

# Productivity Commission SUBMISSION COVER SHEET



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Pragya Giri (02) 6240 3399

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Canberra City ACT 2601

Name (first name and surname): **Julia Davis**

If submitting on behalf of a company or organisation:

Name of organisation: **Consumer Credit Legal Centre (NSW) Inc.**

Position in organisation: **Policy & Communications Officer**

Phone: **02 8204 1384**

Mobile: **0478504634**

Email address: [Julia.davis@cclcnsw.org.au](mailto:Julia.davis@cclcnsw.org.au)

Street address:

Suburb/City:

State:

Postcode:

Postal address: **PO Box 538**

Suburb/City: **Surry Hills**

State: **NSW**

Postcode: **2010**

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# Productivity Commission Submission

## Summary of submissions

- The service delivery model used by CCLC is a very effective and efficient method of addressing legal and related need and enhancing access to justice in relation to credit, debt and other financial services issues.
- There is still considerable unmet need in relation to credit, debt and insurance law in Australia.
- Credit legal services should be integrated with telephone financial counselling and referrals across Australia.
- Community Legal Centres can use their resources to best effect when they use the intelligence gained from casework and service provision to advocate for systemic solutions. This should be explicitly recognised and incorporated into funding models, including reporting and evaluation.
- Access to external dispute resolutions services like the Financial Ombudsman Service and Credit Ombudsman Service are vital to access to justice – and are arguably the greatest addition to consumer protection in Australia in many decades. Current problems with delays in such schemes are not insurmountable and in the process of being addressed.
- The Insurance Law Service operated by CCLC is ideally placed to perform a central role in responding to national disasters but is underfunded to do so. A greater (but still modest) contribution from the Commonwealth and a per capita contribution from each State and territory could increase funding to necessary levels.
- Filing fees and court procedures (or proposed changes to procedures) are creating barriers to pursuing public interest litigation in some cases.

### **I. The service delivery model used by CCLC is a very effective and efficient method of addressing legal and related need and enhancing access to justice in relation to credit, debt and other financial services issues.**

The Consumer Credit Legal Centre NSW (CCLC) operates a multi-disciplinary, integrated, specialist service which combines:

- Financial counselling and legal services;
- Information and advice provided over the telephone;
- Minor case assistance;
- Ongoing casework (including financial counselling and legal representation);
- Visits to country locations and disadvantaged communities (to provide information, advice and education);

- Training and resources for other financial counsellors and public lawyers (in community legal services and legal aid);
- Community Education (including web-based self-help resources); and
- Law reform, policy and campaigning.

CCLC operates two telephone advice services. The Credit and Debt Hotline is accessible from all over NSW and provides assistance to clients who are in financial difficulty. Calls may involve hardship in relation to paying loans, home mortgages, credit cards, utilities and other debts. In some cases people are in hardship as a result of serious illness or injury and wanting to access their superannuation. The other advice line is the Insurance Law Service which is accessible nationally. Callers to this line are usually either being chased for a debt to an insurance company (most commonly because of a motor vehicle accident for which they were uninsured) or have a dispute with an insurance company about a claim. CCLC can only help in personal matters, not business related problems.

The Insurance Law Service (ILS) is a very important service, being the only dedicated, independent free, insurance service for consumers of insurance in Australia. ILS is also a key repository of insurance law expertise and data regarding the consumer experience of insurance claims and disputes. The national focus gives the ILS a unique position in collecting and disseminating information about the consumer experience of insurance across the country. A national, telephone-based model is an efficient manner of delivering insurance law services, because it provides the flexibility to respond to insurance problems that arise from natural disasters anywhere in Australia. It also provides a small core of specialist insurance expertise that helps to provide immediate professional development and support to local legal services, which are likely to lack insurance expertise, in the event of a disaster.

CCLC has developed this service delivery model (including the Insurance Law Service) over time in response to client need and it is informed by the following observations:

- A. Clients have a variety of service needs – from very simple legal or financial questions to the need for representation and support in resolving complex disputes
- B. Clients in financial difficulty do not know whether they need a financial counsellor or a lawyer or both – they just know they need help or guidance
- C. Better client outcomes are possible when the client's overall financial needs are considered rather than just strictly their legal problems
- D. Involving all staff in casework, education, and advice vastly improves the quality of the service provided
- E. CCLC can use its extensive knowledge to assist other community services and the public by conducting training and producing resources

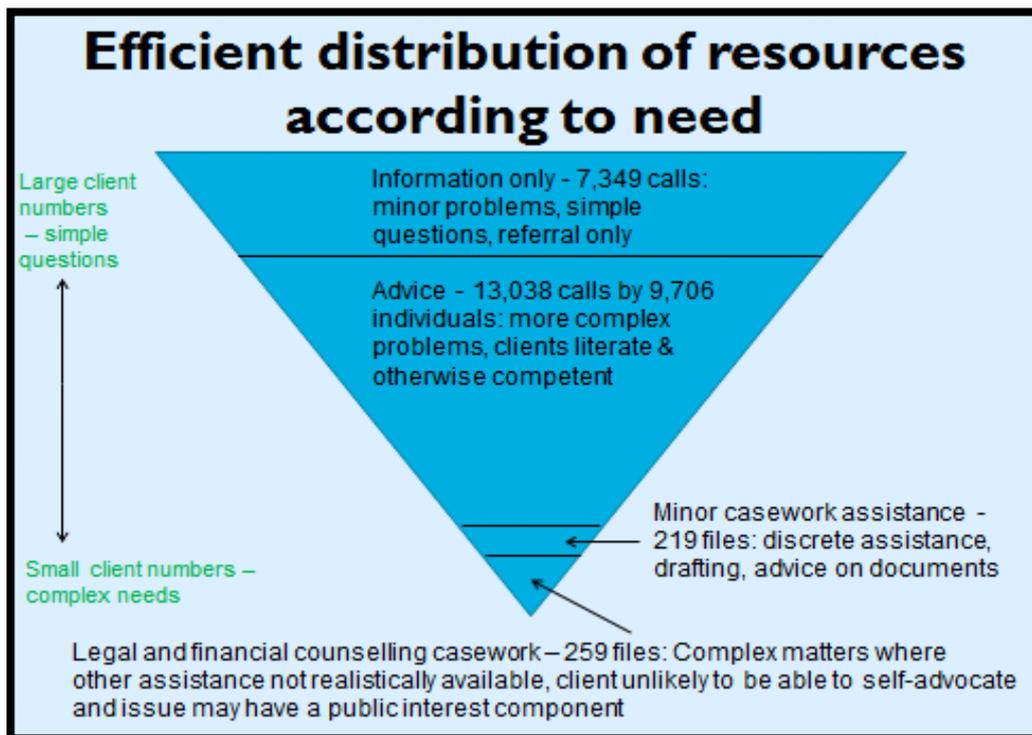
### **A. Clients have a variety of service needs**

Clients contact CCLC with a variety of issues. We try to tailor the service we supply to client's needs, taking into account the complexity of the problem, their apparent ability to comprehend the information we give, the likelihood they will be able to act on any advice we give, and the potential impact if the problem is not solved.

Their request for assistance can be as simple as a question that can be answered in less than 5 minutes (*How do I get a copy of my credit report?*) to something as complex as *I am elderly and about to*

be evicted from my home because of a line of credit I was given when I sought a reverse mortgage or I have 4 children, my partner died 3 months ago and my insurance claim to pay the mortgage has been refused on the grounds of a pre-existing condition. Such complex cases involve ongoing representation by a solicitor and in some cases a financial counsellor also. In between these two extremes are a variety of situations which may involve more complex initial advice or drafting on a one-off basis, or a series of advice calls as a situation unfolds.

The following diagram shows the different types of direct service delivery received by CCLC clients in the 2012/2013 financial year.



Of the 9,706 callers who received advice (as opposed to just general information), 681 received advice more than once. While these people received an average of 6 advices each, in actual fact most received advice on 2 or 3 occasions and a small number received advice more often (some more than 10 times) in relation to the same issue as the situation develops. This facility allows people to take responsibility for their own problem-solving but gives them access to advice as required. For example, a person may be advised to lodge a complaint in an EDR service and then call us back later to seek advice responding to the other party's submissions and then again to seek advice in relation to a settlement offer. This enhances the caller's chances of obtaining a satisfactory outcome to their problem and frees up our resources to directly represent those clients with less personal capacity to self-advocate and/or more complex issues.

CCLC is also the central contact point for referrals to face-to-face financial counselling in NSW. In the last year the CCLC made 6,678 referrals to face-to-face financial counselling services<sup>1</sup>. In doing so CCLC usually undertakes some initial assessment to determine if there are any urgent enforcement issues before making a referral. Where necessary CCLC staff will draft letters for the client over the phone, assist a client to lodge a complaint in an EDR scheme if appropriate, or act for

<sup>1</sup> CCLC does not know to what extent these referrals are taken up by clients.

client in-house to ensure that they are not disadvantaged pending a face-to-face appointment. CCLC also provides in-house financial counselling services for those clients who cannot, in practice, access face-to-face financial counselling services. Such services are usually provided by way of a combination of phone, and e-mail or mail contact depending on the facilities available to the client. In some cases face-to-face services of a more general nature (local neighbourhood centre, charity, generalist legal centre for example) are used to facilitate copying documents or other face-to-face interactions with the client.

Despite being located in Sydney CCLC is also able to reach clients from a large geographical range. The Mortgage Hardship Service operating out of CCLC between 2009 and 2011<sup>2</sup> reached clients from 116 LGAs (76% of the all the LGAs in NSW).<sup>3</sup> Thirty six per cent of mortgage hardship clients came from outside the Sydney Metropolitan area, a proportion being equal to or greater than the percentage of the population living outside Sydney. Telstra records for the Credit and Debt Hotline reveal that 56% or more calls to CCLC (successful or not) originate from outside the capital city. At the same time, analysis of our 2012-2013 financial year client data shows that 39% of successful calls in that period came from outside Sydney, and only seven Sydney suburbs were not represented in our client records.

Similarly, the Insurance Law Service (ILS) is a national service operating from an office in Sydney, yet it has a good distribution of clients compared to population levels for a Sydney based service with limited funding:

ILS callers compared to population		
State/Territory	% Population	Advice calls
NSW	32%	36%
VIC	25%	29%
Qld	20%	20%
SA	7%	5%
WA	10%	7%
TAS	2%	1%
NT	1%	0%
ACT	2%	1%

Recognising that telephone contact does not work for everyone, CCLC also has a number of strategies to reach clients from Non-English Speaking backgrounds and remote Aboriginal communities including reaching out to bi-lingual workers, producing multi-lingual and ATSI

<sup>2</sup> The service continued until funding ceased in July 2013 but the evaluation occurred in 2011. CCLC continues to offer mortgage hardship assistance but no longer has any dedicated positions for this service.

<sup>3</sup> S Forell & M Cain, *Managing mortgage stress: Evaluation of the Legal Aid NSW and Consumer Credit Legal Centre Mortgage Hardship Service*, June 2011, p47

resources, and conducting quarterly visits to parts of regional NSW. One trip to Lismore, for example, enable us to not only provide advice to local people while in Lismore, but also produced a flow-on effect of five different Aboriginal clients from the same small town near Lismore contacting CCLC for assistance over the subsequent months. Overall in the last years about 6% of casework clients identified as Aboriginal. The Mortgage Hardship Service evaluation found that 8% of CCLC clients identified as Aboriginal or Torres Strait Islander, roughly four times the expected number given the demographics of the NSW population. Non-English speaking clients have represented between 13% and 16% of casework clients.

## **B. Clients in financial difficulty do not know whether they need a financial counsellor or a lawyer or both**

Clients are often unable to identify whether they have a “legal” problem until reasonably late in the evolution of a dispute. Usually it takes a letter from a law firm, or a court document such as a statement of claim, for the average person to understand that a financial problem has become a legal problem.<sup>4</sup> In actual fact, most people in financial difficulty can benefit from earlier intervention than this.<sup>5</sup> The availability of financial counselling in our centre means that people contact CCLC prior to their problem being obviously legal.<sup>6</sup> The financial counsellors can then give the caller information about their options and refer them to one of our in-house solicitors if the client would benefit from legal advice or assistance.

## **C. Better client outcomes are possible when the client’s overall financial needs are considered**

CCLC has identified, at least anecdotally, that long term outcomes for clients improve considerably when their overall financial position is assessed by a financial counsellor at the same time as they are receiving legal services in relation to financial contracts such as loans. Below are two examples of ways that our financial counselling services have led to better outcomes: 1) Our Mortgage Hardship Service (MHS); and 2) Our expertise in assisting clients to maximise their income and minimise expenditure.

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<sup>4</sup> That “consumers don’t necessarily identify their consumer credit problem as a ‘legal problem’, and many consumers need both legal and non-legal assistance in relation to that problem” was a main finding of an unpublished report to ASIC on Consumer Credit Legal Services in Australia by Renouf, G and Porteous, P, p6 & 52. The report also noted that “telephone advice and referral services using financial counsellors and legal staff working together appear to be particularly effective”, p7 & p53

<sup>5</sup> The 2009 Access to Justice Taskforce recommended: Early intervention will prevent legal problems from occurring and escalating. In many situations, early action can resolve a matter or identify the best course of action. However, if a person does nothing—which often happens when there is not enough assistance available or it is not clear to a person where to turn to for help—it can be much harder and more costly to rectify the problem. Failure to address legal problems has been shown to lead to entrenched disadvantage. Australian Government (2009a), p. 63.

<sup>6</sup> The Law and Justice Foundation found that people with legal problems who do something about them first turn mostly to non-legal sources (74.4%) rather than legal sources (25.6%) and that many (78%) only go to one source, Coumarelos et al (2006), p. 104.

