Submission by the Financial Rights Legal Centre

Legislative Council
General Purpose Standing Committee No. 2

Inquiry into Elder Abuse in NSW, September 2015

November 2015

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About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the Credit & Debt Hotline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 26,000 calls for advice or assistance during the 2014/2015 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

For Financial Rights Legal Centre submissions and publications go to
www.financialrights.org.au/submission/ or www.financialrights.org.au/publication/

Or sign up to our E-flyer at www.financialrights.org.au

Credit & Debt Hotline 1800 007 007
Insurance Law Service 1300 663 464
Monday – Friday 9.30am-4.30pm

Introduction

Thank you for the opportunity to comment on Elder Abuse in NSW.

As a specialist community legal centre the majority of calls we receive regarding elder abuse relate to financial exploitation or manipulation. In the 2014-2015 financial year the Financial Rights Legal Centre (Financial Rights) gave legal advice or financial counselling to 3,383 callers who were over 50 years old. This makes up over 25% of the total advice calls we receive from consumers of financial services.

Examples of legal and financial situations that we have advised older callers about include:

- When a family member has taken the title deeds to an elderly person's house and mortgaged it without his/her knowledge.
- When an elderly caller was convinced (or forced) to sign as a guarantor or mortgagor for a loan to the benefit of a family member and now the bank is coming after him/her.
- When a family member or carer has gotten a loan against an elderly person's assets (usually their home) with their consent, but now he/she will lose it because the family member has not been making repayments.
- The elderly person's pension is being skimmed or money is being taken form his/her bank account by a family member.
- The elderly person is being denied access to, or control of his/her own funds by a family member or associate.
- Scamming of elderly consumers, including telemarketing scams, online love scams, gambling scams.

Financial Rights provides advice in relation to the above issues as there is generally a Financial Service Provider or product involved, such as a bank, bank account or credit card.

We also give general legal advice about reverse mortgages, credit card debt, funeral insurance and many other credit and debt issues relating to the elderly.

Unfortunately we cannot give legal advice or financial counselling on a number of elder financial abuse related issues including:

- The elderly person's belongings have been sold without permission.
- The elderly person's money or property is being taken improperly though the misuse of a Power of Attorney or Enduring Power of Attorney.
- The elderly person has been forced or unduly influenced or coerced to change his/her will, or sign a power of attorney.

- The elderly person has given family members money in exchange for their promise to care for them or build them a granny flat, and then the family member has not followed through with the promise.

Financial Rights cannot provide advice about these situations, as there is generally no Financial Service Provider who is a party to the dispute. The dispute will generally be individual to individual. Accordingly, in instances above, we would refer such matters to local community legal centre's undertaking generalist services or Legal Aid NSW.

Responses to Terms of Reference

1. The prevalence of abuse (including but not limited to financial abuse, physical abuse, sexual abuse, psychological abuse and neglect) experienced by persons aged 50 years or older in New South Wales

In 2013 according to Michael Franklin (coordinator of EAHRU) over half of the calls to the Elder Abuse Helpline and Resource Unit in NSW were about financial abuse.[1]

Since we are a specialist financial rights legal centre we cannot comment on the prevalence of financial abuse compared to other types of abuse, but we can confirm that over 25% of the callers in financial stress that we were able to advise last year were over 50 years old.

2. The most common forms of abuse experienced by older persons and the most common relationships or settings in which abuse occurs

The most common form of financial abuse that we see involves the older person borrowing money, which is provided to the benefit of a third party, usually a family member.

However, this cannot always be considered "elder abuse". There is a long history of case law in common law and equity that has arisen in respect of the position of parents when such loans go bad. Recently, the Court of Appeal in *Baira v RHG Mortgage Corporation Ltd* [2012] NSWCA 387 at [216]

> 216 The phenomenon of elderly parents with unencumbered homes guaranteeing business engaged in by their offspring is not novel. As Handley JA noted in *Davey v Challenger Managed Investments Ltd* [2003] NSWCA 172, the courts only see the cases where the businesses have failed and lenders seek possession under mortgages, without knowing "how many business ventures financed by parents in this way are successful for the benefit of the community and all concerned": at [24]. Handley JA further commented that the law did not treat "age and pensioner status" as disabling parents from assisting their offspring in this way. The implication of these statements is, presumably, that the courts should not be unduly ready to relieve parents of what turn out to be improvident agreements. It does not follow, however, that elderly parents are therefore without the protection of the law in respect of transactions believed, at least by the offspring, to be beneficial to their interests, regardless of the fact that they may thereby be putting at risk the sole family asset.

