Consumer Credit
Legal Centre NSW

November 2013

Submission to Post-Implementation Review on the Mortgage Exit Fees Ban:

National Consumer Credit Protection Amendment Regulations 2011inserting s79A prohibiting termination fees for certain contracts

Consumer Credit Legal Centre (NSW) Inc

Consumer Credit Legal Centre (NSW) Inc ("CCLC") is a community-based consumer advice, advocacy and education service specialising in personal credit, debt and banking law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We provide legal advice and representation, financial counselling, information and strategies, and referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC also operates the Insurance Law Service, a national service assisting consumers with disputes with their insurance company. CCLC took over 20,000 calls for advice or assistance during the 2012/2013 financial year.

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

Our Submissions

1. In response to the Consultation on the Post Implementation Review of the National Consumer Credit Protection Amendment Regulations 2011which inserted s79A prohibiting termination fees for certain contracts we take this opportunity to make these submissions.

2. **The Consumer Credit Legal Centre (CCLC) strongly supports the ongoing ban on termination fees on mortgages.**

3. In making these submissions we acknowledge that CCLC is not a market analyst. While we are not in a position to comment on the level of competition in the market place we make two observations:

    a. Firstly, there was some consolidation in the home loan market already apparent prior to the ban on exit fees as a result of the GFC; and
    b. Secondly that the apparent competition offered by lenders with significant exit fees was largely illusory.

4. CCLC has historically and on an ongoing basis provided advice to numerous consumers in relation to exit fees, both as deferred establishment fees and early termination fees.

5. As stated in our submissions supporting the ban in March 2011, CCLC has extensive experience including running a test case under the previous s72 of the Uniform Consumer Credit Code being *Broadfoot v RHG Mortgage Corporation Limited (Commercial)* [2009] NSWCTTT 447 (14 August 2009). We also ran a number of matters in External Dispute Resolution in relation to early termination fees and deferred establishment fees.

6. CCLC is of the view that termination fees, whether they be fees for early termination or deferred establishment has the effect of:

    a. Misleading consumers as to the cost of a loan; and
    b. Trapping borrowers in unsuitable loan products.

7. Consumers often reported being trapped in high interest loans, because they could not borrow enough to cover the exit fee upon refinancing. This left some borrowers in the position where they had to sell their homes even though they could have afforded a more competitive loan with lower repayments.

8. We contend that the bill has not had the anti-competitive effect that was forecasted by lenders. The bill has been effective in enabling competition in the mortgage market whilst in turn enabling open, fair and transparent terms and

conditions for borrowers in making choices and comparing products in the market place. In our view, the ban has effectively removed one route for a lender to gouge a borrower without substantially affecting competition to the detriment of consumers. Rather, competition has become more transparent as consumers are able to more easily compare products and their associated costs. We also observe that a number of lenders advertise that there is a ban on mortgage exit fees to encourage shopping around for a better deal.

9. We enclose Annexure A from our March 2011 submissions. The case studies demonstrate that:

   a. Consumers were trapped in loans and suffering detriment as a consequence of the exit fees; and
   b. External Dispute Resolution (EDR) was not equipped to handle the complexity of the review of fees on the basis of "unconscionability" as the EDR schemes express a view that such relief is more appropriately dealt with in Court. Tellingly, neither EDR scheme has made a determination in relation to exit fees to date.

10. Consequently, CCLC supports the ongoing ban on mortgage exit fees.

11. We note the introduction of ASIC Regulatory Guide 220 in November 2010 whose purpose was to provide guidance when an early termination fee may be unconscionable. We note our case study 4 of our original 2011 submissions the Credit Ombudsman Service Ltd (COSL) had yet to determine a matter relating to an exit fee of $27,000 over a loan of $552,500.

12. COSL decided Mr T's matter **after** the publishing of RG 220. The lender in that instance provided the following breakdown:

Loan Account ####### – DEF Estimate Summary

Loan Amount	= $552,500.00
Broker Commission	= 1.25% plus 0.3% upfront being ($12,155)
Other Warehouse Expenses	= 0.30% of the loan amount (approx)
Emerald*** Establishment Costs	= 0.38% of loan amount (approx)
*Lender A*** Group Costs*	
Variable Existing Costs	= 2% approx of loan amount (approx)
Fixed Existing Costs	= $1,365 per loan (approx) or 0.247%

*** Names changed

13. On the basis of the above explanation (and other evidence of payments being made that COSL purported to have seen) COSL determined the deferred establishment fee was **not** unconscionable and it appeared the DEF was a reasonable estimate of the costs incurred by the Lender.

14. Comparing the above purported costs with RG 220, they fall in our view in conformity with the types of costs recoverable under RG 220 albeit CCLC was concerned that no evidence was provided to CCLC and we needed to rely on COSL in being critical as to whether the evidence was sufficient that it was an actual cost incurred or genuine estimate.

15. In our view the application of RG 220 did not assist our client in relation to his matter.

16. Our client was never made aware of the significant costs of the loan because of the lender's complex fee structures in existence, which the lender will seek to recoup if the loan is paid out early. Our client was not able to make an informed choice as to the product. The ban on deferred establishment fees and early termination fees enable consumers to make informed choices when choosing lenders and choosing to switch between products.

If you have any questions about the above submission please do not hesitate to contact **Alexandra Kelly** on (02) 9212 4216.

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Appendix A

Case study 1

See *Broadfoot v RHG Mortgage Corporation Limited (Commercial)* [2009] NSWCTTT 447 (14 August 2009) Of particular note, is that the Broadfoots obtained the loan with RHG (then known as RAMS) in 1996.