## Example I

Clients in mortgage hardship invariably have other financial obligations they cannot pay. CCLC used financial counsellors to great effect in our Mortgage Hardship Service.<sup>7</sup> Negotiating a variation in repayments on the grounds of hardship under the law is pointless if:

- The payments negotiated are not sustainable. Clients have historically given poor instructions to CCLC solicitors about how much they can actually afford to pay. They are anxious to remain in their home and therefore underestimate their other expenses in order to offer more than they can really afford. Inevitably they then default on the arrangement, losing both the benefit of the arrangement and the trust of the creditor. A financial counsellor can assist clients to make a realistic offer and allow the solicitor to take care of the legal processes if they have commenced or are about to.
- The client cannot meet their other expenses such as credit cards, council rates, utilities and Strata fees. A financial counsellor can negotiate appropriate arrangements with other creditors to assist the client stabilise their financial position and remove some of the stress from the situation.
- The client cannot pay for their home in the long term. A financial counsellor can usually assist clients to identify whether their desire to retain their home is realistic, and, in some cases assist them to see the benefits of a voluntary sale in which they retain control of the process and timing, and avoid significant enforcement costs.<sup>8</sup>

Although clients are less likely to have positive results overall when they seek advice late in the enforcement process, CCLC was able to save the homes of 13 of a sample of 21 who sought assistance after they had received a *statement of claim* and assisted the client to get an arrangement to sell on their own terms in 2 others. The home was repossessed in only 2 cases and the outcome was uncertain in the remaining 4. Of the 16 clients in the same sample who sought assistance in the same period after *judgment* had been entered and they had received a *notice to vacate* from the sheriff, 2 were able to retain their homes and 7 were able to negotiate a sale on their own terms. 5 were ultimately repossessed, but often after obtaining a stay to make arrangements for alternative accommodation.<sup>9</sup>

### Case Study I – home retained

When Alice and her husband attended their appointment at CCLC both were employed fulltime and each had been with their current employer over 10 years. A few months previously Alice's husband needed to take leave from work of about 2 months (with no pay, to care for family member). They were able to pay the current repayments on all debts but could not catch up all the arrears from the

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<sup>7</sup> The mortgage hardship service was a joint initiative of CCLC and Legal Aid NSW with the dual objectives of preventing the unnecessary repossession of residential properties and, where this was not practical, assisting borrowers and their families to extricate themselves from the loan contract with the minimum of financial and non-financial loss.

<sup>8</sup> The evaluation of the Mortgage Hardship Services operated by CCLC and Legal Aid NSW in 2011 conducted by the Law and Justice Foundation of NSW found in follow up surveys with a sample of clients that more than two thirds of clients felt they had achieved more financial control after using the service irrespective of whether they had retained their home, S Forell & M Cain, *Managing mortgage stress: Evaluation of the Legal Aid NSW and Consumer Credit Legal Centre Mortgage Hardship Service*, June 2011, p76.

<sup>9</sup> S Forell & M Cain, *Managing mortgage stress: Evaluation of the Legal Aid NSW and Consumer Credit Legal Centre Mortgage Hardship Service*, June 2011, p56

period with no income. They had received default notices from multiple creditors, including their home lender, and their telephone had been disconnected.

A CCLC solicitor assisted them to lodge a dispute in the Financial Ombudsman Service seeking a variation of the loan on the basis of hardship. However, with so many accounts in arrears, it was not at all clear how much they could pay and whether the situation could be salvaged in the longer term.

Alice and her husband were booked in for an appointment with a CCLC financial counsellor who was able to assess their current financial situation and discuss available options. With the assistance of the financial counsellor, they were able to put forward to a repayment plan to all their creditors, including the local council, banks, telecommunication companies and energy retailers. The proposal was affordable and would lead to all the accounts being up-to-date within approximately 5 months. Alice's telephone was reconnected immediately. The repayment plans offered were accepted by all the creditors. The financial ombudsman dispute was settled on the basis that the clients would make payments in accordance with the repayment proposal. They were able to retain their home and essential services.

### **Case study 2 – home sold by client after last minute intervention**

Diane rang the Credit and Debt Hotline at CCLC at 4:20pm the day before her eviction from her home scheduled for 11am. She had previously received a *Notice to Vacate* from her home loan lender but she suffered a detached retina during the last stage of her pregnancy and had asked her partner to “deal with it”. Once her sight had returned and whilst nursing her 2 week old baby she discovered that nothing had been done. She had heard about the impending eviction only the day before at about 3:30pm. She had immediately called the lender and was informed the only way to stop the eviction was to pay \$5,000 by 5pm the same day. She did not have any money to offer at all in such a short time frame.

As the caller was based 250 kms from Sydney she could not make it to the Supreme Court to apply for an urgent stay of eviction. A CCLC solicitor attended the Supreme Court and got an urgent stay at 10am on day of eviction. CCLC were prepared to attend for a further stay, however the lender agreed to a stay by consent on terms of a repayment arrangement. After some consultation with the client she recognised that she had been struggling for sometime with paying the mortgage and she decided to sell instead. She found a buyer and walked away with about \$50,000 after paying out the mortgage. She did not save the home but she was spared the hardship and indignity of being evicted at short notice with a two week old baby and still recovering from an operation. She moved out on her own terms, saved on enforcement costs and did not have to endure a mortgagee sale.

## **Incidental beneficial effects of Mortgage Hardship Service (MHS) as reported by clients**

A follow-up survey of clients conducted as part of an evaluation by the Law and Justice Foundation of NSW found that in addition to the practical assistance with their mortgage and other accounts, clients experienced other beneficial effects

- Twenty-seven [of 38] respondents said they felt more in control of their financial situation at follow-up, including those who had sold their properties after receiving advice – *“Everything you did helped, it took a load off our shoulders during a stressful time. The realistic advice that we could not afford the mortgage no matter what variations were done was helpful”*<sup>10</sup>;

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<sup>10</sup> Forell & Cain, page 94

- Several reported reductions in levels of stress and anxiety as a result of the service – “it was amazing the amount of relief, could sleep at night and not be absolutely out of [my] head wondering what to do and being scared of being kicked out of the house”<sup>11</sup>;
- Others reported greater willingness to take action and seek advice should they experience problems in the future – “I would try to resolve it straight away, instead of sitting on the issue. I would also speak to Legal Aid...to make sure I was OK with the law” & “I would seek help right away from CCLC, I would not be embarrassed about it like I was previously”.<sup>12</sup>

The Australian Housing and Urban Research Institute conducted research in late 2008 which consisted of a survey of 87 people facing home repossession proceedings in NSW and Victoria.<sup>13</sup> They found that the most common response to mortgage stress and default among respondents was to take on more debt, often more expensive debt by borrowing from credit cards (40%) or family and friends (38%). Relevant findings included that:

- “Significantly, only a minority of severely stressed mortgagors surveyed sought independent financial advice on budgeting and other ways to solve the problem;” and
- “Borrowers who seek advice early on when they experience repayment difficulties have more options and suffer less severe long term consequences than those who wait.”
- They also note that only 4% succeeded in varying their repayments although half the respondents had attempted to do so.

The MHS has addressed these very issues by promoting early access to assistance and providing independent financial and legal advice about options to assist clients to either retain their homes, and/or minimise the long term consequences of mortgage stress, including when selling the home is best option. The Supreme Court duty roster and referrals from the Court and financial counsellors also allowed people at later stages of the enforcement process (as those surveyed had been) to seek advice and assistance with a high success rate for either saving houses or minimising enforcement costs and other harmful self-help responses such as borrowing more at higher rates.

## Example 2

Financial counsellors are well versed in assisting clients to maximise their income and minimise expenditure. A seemingly intractable legal problem can sometimes being easily fixed when these skills are applied:

### Client Example

An Aboriginal client contacted a CCLC financial counsellor about a tenancy problem because of the trust engendered in the course of an earlier matter involving the leasing of household goods. The client was being evicted from her Department of Housing premises as a result of rent arrears. The financial counsellor quickly identified that she was not receiving the rebates she was entitled to. When the correct policies were applied, the rental arrears were dramatically reduced.

<sup>11</sup> Forell & Cain, page 95

<sup>12</sup> Forell & Cain, page 96

<sup>13</sup> AHURI Research and Policy Bulletin, The great Australian nightmare: mortgage default and repossession, Issue 128 July 2010, ISSN 1445-3428 reporting on research by Berry, Dalton and Nelson.

### **Client Example**

A middle aged man, who was unable to read, suffered three heart attaches leaving him unable to continue in his usual occupation as a cleaner. He owed over \$7,000 on a credit card and the bank had refused to offer him any further hardship arrangement as it appeared he was never going to get his finances back on track. A CCLC financial counsellor investigated and discovered the man had total and permanent disability insurance attached to no less than 8 superannuation funds. The financial counsellor assisted him to gather the medical evidence to apply under two of those policies and secured enough money to pay his debt, refurnish his rented apartment and greatly improve his lifestyle.

### **Client Example**

An elderly woman who was disabled as a result of a stroke contacted CCLC facing bankruptcy and eviction after she failed in a Tribunal action against her Strata Management for water damage to her unit. She had a legal bill of \$39,000 and also owed \$3,500 in strata fee arrears. A CCLC financial counsellor advised her about the consequences of bankruptcy and her options for dealing with the debt. The client opted to apply for a reverse mortgage to cover the legal costs. The financial counsellor also assisted her to extend time to comply with the Bankruptcy Notice (while the loan was arranged) and made a repayment arrangement in relation to the strata arrears. The client avoided homelessness and potentially thousands of dollars in trustee fees had the bankruptcy proceedings against her succeeded.

## **D. Involving all staff in casework, education, and advice vastly improves the quality of the service provided**

CCLC's advice line solicitors and financial counsellors also conduct casework. This is vital to ensuring that the advice given over the phone is practical (about to be done by the client), up-to-date and realistic (in terms of managing expectations about the results). The quality of the advice is also a result of specialisation. When a caller is facing home repossession proceedings in the Supreme Court, our solicitors can give very practical and realistic advice about how to apply for a temporary stay of eviction (for example, to buy time to find alternative accommodation or because someone in the family is critically ill). This is because our solicitors share a duty roster at the court with Legal Aid NSW and have directly represented clients in seeking stays themselves. When a caller is seeking a hardship variation on a loan, it is likely one of our financial counsellors may have done this on behalf of a client already, and knows the not only the process, but some of the idiosyncrasies of the creditor and what they will require.

## **E. CCLC can use its extensive knowledge to assist other community services and the public by conducting training and producing resources**

As a specialist service CCLC can share its expertise with other services and provide resources for more general use. In the past couple of years CCLC has written a couple of resources produced jointly with Legal Aid NSW to benefit financial counsellors and lawyers in Legal Aid and community centres:

- The Credit Law Toolkit (for financial counsellors and community lawyers)
- The Mortgage Stress Handbook (for the public)

We are also almost finished drafting a Bankruptcy Toolkit for financial counsellors and community lawyers.

We publish two websites with extensive resources for the public: [www.cclcnsw.org.au](http://www.cclcnsw.org.au) & [www.insurancelaw.org.au](http://www.insurancelaw.org.au). The consumer credit website peaked so far this year in May with 321,579 hits and 11,578 unique visitors in the one month. The insurance law website's busiest month so far was July with 341,598 hits in the month and 13,162 unique visitors.

CCLC also presents at conferences and gives regular training sessions to financial counsellors (including trainees), other public lawyers and, occasionally, to groups of the public, especially those with special needs such as newly arrived migrants. We also use the mainstream media to distribute information about issues of concern to the public, to warn about financial hazards and raise awareness of where to go for help.

The CCLC model conforms in many respects to the recommendation in the Consumer Credit Legal Services in Australia report to the effect that:

Any service delivery system in relation to consumer credit law in Australia should build on the strengths of current arrangements rather than involve a complete redesign of the system. Key current strengths include:

- a cohort of experienced specialist staff in some states
- effective models for marketing, triage and referral systems
- co-location of casework staff with telephone advice and referral staff
- co-location of legal services with financial counsellors in some key agencies
- effective models for cooperative work between agencies
- the potential to provide face-to-face services in a reasonable range of geographic locations (through generalist CLCs, legal aid commission regional offices and financial counsellors supported by telephone advice from a specialist legal service)
- a record of successful policy advocacy based on casework experience, and
- a record of successfully designing new services and adjusting existing services in response to the emerging needs of client groups.<sup>14</sup>

The types of legal services currently provided will continue to be needed, although likely in a different mix. The mix of services required is likely to develop over time and will be influenced to some extent by the availability, quality and accessibility of services provided by others, in particular financial counsellors, EDR schemes and ASIC. The services that should be provided include:

- written information to assist consumers understand their options, find services and self-advocate
- information and referral
- legal advice to consumers
- legal advice to financial counsellors and other workers assisting consumers
- minor assistance/non-litigious casework (non-EDR)
- assistance with EDR matters for vulnerable consumers and in more complex matters
- litigation in matters where EDR is not available and a significant matter is at stake
- test-case and strategic litigation
- advocacy on systemic issues and in response to policy development proposals, and
- training for financial counsellors and other workers assisting consumers.<sup>15</sup>

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<sup>14</sup> P121

<sup>15</sup> P124

There is a telephone financial counselling and referral service in every state and territory in Australia accessible by the common number 1800 007 007. Only a handful of these services are fully integrated with legal services. CCLC recommends that the government adopts a deliberate strategy to integrate credit legal services and financial counselling across Australia.