[1] Statistic from Michael Franklin (Coordinator of EAHRU). Meeting between Financial Rights Legal Centre (formerly known as the Consumer Credit Legal Centre) and EAHRU on September 19 2013.

217 The law provides protection with respect to family transactions where, for example, an offspring misrepresents his or her business circumstances or otherwise uses undue influence to obtain a benefit of a guarantee secured by way of mortgage from his or her parents, in circumstances where the credit provider is on notice: see, eg, *Commercial Bank of Australia v Amadio* [1983] HCA 14; 151 CLR 447 at 464 (Mason J). Credit providers anxious to avoid such risks will generally require that a party obtaining no apparent benefit from the financial accommodation (a "third party guarantor") should obtain independent financial and legal advice before entering into the transaction. In particular, both Mrs Baira and Mr and Mrs Ianni senior relied by way of defence and cross-claim on alleged unconscionability under the Australian Securities and Investments Commission Act 2001 (Cth), ss 12CA and 12CB, the Trade Practices Act 1974 (Cth), s 51AC and the Contracts Review Act 1980 (NSW). In each case, what was in fact merely a contingent liability under a guarantee was treated by RHG as an extant liability of the proposed borrowers which each sought to refinance, thereby acquiring, for the first time, a primary liability which they had no capacity to service.

218 A further common consideration, which has become of critical significance in relation to many lending arrangements over recent years is the insertion of various intermediaries between the lender and the borrower. In the present case, as is not uncommon, the application for finance was made through a broker, being a corporate entity acting through its principal, Mr Peter Famularo. Mr Famularo was accused of misconduct which led to a cross-claim against his business and against him personally. However, the broker being the agent for the prospective borrower, a defence to an action by the lender will require separate consideration as to whether the lender has acted unconscientiously in processing the application: see, eg, Perpetual Trustee Company Ltd v Khoshaba [2006] NSWCA 41; 14 BPR 26,639; Tonto Home Loans Australia Pty Ltd v Tavares [2011] NSWCA 389; 15 BPR 29,699.

The above passage highlights the tension faced in instances of elderly parents contacting Financial Rights Legal Centre in situations where a lender is seeking to take possession of mortgaged or guaranteed property.

Our solicitors and caseworkers need to identify when a matter may correctly be characterized as a moral obloquy or unconscionable situations compared with the alternative of an informed, astute person who has taken a risk. As the current case law demonstrates, not all elderly borrowers are relieved of their obligations by a mortgagee.

Below are several case studies of matters Financial Rights has assisted elderly consumers with, in circumstances of mortgages used to the benefit of a third party.

Case study 1 – Unaffordable mortgage for benefit of son

Our client was entirely reliant on his son in respect of financial matters. After the death of his wife, his son took over his account and held his ATM card and pin; he would give his father cash. Our client instructs us that he often had no money for food and had to rely on other

family members. Our client mortgaged his property, and the substantial benefit went to his son. The son had promised to make payments. It became apparent, when we were acting for the client that the son was using the father's account not for the purpose of paying the father's expenses but instead to pay the business expenses of the son.

The loan was granted in circumstances where:
- The client spoke no English;
- Relied on his son to translate;
- A broker acted as an intermediary between the bank and the client/son;
- A period of over 6 years elapsed before the situation became apparent, as the son was paying the loan. When the son ceased paying our client became aware of the seriousness of being an aged pensioner with a substantial mortgage.

From a legal point of view, the father had a claim against the son for the breach of fiduciary duties. The son was a trustee over the fathers account. However, the Financial Rights assisted our client with a claim against the bank. The bank agreed to reduce the mortgage to the amount that could be traced to our client's benefit, which meant that our client was able to retain his home.

