able to retain possession of the home without legal representation.

Case Study 3

RAMS was a well known non-bank mortgage lender in the Australian market-place. RAMS Mortgage Corporation Ltd sold the RAMS brand name and right to originate new home loans under the RAMS name to Westpac in late 2007. It then changed its name to RHG Mortgage Corporation Ltd. RHG continues to own and manage the loan book for existing loans made under the RAMS name before the brand was sold to Westpac, but does not originate any new loans.

In December 2008, Consumer Action took a legal action in the Victorian Civil and Administrative Tribunal against RHG on behalf of a consumer who was charged a $12,000 early termination fee on her RHG variable rate home loan. This early termination fee was charged after she chose to switch mortgages because RHG had made large increases to her interest rate well above the increases of other lenders in the market. She had entered into the home loan with RAMS in July 2007 but RAMS/RHG had then increased the interest rate many times (and well above increases to the official cash rate made by the Reserve Bank of Australia), particularly after the sale of the RAMS brand and right to originate new RAMS loans to Westpac. The legal action alleged an unconscionable early termination fee and unconscionable changes in the loan's annual percentage rate, under the Consumer Credit Code equivalent of new s.78 of the National Credit Code.

This legal action against RHG settled in January 2009, but over 100 other RHG customers contacted Consumer Action for advice and assistance with similar concerns. Consumer Action simply did not have the resources to act for each of these consumers individually in legal actions against RHG.

(continued next page)

However, RHG joined the Financial Ombudsman Service (FOS) in July 2009. As a result, we have been able to begin giving further assistance to other RHG customers affected by these concerns and are currently considering a complaint to FOS.

About us

Consumer Credit Legal Centre

Consumer Credit Legal Centre (NSW) Inc ("CCLC") is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for 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. We provide legal advice and representation, financial counselling, information and strategies, and referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 15,000 calls for advice or assistance during the 2008/2009 financial year.

A significant part of CCLC's work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

Consumer Action Law Centre

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation.

Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. A large proportion of our advice and casework representation relates to consumer credit and debt issues.

Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Since September 2009 we have also operated a new service, MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians facing or experiencing job loss or reduced working hours to help them manage their money and debt.

National Legal Aid

National Legal Aid (NLA) represents the Directors of the eight State and Territory legal aid commissions in Australia. The commissions are independent statutory authorities established under respective State or Territory enabling legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the Federal and State and Territory legal systems; or
- obtain adequate information about access to the law and the legal system.