## **2. Community Legal Centres can use their resources to best effect when they use the intelligence gained from clients contact during service provision to advocate for systemic solutions.**

At CCLC we currently interact with between 15,000 and 20,000 consumers per year (including telephone conversations where information only is imparted on a one-on-one basis). Our clients (individuals with personal details recorded on our advice and casework database) numbered over 9,000 for the last financial year). As a result of this contact our staff:

- Are aware of many problems experienced by consumers in relation to consumer credit (including home mortgages), insurance contracts, utility contracts, and general debt collection;
- Are able to identify particularly problematic players, products or industry practices;
- Are aware of the strategies people employ to try to address their problems in these areas and the success or otherwise of those strategies; and
- Receive feedback in relation to the effectiveness of the various dispute resolution processes available, and the legal system (particularly as it applies to debt collection, including bankruptcy via creditor's petition).

This extensive knowledge is then augmented by the cases we run on behalf of clients, which give us first hand experience of negotiating with financial institutions and other industry players, running matters in dispute resolution schemes, courts and tribunals, and the effectiveness or otherwise of the law in practice. In our view it is imperative that we put this information to good use by feeding it back into policy development processes that improve the fair and transparent operation of the market place, the regulatory framework, and consumer's ability to transact with confidence and to seek redress where appropriate.

### **Example - Finance Brokers and Responsible Lending**

Free availability of credit in the early 2000s created an alarmingly increasing debt to income ratio nationally. At the same time CCLC, financial counsellors and other credit legal services around the country gathered ample anecdotal evidence of consumers struggling with impossible levels of debt. Initially our concern was centred on the credit card market, with unsolicited credit limit increases leading to an explosion in credit card debts which were disproportionate to the consumer's income. You only need to see a handful of cases from every major lender to realise that a problem is systemic, and collectively services were seeing far more than a handful.

The early 2000s also saw the rise of "non-conforming lending" in the home loan market – Australia's answer to sub-prime lending. In particular, it saw the rise "low" and "no doc"

loans<sup>16</sup>. While some lenders specifically targeted and priced their products for marginal borrowers, the trend soon spread into the mainstream, with most mainstream lenders including the major banks offering low doc products. Again, individual cases of people with loans they could obviously never afford began to present to services in increasing numbers.

This trend was exacerbated by the growth in the use of mortgage brokers. Brokers carried none of the default risk worn by lenders and had a strong financial incentive (in the form of commissions) to get as many and as big of loans as possible accepted by the financial institutions and other lenders. The presence of the 3<sup>rd</sup> party in the transaction also allowed the lender (keen to grab or retain market share) to distance themselves from the transaction and to either genuinely miss, or effectively *turn a blind eye*, to irregularities in loan applications.

In 2002 CCLC obtained funding from ASIC's Consumer Advisory Panel to report on serious and systemic problems in relation to finance & mortgage broking. The resulting report released in 2003<sup>17</sup> identified many problems:

- A lack of accountability and access to justice which saw consumers sued for thousands of dollars in broking fees when they chose not to proceed with a loan;
- Caveats placed over people's homes by brokers to secure their fees so that the consumer could not refinance with anyone else;
- No recourse for consumers when the loans arranged were not as described;
- Widespread misrepresentation of borrower's details in order to obtain loans which were not affordable (in order to maximise commissions);
- Predatory lending in which borrowers in financial difficulty were advanced loans that they could not possibly afford (and \$10,000-\$25,000 taken in brokerage and set up costs). These loans inevitably defaulted leading to high interest and default fees stripping any remaining equity from people's homes.

In the years that followed that report CCLC used this research to attract media attention, lobby government and to form strategic alliances with other consumer organisations and reputable industry associations to call for change. We created a Predatory Lending Project (with Legal Aid NSW and the Public Interest Clearing House) to garner pro bono assistance for affected borrowers and to gather data. We held a forum including mainstream industry associations to call for nationally consistent broker legislation and compulsory membership of external dispute resolution. State governments heeded this call and considerable consultation took place resulting in the *Finance Broking Bill 2007*.

In 2008 ASIC released *Report 119: Protecting wealth in the family home: An examination of refinancing in response to mortgage stress*, which focused specifically on predatory lending and equity stripping practices. The issues canvassed in this report built on CCLC's earlier work and the case studies were largely drawn from recent CCLC cases.

The sub-prime crisis in the US, and the ensuing global financial crisis, brought home that there was a bigger price to pay for uncontrolled lending than the impact on the immediate parties to the transaction and gave further momentum to the case for reform. It was at about this time that the well advanced process being undertaken by the State governments to regulate brokers was rolled into a major effort by Commonwealth legislators to address systemic problems in lending via major national law reform in the area of consumer credit.

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<sup>16</sup> Low doc loans are where very little information is obtained on ability to repay. No doc loans are where there is no information obtained on ability to repay. Both loans rely on the value of the asset only.

<sup>17</sup> *Report 19: A report to ASIC on the finance and mortgage broking industry*, by Consumer Credit Legal Centre (NSW), 2003.

CCLC (and a small number of other consumer organisations) participated in this reform process by attending a significant number of full and half day Treasury consultations and providing feedback and written submission in relation to the many issues which arose both prior to the enactment of the new national credit laws, and the subsequent period of rolling amendments.<sup>18</sup>

In 2009 the *NCCP Act* was enacted, coming into effect in stages over the subsequent couple of years. This legislation includes several measures which go directly to the heart of the problems described above in relation to responsible lending and are completely new (and in some aspects unique in the world):

- Licensing of lenders AND importantly, brokers and intermediaries (including the ability to remove or place conditions on a license);
- General conduct obligations;
- Specific responsible lending obligations (making sure capacity to pay is properly assessed); and
- Compulsory membership of free, independent, ASIC approved external dispute resolution schemes.

These major reforms have a number of advantages:

- ASIC can take action to ban particularly problematic players, place conditions on their licenses or accept enforceable undertakings and does so regularly;<sup>19</sup>
- Anecdotally ending standards appear to be improving in the mainstream market; and
- When problems do arise, consumers have access to free and independent dispute resolution services<sup>20</sup> (in sharp contrast to the situation in 2003 when the CCLC Broker Report was released).

This is probably the major law reform undertaking that CCLC has been involved in over the past decade but it is one of many. Others have involved credit reporting, pay day lending, consumer leases, Debt Agreements under the *Bankruptcy Act*, providing feedback to ensure continuous improvement at the dispute resolution schemes, debt collection law and practice, unfair terms in consumer contracts, natural disasters and the response of insurers, and funeral insurance to name a few.

Another report commissioned by ASIC's Consumer Advisory Panel in anticipation of the introduction of the new credit regime reviewed the likely legal need in relation to credit law and

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<sup>18</sup> The national credit laws were rolled out in two main phases – Phase 1 put in place the core obligations and Phase 2 made a number of specific amendments in particular product areas such as pay day lending, consumer leases, reverse mortgages, and consumer leases.

<sup>19</sup> Recent examples include 13-265MR South Australian mortgage broker charged with providing false or misleading information, Friday 27 September 2013; 13-200MR Former mortgage broker pleads guilty to submitting false documents to lenders, Friday 2 August 2013; 13-179MR ASIC permanently bans mortgage broker, Wednesday 17 July 2013; 13-170MR ASIC bans Perth finance broker for falsifying documents, Thursday 11 July 2013; 13-113MR ASIC permanently bans motor vehicle finance and insurance broker, Wednesday 22 May 2013; 13-080MR ASIC bans Sydney mortgage broker and cancels his Australian credit licence, Tuesday 16 April 2013

<sup>20</sup> The Financial Ombudsman Service and the Credit Ombudsman Service.

models for providing that assistance.<sup>21</sup> The following observations were made in relation to systemic advocacy:

- *A wide range of systemic advocacy is undertaken by a small number of agencies. Advocacy responds to issues identified by legal service providers in the course of providing services to individuals and to the requests of government agencies for input.*
- *There is, however, no systematic way to ensure that information derived from casework experience across the country is available to regulators and government policy makers.*
- *Further, the fact that policy advocacy is reasonably well-coordinated between those agencies is largely a result of longstanding working relationships between key staff at those agencies, rather than any structural imperatives.*
- *Consumer advocacy on consumer credit matters receives little specific government funding, unlike consumer advocacy in relation to other issues such as energy, telecommunications and health.*

We note in this context that while CCLC believes it has been a very effective player in the development of law and public policy in relation to credit, insurance, debt collection and other related issues, we have largely done this through staff dedication and resourcefulness. This work is recognised to a greater or lesser degree by some of our government funders in so far as we report our activities bi-annually, but there is no structural support for it and we manage to do it *in addition* to largely meeting (or exceeding) our advice and casework targets.

CCLC submits that it has effectively assisted thousands and thousands more consumers through systemic advocacy, when strategically combined with advice and casework, than would otherwise have been possible. We also note that we are requested to participate in and/or submit to a large number of consultations and inquiries by government and regulators. The quality of those submissions is directly related to whether we are also involved in pro-active systemic projects. The analysis of client data and background policy research involved is not possible without resources and context.

It has been argued that community legal centres cannot afford to spend their meagre resources on campaigns and system advocacy. In our view, we can't afford not to.

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<sup>21</sup> Renouf, G & Porteous, P. *Consumer Credit Legal Services in Australia*, unpublished report to ASIC, 2011, p79

## **Answers to a selection of the questions specifically posed by the review.**

CCLC does not propose to answer every question posed by the review. The following is limited to those questions on which we have meaningful observations to make or can provide relevant evidence.

### **1. About this inquiry**

*a. In what areas can the Commission most add value in undertaking this inquiry?*

CCLC submits that the Commission can most value by determining what is already working well, suggesting strategies for filling the gaps and removing unnecessary barriers to access.

*b. Reform of which particular aspects and/or features of the civil dispute resolution system will generate the greatest benefits for the community?*

- Access to free, low risk dispute resolution options such as EDR and tribunals
- Creative community based early intervention/assessment to information/empowerment initiatives
- Support for holistic, client focussed programs, especially for high needs clients
- Facilitate the running of test cases in the public interest by publicly funded services such as community legal centres and legal aid commissions through the minimisation of unreasonable barriers to such action
- Better recognition and structural support for publicly funded legal services to run campaigns & systemic advocacy which benefit larger numbers of people than individual advice and casework alone.

### **2. Avenues for dispute resolution and the importance of access to justice**

*a. The Commission invites comment and evidence on the main strengths and weaknesses of the civil justice system. What should the objectives of the civil justice system be, and are they being achieved?*

CCLC works in the financial services area in credit, debt and insurance giving specialist legal advice, financial counselling services, information, community education, resource development and systemic advocacy. Our comments are confined to those aspects of the civil justice system where we have some expertise.

#### **Objectives of the civil justice system should be to provide:**

- Proportionate individual redress to the largest number of people
- Redress particularly where the impacts are greatest
- Motivation to address systemic issues and improve service delivery, including trustworthiness and fairness of business practices
- Confidence in the law – that there will be consequences for breaching it (comfort to competitors and customers in business context) and redress for those who are harmed or experiences losses as a result
  - A related issue is the importance of actual money at the end of the process – for example, a compensation fund of last resort

### **Strengths as operating currently**

- External Dispute Resolution in credit and financial services
- Regulator action by ASIC
- Integrated advice and assistance models – early and late intervention
- Integrated law reform and campaign work

### **Weaknesses as operating currently**

- The law is overly reliant on disclosure and the prohibition of misleading and deceptive conduct, but these come with inadequate remedies where suitability of the product or fair treatment of the consumer is the real issue.
- The regulator has insufficient powers to prevent harm through early intervention.
- There are loopholes in consumer protection laws and access to EDR is not as universal as it could be.
- Funding models for CLCs are structured towards numbers of activities (information, advice, casework) rather than impact or outcomes – it's all about how many people we talk to or act for not how many people for whom we make a positive difference.
- Perceptions of powerlessness by the public and fear of costs mean that not enough consumers enforce their rights.

CCLC works in the financial services area in credit and insurance giving specialist legal advice. Financial services are regulated through the Commonwealth. Financial services companies in credit and insurance are required to be licensed. As part of the licensing requirements financial services companies must be a member of an External Dispute Resolution Scheme (EDR).

EDR is a fundamental part of getting access to justice for consumers. Australia arguably has the best dispute resolution scheme in financial services in the world. This in effect means that Australian consumers of financial services can bring disputes with their financial services provider at no cost and get their dispute settled fairly or determined. This access to justice has in turn led to financial services companies improving their dispute resolution processes and products.

*b. What are the benefits to individuals and the community of an accessible civil dispute resolution system? How does a failure to provide adequate access to justice impact on individuals and the community more broadly?*

An important by-product of an accessible civil dispute resolution system is the economic benefit that flows onto individuals and the community. Difficulty in accessing the civil dispute resolution system can be attributed to many factors including:

- Complexity
- Time Delays
- Procedural Intricacies
- Perceptions of powerlessness
- Personal capacity deficits

Factors such as these place a significant financial burden on individuals and the community at large; they often have to obtain specialist legal advice/representation before being able to access the civil dispute resolution system. Failure to provide adequate access can result in individuals and the wider

community being placed in a position where they are disenfranchised with the justice system, due to their lack of access. Furthermore, it can result in individuals accepting unjust and unlawful outcomes, and becoming disenfranchised and further marginalised, purely resulting from their inability to access the civil dispute resolution system.