Financial Rights then referred our client to seek advice about what changes or amendments may be made to his will, in the event that he wishes to leave his property to his other children and not the son.

Case Study 2– Fraudulently obtained reverse mortgage

Our client owned her home in Sydney outright. Having immigrated to Australia, and purchased the property in the 60's, her home was unencumbered. Her daughter, who suffered from a mental illness, was residing with her after the breakdown of her marriage. The daughter had formed an online relationship, and was sending large quantities of money overseas. Our client had her title deeds in the home, and the client's daughter was able to arrange a reverse mortgage over the property where all of the $220,000 was paid to the daughter. The funds were then transferred overseas. Our client eventually discovered a reverse mortgage over her home.

The reverse mortgage was granted in circumstances where:
- Our client was taken to the bank and her daughter served as the translator; and
- Our client's signature was forged, and witnessed by a Justice of the Peace;

Financial Rights acted for the client in the Financial Ombudsman Service. We were successful in having the reverse mortgage set aside by agreement with the bank.

Financial Rights has limited resources. Where a consumer is at risk of losing a substantial asset such as the principal place of residence, and a client meets our intake criteria of being without means of alternative legal representation and otherwise disadvantaged (among other criteria). Running the above matters is taken with a view of ensuring banks and financial service providers such as brokers are meeting their obligations under the Code of Banking Practice, the National Consumer Credit Protection Act 2009 and other relevant law.

Undertaking the above matters is resource intensive and time consuming for the Financial Rights Legal Centre.

Loan guarantees can raise similar elder abuse concerns, although as discussed above a loan guarantee by an older person is not in itself a sign of elder abuse.

A guarantee is where you promise to repay the loan if the borrower does not pay. The lender will ask for a guarantee when it thinks the borrower may have difficulty repaying the loan. Providing a guarantee is a big responsibility because if the borrower does not make all the repayments then the guarantor will be on the hook for the entire loan amount plus interest and fees.

Older people may feel pressured into signing a guarantee for a range of reasons. In some cases older people sign guarantees to preserve a relationship with a family member. In other cases a dependant spouse feels s/he has no choice because the family is dependant on the income generated by the business needing the loan. Whatever the reason older persons should get independent specialist financial and legal advice, particularly if the loan is for a substantial amount. Unfortunately older people may find it difficult to afford specialist financial and legal advice. It is noted that legal advice is limited to the risks of the guarantee and financial advice is often not specialised in this area. It would assist if the Government funded free specialist advice on entering loans and guarantees.

It also pays to remember that while many guarantees are never called upon, things can and do go wrong. In such cases, relationships (between spouses, parents and children and even grandparents and grandchildren) can be permanently damaged, and older persons may find them selves in serious financial hardship if the loan has not been repaid.

RECOMMENDATION

More funding for specialist community legal centres and financial counsellors that can help in disputes against a lender when an elderly person has entered a loan or guarantee in circumstances which are arguably in breach of relevant legal obligations.

Consider funding limited financial/legal advice for free to assist older people to make financial decisions.

Unsuitable or risky financial products

In addition, to the above examples of elder abuse by family members, Financial Rights also undertakes casework and policy reform in regards to unsuitable financial products or the sale of unsuitable financial products to older consumers.

Reverse Mortgages

A reverse mortgage allows older consumers to borrow money using the equity in their home as security. The loan can be taken as a lump sum, a regular income stream, a line of credit or a combination of these options. While no income is required to qualify, credit providers are required by law to lend to all consumers responsibly so not everyone should be able to obtain this type of loan.

Interest is charged like any other loan, except consumers don't have to make repayments while they live in their homes - the interest compounds over time and is added to their loan balance. Consumers remain the owner of their house and can stay in it for as long as they want. Consumers must repay the loan in full (including interest and fees) when they sell their home or die or, in most cases, if they move into aged care. Australian Government requirements under the National Consumer Credit Protection Act 2009 become operational on 1 March 2013. Under the amendments the holder of an Australian Credit License must, before providing entering into a credit contract for a reverse mortgage, provide projections of the borrower's projected equity in the property.[2]

For many older consumers a reverse mortgage is a great product that allows them to leverage the equity in their homes without having to sell. However, it is not the right product for everyone, and we have seen a number of older Australians put into this product improperly.