The Broadfoot's mortgage was initially a "Better Home Loan" and it was marketed having no fees and no new fees introduced. It was at the time a competitive product. The Broadfoots purchased their first home. The Broadfoots paid the mortgage and it reduced over time, however, they decided to increase their mortgage at different stages of their life to pay for IVF treatment, purchase a vehicle and to renovate their home. It would be fair to say that this is not unusual practice for a person over a lifetime to increase their mortgage as borrowing against one's home is cheaper then personal loans or incurring credit card or other unsecured debt.

At each stage they returned to the RAMS broker that they first attended to increase their mortgage. The mortgage product changed to a RAMS Easy Start, at the time the Broadfoots were told because the new computer system could not handle the old product. However, this was denied at the hearing by RHG.

In 2008 RHG's interest rates were increasing above the increases of the Reserve Bank of Australia. The Broadfoots who were expecting their third child were struggling as Mrs Broadfoot was having a difficult pregnancy and could not work. They went to look to refinance, but on one income could not do so with the added exit fee.

Each time the Broadfoots extended the mortgage, the date on which the early termination fee was calculated changed to the date of the increase. So, whilst the Broadfoots initially got their RHG loan in 1996, in 2008 they were going to be charged according to the contract as though they had the loan for less than 4 years as the last variation occurred within that time. Further, even once the four years expired, there was an early repayment fee equivalent to 2 interest only repayments. This equated 1.2% of the loan balance.

Case study 2

Mr X took out a $325,000 mortgage to purchase his first home from a non-bank lender. In 2008 the interest rates increased along with the Reserve Bank of Australia. In 2009 whilst the RBA reduced its interest rates, Mr X's mortgage provider's rates did not decrease but continued to increase. In 2010 the rate remained at 8% whilst other lenders interest rates were as low as 6%. In April of that year Mr X received a letter from his mortgage provider offering to waive any applicable exit fee if he refinanced within the month. Mr X wanting to take advantage of that offer, and having found an alternative lender with better rates sought to refinance. He was one day late on the offer. Mr X was charged $4,500 in exit fees, of that $4,000 was a "fee for early termination"

Mr X took the matter to the CTTT. Mr X was able to recover $3,500 of the fee he paid in conciliation.

Case Study 3

Mr and Mrs L had a variable rate, low-doc, mortgage with a non-bank lender. The interest rate was 10% per annum. They were struggling with repayments when Mr L's business slowed in 2007. They put their property on the market to sell. They had an offer on the property that would discharge the outstanding debt. They contacted the non-bank lender and sought permission to exchange contracts. The lender refused to let them exchange contracts on the basis that the sum was not sufficient to discharge the mortgage including the exit fee of $4,500. Mr and Mrs L offered to enter into a repayment arrangement for the shortfall. The lender still refused.

The property remained on the market. Mr and Mrs L fell behind on repayments, a statement of claim was issued and judgment entered. Mr and Mr L were evicted by the sheriff. The property was sold by the mortgagee in possession for $100,000 less than the final mortgage debt.

Mr and Mrs L are facing bankruptcy.

Case Study 4

Mr. T was 68 and Mrs. T was 57, Mr. T was receiving an aged pension and Mrs. T was receiving disability pension. Mr. and Mrs. T owned two homes, they lived in one and the other was for investment purposes. Mr. and Mrs. T originally had a loan with ANZ and they got behind in mortgage repayments. This led them to refinance with Bluestone for a $552,000.00 loan in May 2005. At the time of refinance Mr. was a pensioner, his partner was a teacher's aid.

Shortly, after obtaining the loan, they started to fall behind. In order to repay the loan Mr. T and Mrs. T had to sell their family home to repay Bluestone. On October 2006 Mr. T repaid the loan plus a 4% deferred establishment fee of $22,100.

In reference to the Deferred Establishment Fee ('DEF') Mr. and Mrs. T had raised a dispute with the Credit Ombudsman Service Limited ('COSL') that the fee was excessive. COSL replied that the DEF was reasonable.

COSL noted that based on the detailed breakdown of the DEF provided by Bluestone, they are satisfied that the DEF represents Bluestone's reasonable costs of assessing the application and setting up the loan. In making the decision the fee was reasonable, no information was given to Mr. and Mrs. T on how the fee was justified.

On behalf of Mr. and Mrs. T, CCLC wrote back to COSL to ask for the evidence they reviewed in deciding the fee was reasonable. Bluestone then provided a piece of paper on how the DEF was calculated. It asserted certain costs but provided no evidence of the cost. CCLC challenged on the basis that this document should be accorded with almost no weight as it is just a document asserting matters. There is no evidence of costs and whether these losses were incurred, whether any of these costs were required to be disclosed or whether these costs are consistent with the CTTT decision of Broadfoot v RHG.

COSL after over 18 months, wrote back to CCLC detailing in their response that they had sighted referral agreements and snapshots of their system purporting to confirm the fees. CCLC were not provided the evidence and needed to rely on the judgment of COSL as to the legitimacy and the correct interpretation of the evidence purported to be provided to COSL.

Case Study 5

Mr F is 89 years old. Seven years ago he obtained a reverse mortgage over his residential home fixed at 8.9%. He looked into refinancing when the loan reached $492,000 into a different product and was told his exit fee was $27,000. About one month later he called CCLC back and reported that he had been told the following month that the exit fee had increased by $7,000. In this interim time, there had been no change to the RBA interest rates. He states the explanation the lender gave him was that his mortgage had been invested in an offshore securitised package. He was not aware of this at the time he obtained the mortgage.

In addition, Mr F's reverse mortgage has an establishment fee of 2% of the loan balance (being $6,400), this amount is payable if paid 6 months from the fixed repayment date. Mr F has been in the loan for almost 4 years and is still liable for the establishment fees. Even though Mr F could have 'elected' to pay it at the settlement date, the figure is "unascertainable"