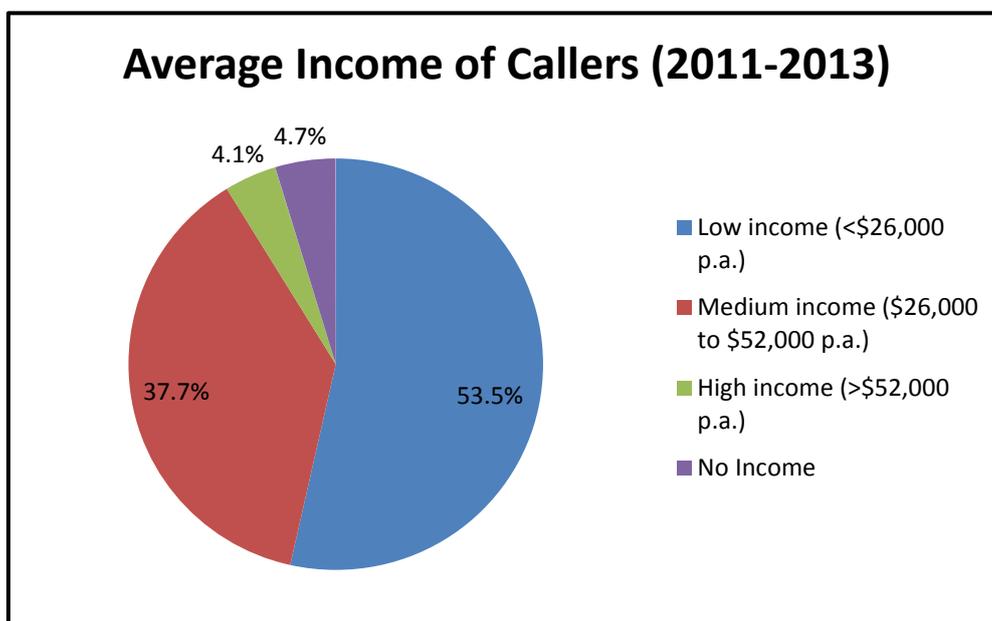
On an indirect level, the economic benefit to the community is a reduced level of dependence on government and community services to meet the needs that might otherwise have been addressed by the enforcement of legal rights.

### 3. Exploring legal needs

- a. *The Commission invites comment on how best to define and measure legal need. How does legal need relate to the concept of access to justice?*

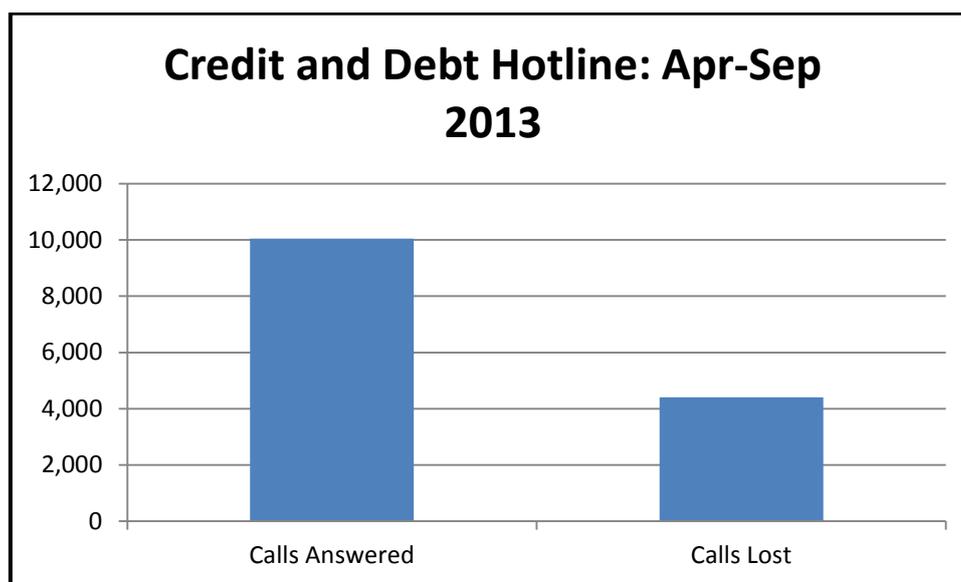
We will not attempt to define legal need here (others have done this far more effectively) but will refer briefly to some pertinent research on the topic relevant to our specialist area and give evidence on the specific expressed and unmet need signified by calls that are unable to get through to our service (that is people seeking help and not necessarily getting through).

There is a direct correlation between unmet legal need and access to justice; the higher the level of unmet legal need, the harder it becomes to access justice for these individuals. With the cost of seeking private legal representation prohibitive for many low-medium income people, individuals calling our service rely on the fact that our Centre is free. As the statistic below highlights, the vast majority of individuals seeking legal advice through our centre place themselves in the low income category (<\$26, 000 p.a.). The second biggest group is in the medium income category.



- b. *What constitutes unmet need in the civil dispute resolution system and how significant is it? How has the level of unmet legal need changed over time? What has driven this change and what evidence is there to support it?*

One indicator of unmet expressed legal need (where people have identified they have a need and are trying to seek assistance) in the civil dispute resolution system is the difference between the calls received and calls answered by our Credit and Debt Hotline and Insurance Law Service.



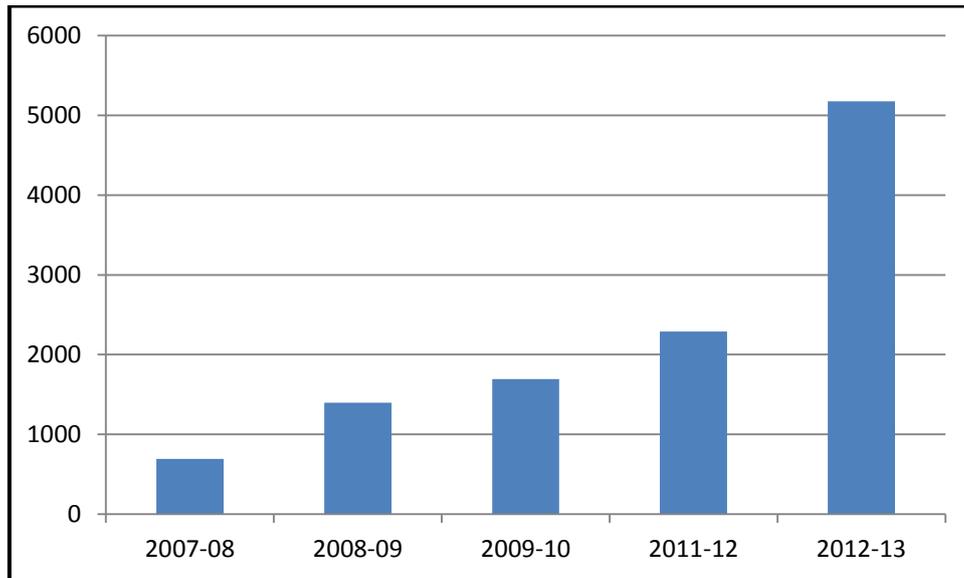
As shown above, approximately 30% of calls to the Credit and Debt Hotline are lost. A voicemail is available at the end of a 5 or 6 minute wait if the call has not been answered. Calls that are returned after a voicemail has been left are not counted as lost. CCLC cannot say how many of the calls that are lost get through later in another attempt. We also note that these lost calls represent only those members of the public who have identified that they have a need and that we may be able to assist. A number of reports have identified that many consumers do not even identify that they have a need and/or do not know where to go with their problem.<sup>22</sup>

Since the beginning of 2013 CCLC has lost 3 staff members due to the non-continuance of our Mortgage Hardship Service (one person in each of April, May and July) meaning that the above *calls taken to calls lost ratio* is likely to be deteriorating.

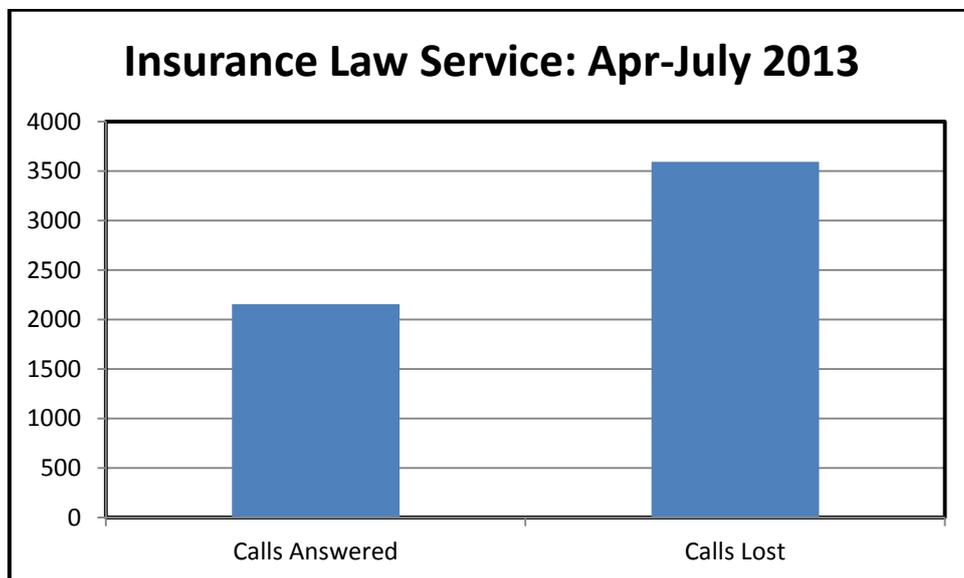
Our Insurance Law Service has an even greater problem with responding to expressed needs. As the only free, specialist, insurance law service in Australia, demand is high and the funding is at a significantly lower level than for our credit and debt services. The following graph shows the growth in calls to the Insurance Law Service since its inception in 2007 as a small pilot:

<sup>22</sup> Renouf, L & J foundation.

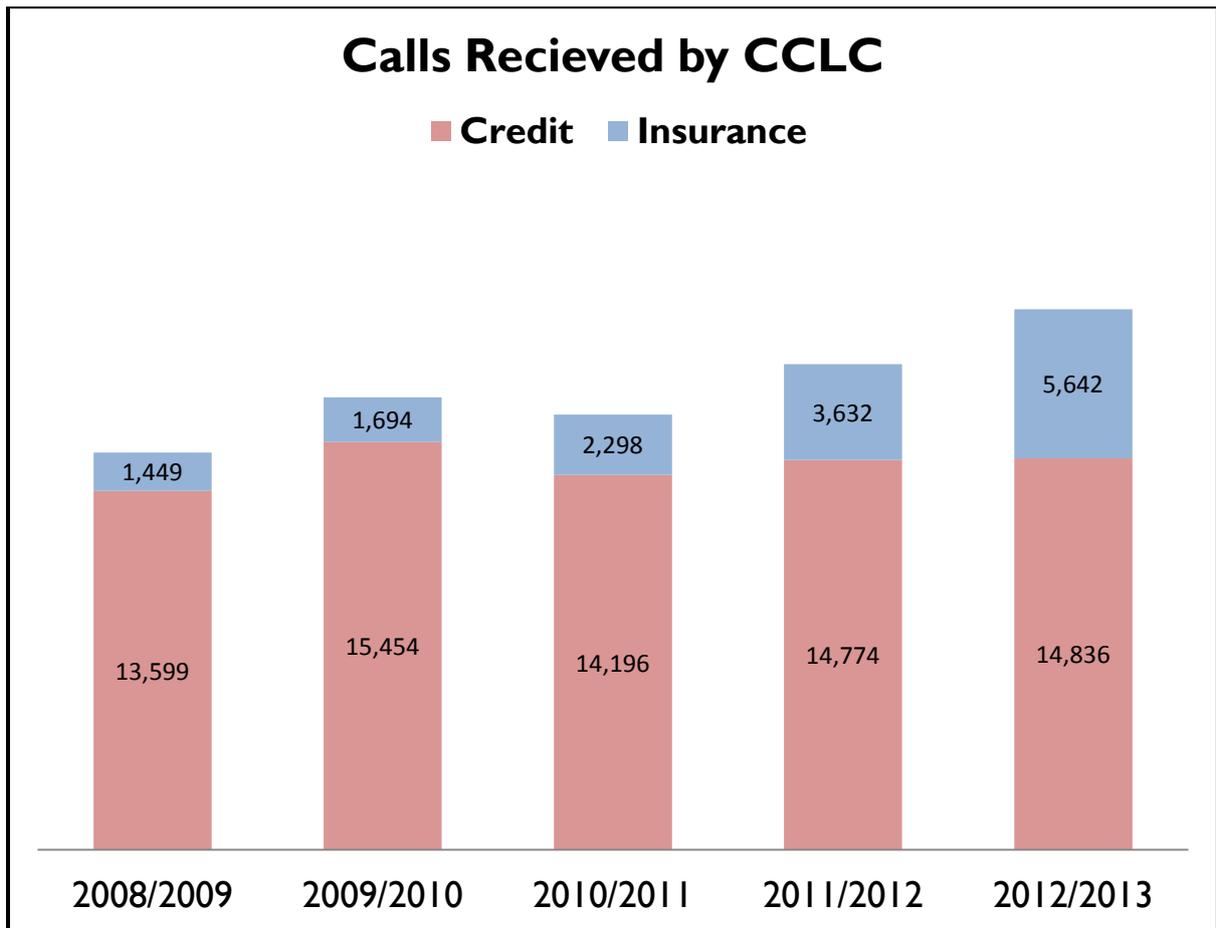
## Calls to the Insurance Law Service over time



In the period between 1 April and 31 July 2013 the Insurance Law Service took less than 40% of the calls received by our phone system data. This disparity between calls received and calls answered by the Insurance Law Service highlights the enormity of the unmet legal there is in this area of law.



The Insurance Law Service was funded in the 2012/2013 financial year at 16% of the level of funding we received (from multiple sources) for CCLC's credit and debt work (including but not limited to the Credit and Debt Hotline). Insurance work however was absorbing a disproportionate amount of our resources (28% of information and advice calls alone).