These products are very complex, and no older person should sign up for one without independent advice (that is, advice without another family member present, and advice independent from the lender). Advice should come from a private solicitor that is adequately insured to give this type of advice. Interest rates are generally higher in reverse mortgages than average home loans and the debt can rise quickly as the interest compounds over the term of the loan. In addition, the loan may affect an older person's pension eligibility and it might mean that they do not have enough money left for aged care or other future needs. Finally, if an older person is the sole owner of the property but someone lives with them, that person may not be able to stay in the home when the owner dies.

The introduction of reforms in reverse mortgage has to some extent reduced the financial harm that Financial Rights has witnessed over the years.

The biggest problem, in respect of these products has been the previous sale of a fixed rate reverse mortgage that attracts a large exit fee in certain circumstances. While early exit fees

[2] The projections are to be calculated using an ASIC approved website. See sections 133DA – 133DE of the NCA.

are now prohibited under the credit law, break fees in relation to fixed rate contracts remain legal provided they are clearly disclosed to the borrower. The break fee should reflect the lender's loss as a result of the contract being terminated early – usually the difference between the amount the lender would charge under the contract being terminated for the remainder of the fixed term and the current rate at which the lender is offering the same product (provided the current rate is lower than the rate on the fixed term). People enter reverse mortgages with the view that they will not exit the contract until they die or enter aged care but circumstances change and people can find themselves facing very large fees.

Case study 3 – Reverse Mortgage Break Fee

Client came to us after trying to sell her house and being told by the reverse mortgage lender that she would incur a fee of about 90% of the value of the credit obtained (over $90,000). Our client had been forced to become a full time carer for her disabled son. Later on, her husband was also forced to retire to assist in the full time care of their disabled son. They lived off his superannuation until it was depleted and they were desperate for further funds to be able to provide proper care for their son. They originally obtained a reverse mortgage of about $90,000. About 5 years later, they obtained a further advance of about $13,000 added to the original reverse mortgage. After the death of their son, they had separated but still lived in the home. About 5 years after taking out the second loan, our client and her husband decided they would need to move into a retirement village. Our client was mostly concerned about her husband's health and they both thought it would be beneficial for them to live in a retirement village.

When our client informed the lender, they were told that they would incur the break cost fee as they were voluntarily ending the mortgage early and that they didn't qualify under any of the exceptions. The lender advised them that had they sold the property in order to move into 'long-term aged care accommodation' then they would not incur the break cost fee. They defined this to mean "places of residence for people who require continual nursing care and have significant deficiencies with activities of daily living". They did not accept that a retirement village met this definition. We argued that this definition was too restrictive. There was no actual definition given in any of the loan documents and also that the definition of 'aged care' under Australian law (Aged Care Act 1997) encompasses a wide range of situations including residential care, home care and flexible care. The lender accepted this but required medical evidence and/or an assessment to be done by an Aged Care Assessment Team. Unfortunately our client's husband did not have an assessment done and so we could not argue further about the application of the exception to the break cost fee. Our client's husband had numerous health conditions including memory issues so our client had concerns that having an assessment done would trigger further deterioration.

Our client and their conveyancer requested for a break down or an explanation of what made up the break cost fee but was told that it was commercially sensitive information so no details were provided to them. The sale of our client's property was settled earlier this year. They paid approximately $148,000 in break cost fees alone. This is approximately 144% of the value of

credit that our client obtained. The break cost fee alone was about 45% of the amount paid by our client and her husband in order to discharge the mortgage.

We are currently putting together a brief, seeking Counsel's advice on challenging the break cost fee in court.

Case study 4 – Reverse Mortgage Break Fee

Our client obtained a reverse mortgage in 2006 of $50,000 at a fixed rate of 8.49%. In 2008 they obtained a further advance of $20,000 fixed at 9.59%. In about 2012, she and her husband who were by then in their late 70s had decided it would be prudent to move into a retirement home. She approached the lender to seek an estimate of what it would cost to pay out the reverse mortgage. The balance on the loans at that point were $89, 608 and $29,902 respectively. In November 2012 she was advised that the break fees on the two loans were under $20,000 each. By February 2013 the fees quoted were over $34,000. The client was horrified, having attended a seminar at the time of entering the original loan and heard another participant told the most it would cost to break the contract within the first 3 years was $1500. Clearly this was a reference to a deferred establishment fee, and not the fixed interest break cost. Our client did not understand the implications of the fixed interest product.