As a result, since August 12 this year, we have had to close the Insurance Law Service advice line two days per week to contain demand. Already this has posed a problem as we would like to be more available in relation to people affected by the recent sever bushfires in NSW but do not really have the resources to open the line. Our service has the potential to play a significant role in responding to natural disasters such as bushfires and cyclones and supporting local services with no expertise with insurance law. We can also play a big role in providing direct services to victims, but with such low levels of resourcing this potential is difficult to realise.

The report prepared for ASIC in 2011 in relation to Credit Legal Services in Australia made a number of tentative findings in relation to legal need in the credit and debt area. It estimated that credit legal services in Australia were likely to be meeting only 19% of the estimated need for such services.<sup>23</sup>

<sup>23</sup> Renouf and Porteous, pp5,6, 91 & 103. Admittedly NSW is probably meeting a higher proportion of the need than this national average as a result of having both a specialist legal centre and one of the only two legal aid services in the country with a significant credit and debt practice.

## The need for credit legal services has increased over time

The need for credit legal services has increased steadily over time as a result of:

- Greater availability of consumer credit;
- Increasing debt levels in proportion to income<sup>24</sup>;
- More complex product offerings (reverse mortgages, equity release products, credit cards and offset accounts linked to mortgages, complex consumer leasing arrangements); and
- The use of direct debits and Centrepay to target low income, disadvantaged consumers who would not otherwise have been considered good credit risks.<sup>25</sup>

The new credit regime is a big improvement over the previous regulatory arrangements. Nonetheless we envisage an ongoing and vital role for credit legal services within that regime to:

- Advise consumers of their rights
- Assist disadvantaged people (those with language and literacy problems, disabilities, and mental illness for example) to access dispute resolution
- Assist people with particularly complex problems and/or cases with a public interest component to access dispute resolution or court
- Ensure the ongoing quality, independent and accountability of the dispute resolution schemes
- Test the law where necessary by running Court cases (or referring potential class actions to interested private firms)
- Identify gaps in the new regime.

In relation to the last point, CCLC working in cooperation with the Consumer Action Law Centre and Financial Counselling Australia, lobbied ASIC to hold an industry and consumers Roundtable Meeting to discuss the business models and harm caused by a range of for-profit services that are operating in the financial difficulty space and do not appear to be caught by either the financial services regulations or the credit regime. We hope to continue to work with other stakeholders in this area to find creative solutions and, if necessary, further tweaking of the law to address these regulatory gaps.

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<sup>24</sup> This trend reversed after the Global Financial Crisis but many consumers are still carrying very high debt levels

<sup>25</sup> Pay day lenders and other small amount fringe loan providers have grown rapidly in the past decade and rely heavily on direct debits to ensure that they are repaid ahead of the clients other necessary expenses. Household goods on consumer leases have been widely marketed to low income earners on the condition that they pay via Centrepay. Many of these products are far more expensive than even the most expensive credit card on the market and yet they are made available to those least able to afford it. Ironically Centrepay does not otherwise allow repayment of interest bearing loans via Centrepay, yet the effective cost of there rental agreements is far higher than most loans.

### **Case Study 3**

Our client, Adoni approached a company offering credit repair services. The company offered to assist him in disputing two default listings on his credit report. The company required over \$2,000 to be paid upfront which the client, an Aboriginal man in receipt of social security income only, commenced paying by direct debit. As Adoni had not signed a privacy consent form required by the company to approach his creditors no action was taken on behalf for a period of almost two years. The direct debit continued to operate despite no service being provided. Adoni cancelled the direct debit authority on a number of occasions only to restart it after pressure was applied by the company. Default fees were added to his account on each occasion. By the time Adoni came to see CCLC, some work had been done very recently without success and Adoni's credit repair was on its face in worse shape due to subsequent default listings (incurred in part because of the commitment to the credit repair company which the client could never afford). At that point Adoni had paid \$2,000 and allegedly owed well over \$2,000 more!

### **Case Study 4**

Our client, Amanda had \$70,000 debt in unsecured loans, including multiple credit cards and a personal loan. She was suddenly unable to work when she contracted cancer. Her creditors began to harass her for late payments and became quite stressed. She decided to sign up with a debt negotiation service who promised to negotiate with her creditors to get her reduced payments, save her from bankruptcy and, stop her creditors from contacting her. The service said that they have a 100% success rate for the clients. They charged 16% of her debts (\$11,200) to negotiate on her behalf. They said she could pay this off through fortnightly payments once she had paid \$2,000 upfront and the service would begin negotiating for her. 18 months later Amanda was being harassed by her creditors again. She contacted the service to find out why this is happening and she was told that they have not achieved any settlements yet. She was furious, but the service pointed out that the contract she signed states that there is no guarantee of the service achieving anything for her.

Amanda was even further in debt as her creditors continued to charge in interest, her creditors are threatening to take her to court, and she has spent \$7,600 on a service which has not done anything for her and still has to pay them another \$5,600 according to the contract. Amanda tried to seek help from the government agencies but she has been told there is nothing they can do and that such services don't even need a licence. CCLC has since negotiated her out of the contract with the debt negotiation service and obtained a refund. A financial counsellor (at another financial counselling service) has negotiated full and final settlement of her debts using money from a family law settlement.

- a. *What are the consequences of unmet legal need? For example, what are the social and economic impacts arising from problems that are either unresolved or escalate due to lack of access to legal assistance?*

There are three indirect consequences that can arise out of unmet legal need. These are:

1. *Consequences arising from the law not operating as intended*

This refers to benefits rendered, not only to individuals, but to communities generally from the proper operation of the law as intended. CLC's, through helping primarily disadvantaged people help to minimise harm to the individual and associated costs to the wider community where laws are pointless because they cannot be enforced.

Consumer and competition law, for example, is intended to ensure that businesses compete on more or less equal terms on the basis of their product or service offering and that genuinely reputable businesses are not outcompeted by those using misleading claims or peddling shoddy quality products and services. The effective operation of these laws should promote good value propositions in the market and give confidence to consumers to transact for the overall economic benefit of all.

2. *Consequences of an inefficient legal system*

CLC's, in providing initial legal advice to individuals ensure that clients are told at the very start of their prospects of success in court, if any. Clients might think they have a valid argument to make in court and overestimate their chance of success; CLC's in providing legal advice will often inform clients of issues such as the real costs of going to court as well as costs risk of the other party. While not every caller is open to such advice, the majority welcome practical guidance and will often settle their dispute on reasonable terms as a result of advice.

### **Example - Hardship and debt collection**

Many callers to CCLC are simply struggling to pay debts they legitimately owe. Often they have their back up about the comments or behaviour of the creditor or debt collector as a result of previous contact (a common example is a demand to pay a completely unrealistic amount by the end of the week). CCLC can often explain the legal consequences of non-payment, how to negotiate a realistic repayment arrangement, and where available, any rights of review either within the creditor or at external dispute resolution. The result of this is often that the person starts paying whatever they can afford towards the debt and makes an offer going forward that the creditor is willing to accept. Debt enforcement proceedings are avoided by the creditor and the debtor escapes additional interest, enforcement costs and the possible repossession of goods or real estate or even bankruptcy.

In other cases a CLC may be able to redirect the energies of the parties to ensure that inevitable losses are redistributed to the most culpable party in a chain of events.

### **Example – redistribution of loss to parties responsible (Case Study 5)**

In the course of assisting borrowers facing repossession proceedings in the NSW Supreme Court, CCLC obtained instructions from a client who was being sued for \$200,000 by a

mortgage credit provider. The house in question had already been sold (\$200,000 represented the shortfall on the mortgagee sale) and our client was a very young African refugee with a small baby and no assets. The likely outcome of the case was going to be that client would be forced into bankruptcy and the lender would be out of pocket for not only the \$200,000 but all their enforcement costs.

After getting further instructions in the matter CCLC identified that the client had been added to a loan application by her mother when she was barely 18. Her mother in turn had been the victim of a scam in Western Sydney whereby a developer, with the cooperation or at least neglect of other parties involved in the transactions, had sold a significant number of residential properties to refugees who had little means of repaying and poor financial and literacy skills. Most of the properties were financed with loans from mainstream credit providers that were “topped up” with expensive loans from fringe providers presented as the borrowers own “deposit”. The properties were generally overpriced (as the borrowers were unlikely to have any realistic understanding of the Australian property market) and most sold with large shortfalls when the borrower’s inevitably defaulted.

CCLC withdrew the client’s defence to the Supreme Court proceedings by the home lender and commenced action in the Consumer Trader and Tenancy Tribunal against the home lender and 4 other parties – the developer, the solicitor, the mortgage broker, and a mortgage manager. Redfern Legal Centre agreed to act for the client’s mother. Ultimately the matter was settled at mediation. Our clients were released from the debt and paid compensation which enable them to settle numerous other unsecured debts they had accumulated in their desperation to meet their mortgage payments. The other four parties agreed to meet a proportion of the settlement (the exact proportions were confidential), thus reducing the losses of the mortgage lender who was the least culpable in the affair and had otherwise been likely to have shouldered the entire loss.

CLC’s also efficiently use non-court based options The CCLC nearly always uses the external dispute resolution bodies established, such as EDR schemes, including the Financial Ombudsman Service, Credit Ombudsman Service Limited, the Telecommunications Industry Ombudsman and the Energy and Water Ombudsman, as the first port of call to resolve client disputes and complaints. In the last two years, for example, CCLC made 7,391 referrals to EDR, assisted with lodgement of EDR complaints (and in some cases acted for the client throughout the dispute) in 226 matters, and only conducted 41 matters in Court. Of the Court matters, about 60% were seeking temporary stays of eviction in home repossession proceedings.

The benefit that CLC’s provide in this sphere is therefore at least three-fold; not only do CLC’s provide clear legal advice upfront to clients (often resulting in the client changing their thoughts on going to court) they also assist in achieving realistic settlements once proceedings have commenced, and promote alternative dispute resolution mechanism which reduce the strain on an already overburdened court system.

### 3. *Consequences of externalities*

CLC’s in providing legal advice, often ‘unearth’ other related issues which could lead to external costs incurred by society. These are covered below in our answer to question c.

- b. *Given the finite resources that are available to respond to legal need, are there particular types of civil legal need that are less critical?*

There are many access to justice issues that are not in any way related to money. We refer to the joint submission by the National Association of Community Legal Centre and the state peak bodies which contains excellent examples of these. In the areas of law in which CCLC operates, it largely boils down to money, although there are many other relevant factors including preventing homelessness, preserving health, relationships and dignity and ensuring people have sufficient money to pay for vital medical care and essential living expenses.

It is tempting in this area to define the importance of a dispute by reference to its monetary value. While CCLC certainly receives calls from people who are arguably irrationally determined to pursue a few hundred dollars in principle (against all logical cost benefit analysis when taking into account the time, effort and risk), we have a real concern about assessing disputes more generally in terms of the quantity in dispute. Amounts of money are relative and a routinely applied default fee of \$30-50 for example, or the costs of credit on a pay day loan, can represent a significant percentage of income lost to a person on social security. This has consequences for the person concerned in so far as it impacts on their ability to meet basic expenses like food, shelter and energy, but also the government (and the taxpayer) who are providing the income support in the first place as it increases pressure about its adequacy, and on friends, family and charities who may be asked to make up the deficit when the person cannot afford to eat or is facing eviction.

- c. *What are the benefits to individuals and the community of an accessible civil dispute resolution system? How does a failure to provide adequate access to justice impact on individuals and the community more broadly?*

Access to justice can have enormously valuable benefits to individuals as the following cases demonstrate:

### **Case Study 6**

Janie's residential and investment properties were both insured.

Following the January 2011 floods in Queensland Janie claimed on her policies for the damage caused to her buildings and contents. The insurance company determined that the properties were flooded and paid out the maximum \$15,000 per claim under each policy for the total loss caused. We took on a dispute against the insurance company and argued in the Financial Ombudsman Service that the \$15,000 limit could not apply because the insurance company had not met its disclosure obligations with respect to the term limiting flood cover in the policy. We also disputed the hydrology report relied upon by the insurance company and argued that the loss was caused by stormwater, an insurable event under the policy with no monetary caps.

Just before the matter was to be referred to a Determination at the Financial Ombudsman Service, the insurance company accepted all claims for stormwater damage.

Janie was paid a total of \$480,015. The payout includes a payment of interest on the claim, and per the FOS recommendation and a payment of \$6,000 for the non-final losses Janie sustained for each of her three claims.

A complaint against the insurance company in relation to the poorly disclosed cap on cover was also referred to ASIC on the grounds that this was a systemic issue. Janie sent us word that not only won this battle for her but that we have inspired many other people in her town of Queensland.

There are also benefits at the community level. A Cost Benefit Analysis study conducted by Judith Stubbs and Associates for the National Association of Community Legal Centres found that the centres studied produced a net economic benefit to the community of 1:18 for every dollar spent operating the Centre.<sup>26</sup> CCLC in particular was assessed at 1:33 (meaning for every \$1 of government funding spent, CCLC provides \$33 of value to the community).<sup>27</sup>

The Cost Benefit Analysis took a strict view of economic benefit which only counted costs that would not have been incurred otherwise, not transfers of costs from government or companies to individuals. Thus an insurance claim that had been rejected and was later paid after CCLC raised a dispute resulting in a payout of several hundred thousand dollars to the client to rebuild their home did not rate as an economic benefit because it was a transfer from the company to the client. On the other hand, preventing unnecessary legal proceedings was counted as a direct economic benefit because these are costs that would not otherwise have been incurred by anybody (see examples of mortgage cases in **Case Studies 1 & 2** above).

In a case such as this, the costs benefit analysis may have allocated \$6,850 as the average cost of Supreme Court possession proceedings, \$213 as the cost of eviction by the Sheriff (should that have been necessary), and approximately \$11,000 in real estate agent commission (based on the median value dwelling in NSW at the time). This analysis did not take into account the difficult to quantify value of:

- Avoiding the need to move by the family, potentially interrupting social networks, education and other intangible consequences;
- Relief of stress and the consequent health and productivity benefits associated with this;
- Avoiding the possibility of homelessness. Some clients have high needs that cannot easily be met by rental accommodation such as where a disabled person has a substantially modified house. In other cases clients simply cannot afford rental accommodation commensurate with the size of their family – particularly if they have had the house for a long time and do not have a large mortgage compared to the size of the property;
- Retaining dignity and control

The consequences above can result in considerable costs on other parts of the community including government services, charities, schools and even employers.

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<sup>26</sup> Stubbs, J. & Associates, *Economic Cost Benefit Analysis of Community Legal Centres*, June 2012, p17.

<sup>27</sup> Stubbs & Associates, p61, “no particular high value cases were identified, however there is a benefit associated with most matters, the average benefit is quite high, and a very large number of advices are processed. Of particular interest, particularly with regard to mortgage disputes, the earlier the centre was involved particularly prior to legal action, the greater the benefit. The overall impression is that the centre deals with a range of people and matters and does this in a very efficient way, particularly not wasting people’s time and the centre’s resources where there is no case, and strategically following through on selected matters for a range of reasons. This is an effective use of community resources and is reflected in the high benefit cost ratio.”

While CCLC may sometimes steer people in the direction of bankruptcy if that is the most appropriate option for them, we also assist people to avoid bankruptcy in many cases. Sometimes this is in the very general sense that we assist them to make arrangements to either pay off or dispute their debts. At other times it is in the very real and pressing sense that they are already subject to bankruptcy proceedings:

### **Case Study 7**

In December 2012 CCLC received a call from a financial counsellor at Lismore and District Financial Counselling service in relation to a client from Byron Bay. The client was a Disability Support Pensioner in his early 50s. He owned a unit outside Byron Bay and was due to appear at a hearing in the Federal Magistrate's Court in Sydney at 2pm the following day! The hearing was a Creditor's Petition hearing at which the Strata Managers from his building were seeking to make the client bankrupt.

The client suffered from severe disabilities as a result of an accident. He had subsequently had a major heart attack and is now alcohol dependent, both of which contribute problems with attention and cognition. He usually has a carer but at the time of making contact with CCLC his carer had recently resigned and had not been replaced. He had no driver's licence and his usual mode of transport in and out of Byron Bay was hitch-hiking. He had a mobile phone only, with no credit for outgoing calls.

It transpired that the property the client was living in was worth \$250,000-270,000 and his only significant liabilities were \$19,000 owed to a bank and secured over the property, plus the \$15,000 in strata fees which had led to the bankruptcy proceedings. He had tried to sell the property but the real estate agent wanted \$1,000 upfront to list the property which the client did not have. If the client had been made bankrupt he would have lost not only the property but up to tens of thousands of dollars in trustee's fees, plus the restrictions and drawbacks of bankruptcy in circumstances where his assets significantly outstripped his debts.

A CCLC solicitor tried to negotiate an adjournment with the other party's solicitors without success. The financial counsellor in Lismore then organised for the client to obtain a Centrelink advance of \$1,100 to pay the upfront costs of listing the property for sale and an appointment with a real estate agent. The CCLC solicitor convinced the client to make the journey to Byron Bay to visit Centrelink and the Real Estate agent the morning of the Creditor's Petition hearing and for documentation proving that the property was listed for sale to be forwarded immediately to CCLC for inclusion in an affidavit. The CCLC solicitor drafted submission in support of an application for an adjournment and applied to the Court Registry for the client to appear by telephone. The adjournment was granted.

Since then several other court appearances have occurred and CCLC has enlisted the services of both Legal Aid Homeless Person's Outreach in Byron Bay (to witness affidavits) and the local Salvation Army service (to support the client in telephone hearings). The property has now been sold and the client has a considerable amount of money left with which to re-establish himself.

## Case study 8

Our client's family migrated to Australia in the early 80's from Macedonia. Our clients, the Markovskis, an elderly couple, jointly owned two units in Sydney with their son and daughter-in-law that were subject to mortgages paid by the adult children.

Our clients, the Markovskis worked as cleaners and their English skills were poor. Whilst they understood they owned both properties with their son, they had little understanding that they had joint obligations under the mortgage and in relation to strata fees. The son, who had primary responsibility in paying the mortgage, fell behind on the mortgage and the strata fees. Legal Aid NSW assisted him to get a hardship arrangement in place with the mortgage lender. In August 2009 a Statement of Claim was issued and served for the outstanding strata fees. The Markovskis did not respond to this because they did not understand it. After, 28 days judgment was entered against them for \$5,200 including legal fees.

Two days after the judgment was entered, a Bankruptcy Notice was issued and subsequently served on our clients. Again, not understanding the implications they did not respond to the Bankruptcy Notice so they committed an act of bankruptcy.

Between December and January Creditor's Petitions were served and a date was set for a hearing at the (then) Federal Magistrate's Court. Again all of this went over their heads.

In February 2010, the entire family were made Bankrupt by sequestration order in their absence by the Registrar of the Federal Magistrates Court. They received Statements of Affairs in the post and were contacted by the Trustee. 16 days after the orders were made they sought advice from Consumer Credit Legal Centre ("CCLC") after being referred by Legal Aid NSW.

CCLC applied for a review of the Registrar's decision. In the meantime on CCLC's advice, the family raised enough funds to pay the original judgment. CCLC commenced negotiations to have the sequestration order set aside by consent. Eventually it was agreed that the family would pay the Trustee's costs of \$3,000 and the legal costs of the petitioning creditor.

In total, the Markovskis paid \$11,000 to avoid bankruptcy. The original strata levy debt was \$3,000. This was unfortunate – but the costs of being made bankrupt would have been far higher.

Bankruptcy involves a number of significant costs, both monetary and non-monetary:

- Trustee fees can be substantial – often amounting to tens of thousands of dollars. A person who is made bankrupt in circumstances where their assets outweigh their debts will lose a considerable amount of wealth due to trustees fees and other costs of administering the bankrupt estate;
- There are numerous restrictions placed on the person's freedom to interact financially, to travel internationally and to obtain credit and access to other services in the future. This

may be appropriate where the person is genuinely unable to pay their debts but is a high cost to pay in circumstances where the bankruptcy could have been avoided;

- When a person is made bankrupt by one creditor, other creditors who would have otherwise been paid may lose out. For example, where a person has sufficient income to pay most of their debts and had intended to keep paying. Once they are bankrupt there is little motivation for them to do so. If there are insufficient assets to meet the person's debts, and the costs of the administration of their bankrupt estate, these creditors will not be paid and will have no recourse.

There is therefore considerable benefit to the client and to the broader community in preventing unnecessary bankruptcies.

*d. How frequently do Australians — including individuals, businesses and other organisations — experience substantial civil legal disputes including in the area of family law? What is the nature of these disputes?*

This is covered above in our opening comments about the number of calls to the service, in the section about unmet need.

*a. How strong is the evidence that a relatively small number of individuals account for the bulk of civil legal disputes at a given point in time and/or over time? How well does the legal system identify and deal with cases of persistent need?*

CCLC's service delivery experience is consistent with the findings of research<sup>28</sup> that a small number of high needs individuals have a large number of legal needs. This is not to derogate from the importance of providing efficient access to assistance for the larger number of people who may need advice on one issue, but that advice may be vitally important to the satisfactory resolution of their particular dispute and prevent their legal and economic position deteriorating. This is why we have structured our service delivery model to enable the bulk of clients to get what we hope is useful and timely help, while recognising that some of our clients will need intense assistance, often from multiple staff members (such as a solicitor and a financial counsellor) to address their complex, clustered needs.

### **Case Study 9**

Our clients were a couple who approached us when, having proposed a *Debt Agreement* under the Bankruptcy Act to deal with unmanageable unsecured debt, found themselves at serious risk of Bankruptcy and the consequential loss of their home.

They had proposed the *Debt Agreement* on the advice of a for profit debt advisory service without sufficient explanation of the risks and consequences. The wife in particular only had one debt and did not appear to be a suitable candidate for a *Debt Agreement*. The debt collector who was chasing that debt appeared to think so too because they responded to the *Debt Agreement* proposal by presenting and serving a *Creditor's Petition* in the Federal Circuit Court.

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<sup>28</sup> L & J survey

Both clients suffered from serious stress and health problems. The husband had incurred most of his debts by running up credit cards for living and medical expenses when he suffered a heart attack and need hospitalisation on several occasions.

CCLC discovered that both clients had likely partial defences to a number of their debts, including the one that was the subject of the Creditor's Petition. A CCLC solicitor and financial counsellor then worked together to achieve the following over many months:

- Stopping the bankruptcy proceedings
- Getting the original credit provider to buy back the wife's debt from the debt collector and settle it for a lower amount with reasonable repayments and no interest
- Terminating the Debt Agreement
- Making settlements with 4 other unsecured creditors, including a permanent release from the debt in some cases
- An arrangement to get the mortgage back on track
- A refund of the debt advisory services fee
- An arrangement in place to repay a Centrelink debt.

Without this assistance these older clients would have been homeless in their middle age while facing serious health issues. Instead they are still in their own home and have a manageable repayment schedule for the remainder of their debts.

c. *What are the characteristics of individuals who experience multiple problems and what types of disputes are they typically involved in?*

As our Centre is a specialist Community Legal Centre, we provide legal assistance in only a small range of disputes. The disputes that our Centre takes on relate to credit/debt and insurance law problems. However, there are certain characteristics that are individuals who face multiple problems in these areas of law exhibit. These characteristics are listed below:

- Unemployment
- Illness and disability
- Low income/ welfare dependant
- Mental illness
- Lower educational attainment (although not always)
- Identification with a culturally and linguistically diverse (CALD) background

Our experience also shows that people can move from a fairly strong social and economic position to a situation of vulnerability very quickly as a result of as unemployment, illness, disability (their own or someone dependent on them) or relationship breakdown.

CCLC participated in a *Bring your bills day*<sup>29</sup> jointly hosted in Lismore by the local financial counselling service, legal centre and legal aid. Many attendees were aboriginal and once they had received advice about one bill or debt, asked if they could go home and return with a range of other similar problems.

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<sup>29</sup> *Bring your bills days* were piloted by a legal centre in Victoria and consists of bringing together a range of agencies with the capacity to advise on and or settle disputes to an area with a high population of disadvantaged clients.

Pay day lending clients also present at CCLC with many issues related to insufficient income. Often one pay day loan has led to another (either from the same provider or a different one) as they struggled to repay the debt including the high costs. It is not unusual for a client to have had 10 or more loans, many concurrently or back-to-back. They also tend to have a range of other issues such as fines and Centrelink debts. In some cases they are struggling with a mortgage and this has driven them to the pay day lender in the first place. Resolving these issues involved multiple strategies, not least of which has been lobbying government to prevent these harmful loans which only exacerbate disadvantage.

#### **4. The costs of accessing civil justice**

- a. *What evidence is there that the financial costs of civil dispute resolution are changing? Where in the legal services process and/or in which areas of the law are these changes in cost accruing.*

Without access to External Dispute Resolution the costs of civil dispute resolution in credit, debt and insurance would be untenable for the vast majority of Australians. Even if a consumer could access a private lawyer, this will often be of little assistance to the consumer because:

- Generalist lawyers have little or no specialist knowledge of credit, debt and insurance;
- If the dispute is small then the cost of lawyer is not worth it for the dispute – yet as discussed above, low value disputes are sometimes crucial, either to the individual or at the systemic level or both; and
- It is very difficult to afford a lawyer when the consumer is in financial hardship already - a significant proportion of EDR disputes relate to financial hardship, and those that are not primarily about hardship will often have a financial hardship component (allegations of unjust contacts or failure to comply with responsible lending, disputing a refused insurance claim where the person is dependent on the claim to meet essential expenses).

- b. *Can consumers readily judge the expected costs and benefits of taking action? Are perceptions of cost accurate? Should the legal costs of resolving common disputes be made more transparent?*

No, consumers cannot readily judge the expected costs and benefits of taking action. Some consumers are so intimidated by their perceived cost of going to court that they will not even pursue meritorious claims.

- c. *How should the economic cost of delay of justice be measured?*

Examples the economic cost of delay of justice to consumers:

- Interest on debts continues to increase as delays extend. This cost will eventually be worn by either the consumer or the lender depending on the outcome of the dispute, but either way speedy resolution is better. Where there is property involved, this accumulation of interest can erode equity significantly.

- Consumers may accept low settlement offers even on a strong case because they are worn down by the delay, or even drop out of the process altogether.
- There is a general cost to the economy when a consumer can't rebuild their house or buy a new car because they are waiting for an insurance dispute to be resolved.

d. *The Commission invites comments and evidence on the 'user friendliness' of the civil dispute resolution system.*

We reiterate that access to external dispute resolution (such as the Financial Ombudsman Service) is a vital component of workable access to justice.

e. *Does the way in which civil laws are drafted contribute to the complexity of the law, and could it usefully be reformed? Do legal practitioners contribute to complexity, and if so how? What, if any, incentives do legal practitioners face to contribute to a more user-friendly system?*

We have tried to limit complexity in civil laws every chance we get, but there are always loopholes that get left open and have to be closed with additional legislative language.