We provided the client with advice about her options for challenging the fees. In the circumstances they decided to remain in the home rather than risk losing such a dispute and being liable for the quoted fees. Two years later she rang us again, nothing had changed and she was very distressed.

Case study 5 – Reverse Mortgage Break Fee

A caller to our advice line had needed an urgent loan to visit UK in 2006. He had approached a broker who organised a loan of $60,000 secured over his home. He returned from the UK to pay the debt of $60,000 plus interest but was shocked when he was told the debt was $99,000 as there was a break fee. He says he was never informed by broker about this fee. The caller said he had been arguing over this ever since and it was 2015 when he contacted us. The debt was then $200,000 and the client 80 years old. We provided him with written advice on how and where to run the dispute, but some of the limitation periods would have already expired..

Again, these matters involve significant resources. To date, matters have been run in the Credit and Investment Ombudsman but without success. Ultimately, these will be matters that will require proceedings to be commences in Court. Our clients who are elderly and vulnerable can be reluctant to pursue matters in Court and expose themselves to costly litigation in the

event they are unsuccessful. In addition, by their very nature their age means that their recollection of events leading up to the entry into the product can be poor.

RECOMMENDATION

NICRI or equivalent refunded and specifically given funding to provide specialist legal and financial advice to older people on reverse mortgages.

More funding for specialist community legal centres and financial counsellors that can help in disputes against a lender when an elderly person finds themselves in an unsuitable reverse mortgage or in dispute over particular terms and conditions.

Pay day loans and pawn broking

Pay day loans and pawns are both types of financial products that we believe are often detrimental for older consumers. Although they are not as symptomatic of elder abuse as an unsuitable guarantee or mortgage, they can be the cause of compounding financial hardship for vulnerable consumers like elderly pensioners.

Pay day loans

Our advice and casework experience strongly suggests that despite the introduction of national responsible lending laws in 2010 and additional rules specifically for pay day loans in 2013, many consumers are still stuck in a harmful cycle of debt. Research has found that payday loans are often taken out to cover day-to-day living expenses rather than 'one off' expenses.[3] Consumers already struggling to make ends meet simply cannot afford to make repayments, and are caught in a harmful cycle of repeat borrowing.

For these low income and vulnerable customers pay day loans can be very detrimental and the industry's business model seemingly depends on this detriment to survive. According to a recent report by Digital Finance Analytics, the average income of payday borrowers has changed very little over the past 10 years. In 2005 the average income was $35.459 and by 2015 it has only increased to $35,702[4] which has not even kept pace with inflation. The average income for older Australians is lower than most of the general Australian population making them more susceptible to pay day lenders.[5] The DFA report also found that while older

[3] ASIC Report 426 (2015), 'Payday Lending and the small amount lending provisions', available at: http://download.asic.gov.au/media/3038267/rep-426-published-17-march-2015.pdf

[4] Digital Finance Analytics, *The Stressed Finance Landscape Data Analysis*, October 2015. Sec 3.5, Table 26. Available athttp://financialrights.org.au/wp-content/uploads/2015/10/The-Stressed-Financial-Landscape-Data-Analysis-DFA.pdf

[5] "Around 53 percent of those aged 65 and over have personal incomes concentrated between $200 and $400 per week, consistent with the reliance on an Age Pension" – from the "Older Australian Factsheet" by the ARC Centre of Excellence in Population Ageing Research (CEPAR), September 2014. Available at http://cepar.edu.au/media/136772/statistical_portrait_average_older_australian.pdf

borrowers were less likely than those in their 40's to use pay day loans, stressed seniors using pay day loans had grown from 1.6% in 2005 to 5.3% in 2015.[6]

In its recently released report on "Trends in the Australian small loan market" the Australian Centre of Financial Studies observes that