We support broad principles in legislation, where decision-makers can use discretion (ie a commitment to fairness; catchall provisions against avoidance schemes, etc)

f. *Which particular parts of the civil system are unnecessarily complex? Are there leading examples of reducing complexity and promoting transparency? How does complexity impact on parties to a dispute?*

Examples of overly complex parts of the civil system

- Credit Reporting
- General Insurance and Life Insurance
- Bankruptcy

The place for less-complex language is in the Industry codes – Australian Banking Code and Mutuals Code are both good examples of simple, clear and accessible rules.

g. *How important is face-to-face contact with lawyers or court officers? Does a lack of physical proximity represent a barrier to accessing justice? To what extent can technology overcome geographic barriers?*

While face-to-face contact is important with lawyers and court officers, it is not as big a hurdle in the 'access to justice' sphere as it previously may have been. Advancement in technologies available and especially the technological literacy of the wider population has ensured that the access to justice challenge is not insurmountable. There remains however, a number of people who are not able to access any technologies and need the benefit of face-to-face interaction.

Our Centre uses a variety of technological means to overcome the geographic barriers, without compromising on the quality or level of legal service provided. The use of technology perhaps even increases the efficiency of our Centre's operations. The Insurance Law Service, covering Australia and the Credit and Debt Hotline, covering NSW, provide advice solely over the phone. Clients have the ability to scan & email, fax or post any written correspondence they wish to have with the

Centre. The availability of email is particularly beneficial as it is a highly cost effective and time efficient method of written correspondence with parties who are often geographically isolated. The extent of our reach using these methods is covered in our opening section above.

Another initiative that the Centre has developed is an online inquiry form for the Insurance Law Service. Given that the ILS services all of Australia, callers may often find it difficult to 'get through' to a solicitor on the phone. They are informed of the option they have of submitting an online inquiry form. The form contains fields which the clients are asked to fill in. Solicitors then review the submitted inquiry and respond by calling the client with legal advice. This is often more efficient, as solicitors are accurately able to gauge the nature of problem/issue at hand and respond in a quicker timeframe.

By conducting the vast majority of our work over the telephone, CCLC preserves some resources to ensure that we can provide face-to-face access where required. For example, CCLC staff will travel to country locations around NSW to take statements from clients in complex matters or to appear in local sittings of Courts or Tribunals. We also conduct quarterly visits to different regional locations around NSW to provide education for local community workers and information and advice to local people who might not otherwise access the service.

- h. Which particular regions, groups or case types face geographic constraints to accessing the justice system? What are the costs to individuals and the community as a result of geographic barriers? Which particular mechanisms or jurisdictions have been effective at dealing with these barriers?*

Aboriginal and Torres Strait Islanders is a cultural group that often faces geographic constraints in accessing the justice system, purely due to the isolated location of their communities. CCLC has visited Aboriginal communities where ownership of a telephone was unusual. In such circumstances cooperation with local agencies (which may not be legal services) is vital as they may be the only means we have of staying in contact with clients for ongoing matters. Rural communities in general often have significant issues in accessing the justice system, again due to geographic remoteness and lack of services in these areas. Inability to access local face-to-face services is a key intake criterion for CCLC in offering both ongoing legal casework and financial counselling.

As stated above, CCLC makes quarterly visits to regional locations. In the last 12 months we have been to the Shoalhaven, Lismore, Wilcannia, Menindee and Broken Hill. We also conducted training for financial counsellors in Wagga Wagga. We have also recently redesigned a number of our resources in Aboriginal colours and designs, and part of our 13/14 strategic plan includes holding events with or for local Aboriginal communities on all regional visits where this can be arranged.

## **5. Is unmet legal need concentrated amongst certain groups?**

- a. What has driven the apparent growth in SRLs? What data are available on the numbers of SRLs and the reasons for self-representation?*

This Centre can confidently state that a key reason that there has been an exponential growth in SRL's is due to the increase in the costs of obtaining legal representation. The recent economic downturn, experienced since 2008, means that individuals often have much less disposable income

or savings, due to being adversely affected due to the global financial crisis. As a result, individuals are resorting to self-representation in the court system.

It is important to note that the increase in SRL's is not only in the lower socio-economic demographic. As outlined above, individuals who might earn above average wages, still cannot access private representation due to affordability.

*b. What is the impact of self-representation on opposing parties, courts and tribunals and the parties themselves?*

The effect of SRL's on opposing parties, courts, tribunals and of course themselves, is that they create system wide inefficiencies. Essentially, they undertake to do the work themselves that a qualified solicitor (and/or barrister), with years of training and formal tertiary qualifications, would do. This will have obvious effects on procedural efficiencies within courts and tribunals.

Courts are also compelled for reasons of natural justice to give a certain amount of leeway to SRLs in regards to procedural issues. This can create significant delays as ultimately irrelevant material is heard by the court "just in case" there is a valid point to be made somewhere.

SRLs are in some cases less inclined to settle matters on sensible terms, having regard to the likely result of the litigation. Sometimes this is as a result of not having access to good legal advice. In some cases, however, there is a determination to have the person's "day in court" that is more to do with principle than logic or expediency. While this can be an admirable goal in the right circumstances, at its extremes it can be a cause or a symptom of an unhealthy obsession. At the extreme, some parties — referred to as querulous or vexatious litigants — bring legal action that has no basis in law, often bringing multiple claims against the same defendants. The disproportionate pursuit of claims by these parties may come at great personal and financial cost, both to themselves and to other parties to the dispute.

While people should be entitled to self-represent if they elect to do so – it is in the broader public interest to minimise the number of SRLs who have not elected to take this path but are compelled to do so because they cannot afford legal advice or representation. Even more importantly, there are many sensible people with meritorious claims who would be so daunted by the prospect of self-representation that they would never attempt it. These people need access to advice and assistance.

*c. How does the legal system accommodate SRLs and does this take into account the attributes of SRLs themselves? How can parties best be assisted to self-represent?*

If self-representation is the only alternative, or the choice that the client personally elects, there are various things that can be done to assist such parties. These include:

- The provision of easily accessible 'self-help' materials. Providing materials or templates of the forms/letters/documents that SRL's will often need will greatly assist in making their submissions more uniform and more likely to be relevant.
- Timely advice about their prospects of success and the strengths and weaknesses of their case. They need to understand what will occur if they win (which may not be everything they are hoping for) and if they are unsuccessful.
- Advice and resources outlining the process/procedure of their claim. Setting a clear timeframe in the mind of SRL of the courtroom process/procedure that they are going ahead with will help manage their expectations. More importantly, SRL's will be aware of

what they need to do in order to proceed with their case. For example, how to gather and present evidence, what will be considered admissible evidence, and what will happen at each stage of the process.

- a. *Can indicators be used to predict disputes or the individuals more likely to experience them? How can early intervention programs be best targeted and delivered? How can the use of instruments, such as legal health checks, be used to best effect?*

Illness, disability, unemployment and relationship breakdown are key indicators for problems in relation to credit and debt, and in some cases insurance (denied claims for consumer credit insurance, life insurance, total and permanent disability insurance, income protection and travel for example). Targeting referral information at non-legal services assisting in these circumstances is good practice, but often difficult to achieve in a tight funding environment.

Indicators can be used to great effect to predict disputes or individuals most likely to experience them. As our Centre deals primarily with clients who are experiencing problems with credit and debt, default rates are an excellent indicator of individuals who are likely to experience problems and seek our Centre's assistance. Reports by credit ratings agencies such as Fitch Ratings, outline geographic areas that face problems with mortgage delinquency, for example.

Natural disasters are also a good predictor of insurance related issues. CCLC has now been involved to a greater or lesser extent in the aftermath of a number of bushfire, storm and flood events, all of which engendered a range of legal needs in relation to insurance, and related financial problems, such as inability to meet loan repayments. The ILS is well placed to provide this advice, and to act as a resource to local agencies which are better placed to assist geographically but may not have any relevant expertise. With funding for only 3 positions to service the entire nation, however, it is difficult to provide on the ground support at the same time as responding to calls on the advice line.<sup>30</sup>

## **6. Using informal mechanisms to best effect.**

- a. *The Commission seeks data on the number, proportion and types of disputes resolved through ADR and the relative satisfaction of disputants with the outcomes of using these mechanisms.*

While CCLC conducts most cases in EDR, we have initiated or defended a small number of cases in the previous few years in the Supreme Court, the District Court, the Local Court, the CTTT, Federal Circuit Court and the Federal Court. All but three or four of these matters have ultimately settled at mediation or conciliation. We are very supportive of ADR processes.

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<sup>30</sup> Better resourcing of the ILS to perform this function was a recommendation of the House of Representatives Inquiry into claims handling following the catastrophic floods in Qld in 2011 - House of Representatives, Standing Committee on Social Policy and Legal Affairs report, *In the Wake of Disasters*, Recommendation 10

b. *The Commission invites comments on the scope and operation of ombudsman services in Australia.*

CCLC is very supportive of the Ombudsman Services and other external dispute resolutions services in our area of operation (credit, debt, insurance, utilities and telecommunications). Industry based External Dispute Resolution schemes, where membership is required as a condition of licensing, and independent governance and oversight approved according to benchmarks and strict criteria, have been the greatest advance for consumer rights in Australia. The following is an extract from the joint consumer submission to the current independent review of the Financial Ombudsman Scheme, co-authored by CCLC and the Consumer Action Law Centre after consultation with a number of other consumer organisations and a survey of 136 financial counsellors from around Australia:

FOS is providing an essential service of a high standard and should be congratulated. Contributors to this submission on the whole consider FOS to be a fair, accessible and effective dispute resolution scheme for our clients, though some concerns are raised below.

FOS provides access to justice to people who would struggle to access it otherwise, and it provides an alternative to more formal dispute resolution through the courts. The performance of FOS's Insurance area over the last three years is a case in point—it has provided thousands of people with access to review following natural disaster claims in circumstances where very few could have accessed the courts.

Contributors also praised FOS's work in identifying and publicising systemic problems and in particular FOS's guidance on how it responds to common problems (such as The FOS Approach to Financial Difficulty). In our view the availability of detailed guidance of this kind ultimately creates a more efficient process by helping applicants and advocates prepare applications and gather evidence. It also assists with consistency in decision making.

In addition to the good work done by FOS specifically, a good external dispute resolution scheme brings a number of benefits:

- It creates space for calm resolution of a dispute. This is especially important in, for example, cases of debt collection harassment. Debtors can feel that collection processes move very fast, that they are constantly under pressure by the debt collector and what happens is largely out of their control. Once the EDR application is made, the constant contact stops, the debt collector is more likely to respond to requests for information (such as proof of debt) and requests for payment plans. As one financial counsellor remarked —I like working with FOS. The ability to lodge a dispute empowers our clients and makes the creditor take the matter more seriously and usually results in a better outcome.
- Accessible, high quality dispute resolution improves the efficiency of markets generally. Where consumers cannot easily complain about poor treatment and seek redress, dishonest traders hold a competitive advantage over more responsible traders. Effective dispute resolution reduces the incentives for poor conduct.

- c. *What data are available on the frequency and timeliness of disputes resolved through ombudsman services? Are ombudsmen an efficient and effective way of resolving disputes with government and industry – where do they work best? How might ombudsman services be improved?*

There have been many complaints in recent years about delays in EDR, including from consumer representatives such as the CCLC (these concerns were outlined in detail in the joint consumer submission referred to above). It is important to keep these complaints in context. EDR is still faster than court action in most cases, certainly faster than defended court action. While creditors could certainly enforce debts that are not defended with reasonable speed through the court system, this effectively denies any form of empowerment or redress to the majority of individuals who would not have the knowledge, confidence or resources to defend legal matters.

The major EDR schemes in the credit and financial services area are both entering a consolidation phase after three years of rapid increases in numbers of members and complaints as a result of the introduction of compulsory EDR membership under the credit regime (commencing in 2010). Complaints numbers are now levelling off and even reducing in some cases. Both schemes are now targeting delays as a major priority and we believe these concerns will be addressed.

## **7. Improving the accessibility of tribunals**

In NSW we currently have the Consumer Trader and Tenancy Tribunal (CTTT) which is an amalgamation of the old Consumer Tribunal and the Residential Tenancy Tribunal.

In 2014 the CTTT will be even more widely merged with additional tribunals. This further consolidation in NSW is in line with similar tribunals in other states: VCAT, ACAT (ACT) and the QCAT.

The consolidation in NSW has yet to take place, so it is difficult to judge in abstract. However, the fusion of the Consumer Tribunal and the Residential Tenancy Tribunal to create the CTTT did have some consequences.

Generally speaking the negatives of the merger were:

- a. The watering down of specialisation (members needing to know a little over a lot)
- b. Where decisions are incorrect ensuring appropriate and accessible routes of appeal. Notably the change from an appeal from the CTTT to the District Court from the Supreme Court
- c. Delays in setting hearing dates due to complexity of lists
- d. Inconsistent approaches to hearing matters

The positives of the CTTT in general include:

- i. Normally the jurisdictions have a limit on money awarded
- ii. It is generally a costs free jurisdiction – so there is no risk of costs for consumers
- iii. Rules of evidence do not apply, which makes the Tribunal more accessible.

Our main submission is that lawyers should need leave to represent complainants. In NSW, in matters commenced by unrepresented litigants we routinely saw the defendants being represented by “in-house legal counsel”. The defendants were not seeking leave to appear. In trying to promote access to justice in informal tribunals, where rules of evidence and other procedures are designed to ensure fairness and for unrepresented litigation.