> *"a common characteristic of all small loan business models is that, because start-up costs are high and margins low, SACC revenue lines only tend to become profitable after the second or third loan. A lender's start-up costs include establishing a clear risk profile for each customer, developing an agreed method for checking a customer's credit history, and meeting the initial administration costs required to comply with regulations. In general, profits appear to be derived from chronic borrowers–and the international industry is built around maximising repeat business. SACC firms in Australia have adopted a range of models that take different approaches to minimising default risk, encouraging repeat borrowing, sourcing new customer groups, leveraging value from customer interactions, and instituting administrative and compliance efficiencies."*[7]

Amendments to the law to address repeat borrowing which commenced in 2013 have failed to achieve their objective. The DFA report indicates that the number of borrowers taking out multiple loans in any 12 months period had grown from about 17% to 38%.[8] In the same period the number with concurrent pay day loans grew from about 10% to over 29%.[9] The submission to the current review of the small amount credit contract laws by Credit Corp Group Limited, a corporation offering such loans until recently, indicated that of the 138,000 loan applications received in the eight month period to August 2015, 49% had already had two pay day loans in the previous ninety days and 36% had evidence of at least three such loans in the same period. [10] The net result of this is customers who are going without essentials, paying pay day lenders over other creditors, and turning to repeat and multiple concurrent borrowing to feed a cycle of unsustainable debt.

Case study 6 – Habitual use of pay day loans

Our client is 80 years old, entirely dependent on Centrelink and a tenant of the Department of Housing. He has been a habitual user of pay day loans for 10 years, predominantly for car repairs, but also for food and bills at times. In January 2015, with two other pay day loans already outstanding, he obtained a third loan to pay his car registration.

Despite relatively low repayments over a twelve month period, this loan was the straw that broke the camel's back and he could not afford the repayments.

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6 Digital Finance Analytics, op cit,Table 30, p25

7 Banks, Marcus, De Silva, Ashton & Russel, Roslyn "Trends in the Australian small loan market" Australian Centre for Financial Studies, School of Economics, Finance and Marketing, RMIT University, October 2015, p. 6-7. Available at:http://australiancentre.com.au/sites/default/files/NewsDocs/Commissioned%20paper%20-%20Trends%20in%20the%20Australian%20small%20loan%20market.pdf

8 Digital Finance Analytics, op cit,Table 13, p16

9 Ibid, Table 14, p17

10 Submission to the Review of the small amount credit contract laws by Credit Corp Group Limited, 15 October 2015, available at

Our solicitor had to ask the SACCs provider three times in writing before they would act on a withdrawal of his direct debit authority. In the meantime, another 6 attempts were made to take payment from his account which had insufficient funds, resulting in $30 in bank dishonour fees.

Case Study 7 – Unsuitable payday loans

Our 67 year old client has Parkinson's disease, Diabetes Type II (on insulin), short term memory problems and other physical issues. She lives in Government Housing. She has a disability and needs assistance to go anywhere. Her financial counsellor advises that she sometimes does not buy medicine in order to pay loans and bills.

In the period from October 2013 to April 2015 she has had 5 pay day loans.

It is also apparent from the lenders own document that she has at the time of the loan below one pay day loan that has just finished a couple of weeks previously (City Finance), and two other concurrent pay day loans (cash Converters and Loan by Phone). She also has a consumer lease and is repaying a lump sum to Centrelink.

Pawn broking

Pawn broking is another example of a financial product that can be very detrimental to vulnerable consumers like the elderly. Pawns are essentially the provision of secured credit, involving charges of interest and various fees. Yet it is under-regulated comparative to all other forms of credit, with only the unjust contract provisions of the Credit Act applying. With the exception of these limited provisions, pawn broking remains the jurisdiction of the state government.

It is primarily the most vulnerable and disadvantaged members of the community that access loans from pawn brokers, who are considered an option of last resort when consumers cannot access mainstream credit, borrow from friends or family or obtain food or electricity vouchers.

Pawn broking is often exploitative, and involves extremely high interest rates, fees and other set-up charges. In Financial Rights' experience, pawn broking contracts often charge interest rates exceeding 20% per month, with some exceeding over 80% per month. This is much higher than the cost cap currently in place for SACCs, and it is significantly higher than the 48% interest rate cap that applies to larger amounts of consumer credit. Under current pawn broking legislation there is also no protection for essential household items - there is a vast difference between pawning a car needed to get children to school and pawning old jewellery or DVDs.