## **8. Improving the accessibility of courts.**

### Discovery in the Supreme Court of NSW

The Supreme Court Equity division in response to significant costs, delay in lengthy litigation disputes adopted *PRACTICE NOTE SC Eq I Disclosure* in the Equity Division which included the following:

#### Disclosure

1. The Court will not make an order for disclosure of documents (disclosure) until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure.
2. There will be no order for disclosure in any proceedings in the Equity Division unless it is necessary for the resolution of the real issues in dispute in the proceedings.
3. Any application for an order for disclosure, consensual or otherwise, must be supported by an affidavit setting out;
  - a. the reason why disclosure is necessary for the resolution of the real issues in dispute in the proceedings;
  - b. the classes of documents in respect of which disclosure is sought; and
  - c. the likely cost of such disclosure.

The aim of the Practice Note is achieving the just, quick and cheap resolution of the real issues in dispute in the proceedings.

It is our understanding that the Supreme Court Common Law divisions also mooted the idea of adopting such practice across other lists, including the Possessions List. Whilst in some matters Discovery can become a time consuming, frustrating and lengthy process with little discernible outcome apart from the incursion of legal expenses, the adoption of a too rigid approach may have unintended consequences.

As a community legal centre that regularly represents defendants in Possession matters (a mortgagee exercising its power of sale), our clients are invariably disadvantaged, often culturally and linguistically diverse, sometimes elderly, and have little recollection of events, parties (to a contract) and rarely have documents. In preparing matters in those proceedings, Discovery is often essential for the legal practitioners to fully understand the real issues in dispute prior to the serving of evidence. Often discovery orders are sought, particularly where there are multiple parties to the disputed transaction such as lawyers. It also aids with the early settlement. In our experience plaintiffs rarely want to provide copies of relevant documents unless through discovery and without the benefit of discovery clients will be disadvantaged in the litigation.

Reform of discovery needs to take into account that not only will it affect corporate litigation but may have consequences in other proceedings and may limit a parties access to justice.

- a. *How and to what extent do the current approaches to expert evidence impact on access to justice? In what areas do issues relating to experts particularly affect access to justice? How could they be reformed to improve access?*

### **Case Study 10**

The CCLC is acting for a family with seven children. The clients were caught up in a property scam in Western Sydney<sup>31</sup>, involving a property developer who would provide vendor finance and arrange loans on behalf of borrowers to buy properties at an inflated price. Inevitably, the clients were unable to keep up with the payments, and the property was subsequently sold at a significant loss. ASIC had obtained an enforceable undertaking under the ASIC Act from the property developer, and our clients attempted to claim compensation. The matter did not settle and legal proceedings were contemplated.

Senior Counsel was briefed on a pro bono basis as it was apparent the matter was not going to settle and additional parties were involved including negligence claims against a former solicitor. Counsel was briefed and initial advice was to commence in the Federal Court of Australia. CCLC looked into the filing fee requirements of the Federal Court, but the clients were not entitled to a continuous exemption and would need to make a fresh application each time a fee arose under financial hardship because:

1. Legal Aid was not available in a Federal Civil matter of the type the clients contemplated;
2. Further, Legal Aid was not necessarily required as CCLC was acting pro bono as was senior counsel;
3. The clients were not concession-card-holders; they were on modest incomes derived from paid employment.

Our clients were struggling financially at the time of the initial application; however, there was no guarantee that the ongoing fees that may arise would be exempted as the matter progressed, or that the fee would be exempted at all by the Registrar. The clients' income, debts and liabilities were and are at a time of flux.

The CCLC as a community legal centre acting on a pro bono basis may be eligible for a deferral of fees. However, the deferral is for 28 days or as directed by the Registrar in writing. No guidance is provided as to when a Registrar may then require payment, or if any circumstances existed in which the fees could be deferred indefinitely or remitted. Because of the lack of certainty about the Federal Court Fees, CCLC (with the advice from Counsel) chose to pursue alternative venues for their matter to proceed.

At the NSW state level, the Court Fees Guidelines give litigants greater certainty. Fees are always postponed for pro bono or legally assisted parties, and after judgment, fees are never taken if judgment is against the party or they are successful but costs are not awarded (or damages nominal). The CCLC was required to reframe their case in the State Jurisdiction in the District Court even though Senior Counsel's preferred location was the Federal Court.

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<sup>31</sup> Same scam as **Case Study 5** above but different clients.

The following is from CCLC's recent submission to the *Standing Committee On Legal And Constitutional Affairs* regarding its Inquiry into the impact of federal court fee increases since 2010 on access to justice in Australia.

The CCLC urges the government to reconsider its recent federal court fee increases. We consider them to be a barrier to accessing justice and a cause for further inequity in the judicial system. Low-income consumers like our clients are already financially disadvantaged as compared to their lender and retailer counterparts, and recent fee increases only accentuate that disadvantage.

CCLC recommends that the Court:

- a. Limits overall fee increases for litigants who are persons and not companies
- b. Extends the General Exemption from paying Court Fees to include individuals who are represented by a Community Legal Centre (CLC) or pro bono.
- c. Abolishes Deferral Systems due to the administrative burden caused (see case study above).
- d. In the alternative, if deferral systems are to be kept then the following procedure should be used:
  - i. All fees must be deferred for a pro bono or CLC represented party until judgment has been given, and
  - ii. After judgment, fees are not to be taken from a pro bono or CLC represented party if:
    1. Judgment is given against the party, or
    2. Damages are not awarded or nominal damages are awarded, and costs are not awarded in favour of the party.

These recommendations are in line with the NSW Civil Procedure Act 2005 and the "Guidelines for the waiver, remission and postponement of fees."

- b. *What factors should be considered in determining court fees? How can processes for determining fee structures be developed to improve the incentives for disputants?*

In 2010 the state consumer credit legislation was transferred to a national consumer credit protection regime (*National Consumer Credit Protection Act 2009* (NCCP)). It was recognised at the time consumers would lose access to state tribunals, such as the Consumer Trader and Tenancy Tribunal in NSW. In return consumers gained greater access to free External Dispute Resolution schemes, such as Financial Ombudsman Service and Credit Ombudsman Service whom were provided greater jurisdiction and had mandatory membership and in addition they gained the small claims procedure under the NCCP Act in the Federal Circuit Court.

In CCLC's experience EDR providers have indicated reluctance in relation to decision making in respect of claims relating to unjustness or unconscionability, with a view that it is a remedy more appropriately dealt with by the court. It is not uncommon for loans, mortgages and other personal debt to exceed the small claims jurisdiction of \$40,000.

Consumers in NSW have lost access to a Tribunal, which provided a low cost alternative to access to justice. An application in the CTTT for an ordinary NSW consumer ranged from \$37 for a claim

under \$10,000 or up to \$197 for a claim exceeding \$30,000, or \$5 if you are in receipt of a concession card. This is significantly less than the Federal Court fees and Federal Circuit Court fees which range from \$180 in the small claims division to \$515 or \$1,080 in the Federal Court. The fees to commence proceedings in the Supreme Court or District Court are significantly more.

An applicant under the *National Consumer Credit Protection Act* could be seeking redress on a number of issues. Pro bono, legal aid and community legal centres cannot represent all potential applicants due to a lack of resources. In the small claims procedure, representation is not a right but rather leave needs to be sought for parties to be represented.

This leaves consumers seeking to self-represent in small claims or otherwise needing to seek an exemption on financial hardship grounds and required to complete a financial hardship application. In CCLC's experience this can be a daunting and frustrating task for consumers. CCLC runs a duty scheme in the Supreme Court of NSW in relation to home repossessions, as part of our functions we are often assisting consumers to complete applications to a NSW Registrar. We also assist consumers to complete statements of financial positions and applications to pay debts by instalments in our everyday practice. In our experience consumers are often incapable of completing applications correctly, often thoroughly underestimating their financial position or over estimating. In urgent applications, such as in Bankruptcy – for example a Review of a decision of a registrar (fee \$300)- there may be added urgency in the completion of the form.

Consumers in applications under the NCCP and Bankruptcy acts are often already in financial difficulty.

Consequently, it is CCLC's position that the imposition of high fees will push those who may be able to contribute some amount to paying the fee, to seek to defer the fee on financial hardship grounds because this is the only option. Further, we submit that financial hardship application approach is in itself cumbersome.

In addition, in the Supreme Court of NSW for example, the setting of a corporate entity filing fee does not take into account that often plaintiffs such as mortgagees, and strata bodies under the Strata Schemes Management Act (NSW,) have contracted or legislative indemnities whereby the ultimate payer of the fee is the defendant as a third party payer. A client facing financial hardship who has been served a *statement of claim* for possession of their home is slugged with the added burden of a \$3,000 or more legal bill for the filing and the preparation of a *statement of claim*. In our experience a defendant is often advised, when they intimate they may "defend" proceedings, that they will not only be paying for the costs of their own representation (unless they are undertaking it themselves) they are also effectively paying for the plaintiffs costs of the proceedings on an indemnity basis. A defendant may choose to give up legitimate legal rights due to the cost of the proceedings of both the filing fees (which they pay for) and the solicitor costs of the plaintiff.

When deciding court fees care should be taken to analyse the effect, or roll one effect this may have across the range of potential claims.

- a. *How difficult is it for legal aid services to attract and retain appropriately qualified lawyers as core staff? How well does the 'mixed' service delivery model work for the successful delivery of legal aid services? To what extent are the fees paid to private lawyers/law firms to undertake*

*legal aid work sufficient to attract adequately qualified lawyers/law firms? What other approaches (such as the use of vouchers) could be more effective?*

There is simply no evidence to suggest that CLCs, through the mixed service delivery model, are not achieving their mandate of helping the wider community with their legal issues and concurrently improving access to justice.

Promoters of this voucher model hypothesise that by establishing a market for legal services, there will be a much more efficient use of state legal aid resources. The efficiency is said to come from the market determination of the value of the vouchers. Furthermore, this system has been put forth to overhaul the existing system of funding provided to bodies such as CLCs, Legal Aid and other similar institutions.

Proponents of the voucher system fail to adequately account for the anticipated failures of this model. Firstly, it seems counter-intuitive to ask the disadvantaged to go through a bureaucratic and complex process to actually obtain the 'legal aid vouchers' in the first place. This is at complete odds with the notion that this system will facilitate access to justice.

Secondly, the likelihood of firms to compete for 'legal aid vouchers' is highly questionable. Given that the actual value of the 'legal aid vouchers' would be low, it is unlikely that many firms would compete with each other in order to secure these clients. The more likely outcome is that the holders of the 'legal aid vouchers' will have to search for firms who are willing to take on their case for the paltry value of the voucher.

The third and perhaps most convincing argument against the voucher system is small practices/firms who are envisaged to take on these 'coupon clients,' often lack the expertise, knowledge and resources to adequately serve their clients. Specialist CLCs, such as the Consumer Credit Legal Centre, have the resources, knowledge and experience to best help their clients. Large firms, who *might* have the knowledge and expertise to help clients, are unlikely to take on the clients, with their fees being constituted solely by the vouchers. These larger firms are often 'commercially conflicted out' of such cases, as their clients are often large corporations whom the individual wants to take on. CCLC, for example, has struggled to find pro-bono assistance in relation to any case involving a major bank or insurance company because the larger firms are all contracted to give advice to these entities.

In any event, we doubt very much that the large firms do have the expertise to deal with the types of issues confronting high needs clients, many of whom have multiple disadvantages and a range of interconnected legal and non-legal problems.

*b. What factors determine the volume and distribution of current funding for legal assistance at both the Commonwealth and state and territory level?*

In CCLC's experience the Commonwealth is under-contributing to the funding of our particular CLC. Credit has been national law since 2010 and yet the State Government remains our most substantial funder. It is appropriate that the States contribute as we still advise about State-based debt collection processes and home repossession processes. We also employ financial counsellors who have a wide remit covering State and Commonwealth areas of responsibility, and we advise and run some matters under State laws such as pawn broking and consumer claims. Nonetheless, a more

substantial contribution from the Commonwealth government would appear appropriate, especially as credit licensing revenue is being collected by the Commonwealth, along with the potential for any penalty successfully prosecuted by ASIC under the credit law regime. We also note that we are the NSW answer point for the free 1800 number promoted by the Department of Social Services (formerly Families, Housing, Community Services and Indigenous Affairs).

In relation to the Insurance Law Service, which is available nationally and consistently struggling to keep up with demand, less than a third of current funding comes from the Commonwealth Funding and the balance is provided by Legal Aid NSW. We submit that a very useful and workable service could be achieved with double the current funding (from about \$300,000 to \$600,000), with a larger contribution from the Commonwealth, and a very modest per capita contribution from each State and Territory. See figures repeated below in relation to the current proportional use of the service by the States and Territories.

ILS callers compared to population		
State/Territory	% Population	Advice calls
NSW	32%	36%
Vic	25%	29%
Qld	20%	20%
SA	7%	5%
WA	10%	7%
TAS	2%	1%
NT	1%	0%
ACT	2%	1%

Thank you for the opportunity to comment on the Inquiry into Access to Justice Arrangements by the Productivity Commission. If you have any questions or concerns regarding this submission please do not hesitate to contact the Consumer Credit Legal Centre on (02) 9212 4216.



**Karen Cox**  
 Coordinator  
 Consumer Credit Legal Centre (NSW) Inc  
 Direct: (02) 8204 1340  
 E-mail: [Karen.Cox@cclcnsw.org.au](mailto:Karen.Cox@cclcnsw.org.au)



**Katherine Lane**  
 Principal Solicitor  
 Consumer Credit Legal Centre (NSW) Inc  
 Direct: (02) 8204 1350  
 E-mail: [Kat.Lane@cclcnsw.org.au](mailto:Kat.Lane@cclcnsw.org.au)