Case study 8 – Unfair practices in pawnbroking

Mr H's sole source of income was Centrelink benefits. He was in his seventies. Mr H could not afford food and other necessities and was behind in rent on his Department of Housing accommodation, but was ineligible for a Centrelink advance. In desperation, Mr H contacted a pawnbroker seeking a loan of $500. The pawnbroker offered a $500 loan initially by phone, but when Mr H arrived at the business premises, the pawnbroker reduced that offer to $300. The pawnbroker did not make any enquiries about Mr H's financial position or his ability to repay the pledge. After a 15 minute discussion, Mr H was put into a pawnbroking contract for $300 which was secured by his car, valued at approximately $3000.

The contract imposed an interest rate of 83% per month, which was not disclosed on the pledge in breach of the disclosure requirements. The contract also imposed a 83% selling fee, and a REVS check fee of $60 (which is normally free). The pawnbroker also inserted into the contract, in the miniscule print, a provision stating 'I do not want to be notified of any surplus' from the sale of the car.

While there may be risks inherent in lending to low income and disadvantaged groups, pawn broking is a form of secured credit and the pawnbroker takes possession of the pledged item before handing over any money. Added to this is the consumer's heightened position of financial fragility and vulnerability, since pawning personal items is often a means of last resort. The position of bargaining power "will always rest behind the counter".[11]

Pawn brokers are currently significantly less regulated than the payday lenders they are competing with, who have similar customer bases but are subject to all the requirements of the NCCP Act, including licensing, responsible lending and external dispute resolution (free access to dispute resolution for customers). We are also aware of pay day lenders who run pawn broking businesses, and refer clients internally to their pawn broking business when the law prevents them from obtaining further pay day loans. This only serves to defeat the purpose of the responsible lending legislation.

Pawn broking is under-regulated compared to all other forms of credit, with NCCP only having limited application (s78 of the NCC). There is a risk of downward drift of predatory operators away from other types of credit and into pawn broking. Pawn brokers are not obliged to be members of External Dispute Resolution.

[11] Pawnbrokers thriving as poorest hurt in slowdown, Bloomberg, Business Day July 1, 2013 Read more: http://www.smh.com.au/business/pawnbrokers-thriving-as-poorest-hurt-in-slowdown-20130701-2p5uh.html#ixzz2eS6zUdcm

RECOMMENDATION

The State Government should institute a review of the pawn broking legislation in the light of the impacts of the national credit regime.

At the very least, pawnbrokers should be required to be members of an ASIC approved EDR service.

<u>Funeral Insurance</u>

Funeral Insurance is a financial product that we believe constitutes financial abuse purely in its existence. It is a poor value product and is very heavily advertised to seniors in an emotionally manipulative way. We consistently advise older callers that simply putting money into a high-yield savings account or paying off a funeral plan in instalments are much better ways to save for a funeral than signing up for this insurance product.

Funeral insurance is advertised at very low starting prices for premiums. Many elderly clients on a low income, especially those from Aboriginal or non-English speaking backgrounds, are attracted by what looks like an opportunity to ensure they are not a burden on their family members in the event of their death. What is not clear, however, is the extent to which premiums increase over time. One of our clients who spoke very poor English paid $16,000 before the payments became completely unaffordable and he was forced to stop paying the premiums, losing all hope of any benefit under the policy. In another case our client was an elderly lady who was left with $10 per week to live on after she paid her aged care living expenses and funeral insurance. She was no longer able to pay for her medicine. Many clients we talk to will never benefit from this product because it will inevitably become unaffordable. In the meantime they will have paid enough money in premiums to pay for a pretty decent funeral if they simply put the same amount in a savings account – in some cases paid a few times over.

Consumer groups have published a 13 point strategy for a fairer deal for older consumers in relation to funeral insurance (see attached Strategy, and recommendations below). (http://consumeraction.org.au/time-to-end-the-funeral-insurance-rip-off-a-consumer-strategy-for-a-fairer-deal/)

RECOMMENDATION S

1. Premiums should be fixed for the duration of the policy
2. Full disclosure of estimated total costs of a policy
3. Extend allowable policy arrears periods
4. Encourage the introduction of capped insurance products
5. Publish up-to-date information about funerals costs
6. Minimise policy exclusions
7. Improve reporting on policy attrition

8. Superannuation funds and life insurers should prominently advise consumers about coverage for funerals
9. Improve compliance with advertising prohibitions of mis-selling and deceptive conduct
10. Help older Australians understand the product
11. Promote alternatives
12. Improve disclosure and warnings
13. End the insurance industry exemption on unfair terms

Case Study 9 - Unaffordable funeral insurance

Mr A is 64 years old and in receipt of a Disability Support Pension. He has a mental illness as well as a physical impairment. He heard an advertisement on the television 6 years ago about funeral insurance for $2.60 a day. He rang up and took out the insurance, as well as another 'special' insurance that he was persuaded to buy when he was on the phone.

He is now being Direct Debited $48.50 per fortnight for the funeral insurance and a further $38 per fortnight for the other insurance. He can no longer afford it.

To his recollection he did not ask whether the premiums would rise and he could not remember if he was told they would verbally. He had never taken insurance of any sort out before. At the time the insurance was arranged he worked as a low income labourer. He never finished school, and he has a history of mental health problems including been treated chronic depression, schizophrenia and attempted suicide.

He recalls that a year into policy the insurer called him and offered an extension of his policy - from $6,000 cover to $7,000 cover. He could not remember whether they told him his premiums would change, and it was not until he saw his next bank statement he realised his premiums had risen.

Case Study 10 – Exclusions and Nonpayment

Mr J and Mrs B have had some form of funeral insurance or life insurance for at least 8 years. Mrs B had been suffering from non-Hodgkin's Lymphoma (cancer) over a long period.

After seeing an advertisement on television Mr J contacted the insurer. He was concerned as the premiums on his current policy were increasing. He spoke to someone at the relevant insurer who appeared to have some of his details, including telephone numbers on file. When questioned he was advised that Mr J may have "called before".

During the course of the discussion Mr J inquired about obtaining insurance only for $5,000. It appears from the recording he was doing this because his premiums with his existing insurer

were $56.16 per fortnight each. He indicated he was looking at an alternative product as his existing insurer "charged like the light brigade".

In the course of the conversation, the new prospective insurer convinced him to take his new product which turned out to be the same price ($56.16 per fortnight each for himself and his wife). However, it had a limitation that it would only cover "accidental death" (and not illness) in the first 12 months. The insurer indicated Mr J should cancel the first policy. He indicated the Product Disclosure Statement (PDS) would be sent within 5 days

Mr J indicates a number of times in the conversation he is having difficulty hearing. Mr J never received the PDS. Unfortunately Mrs B passed away within 12 months of taking out the policy and Mr J made a claim. The claim was rejected as Mrs B passed away from cancer and not an "accident". Mr J received the PDS and other relevant documents only after he contacted the insurer in respect of making a claim on Mrs B's policy (including a will kit for his wife who was by then already dead).

The matter was ultimately settled to our client's satisfaction after raising a dispute in the Financial Ombudsman Service.

ASIC has now released two reports in relation the Funeral Insurance available on their website. The recommendations contained in those reports should be fully implemented.

Anti-discrimination

Financial Rights remains concerned with the lack of safeguards and protections for the elderly in their dealings with the insurance sector. The ALRC noted in its 2013 report Access All Ages – Older Workers and Commonwealth Laws[1] that the elderly face difficulties in accessing information about available and appropriate insurance products; face limitations on the availability of insurance; and increased premiums and have benefits restricted as a result of the imposition of age restrictions.[2] These can have a significant impact on older persons' ability to find employment as well as negatively impacting upon their ability to empower themselves financially.

The ALRC made a number of recommendations in their report to break down discrimination on the basis of age. Financial Rights believes these recommendation warrant consideration by this current Inquiry. They include:

- The Australian, state and territory governments should review insurance exceptions under Commonwealth, state and territory anti-discrimination legislation. Currently the exceptions allow insurers to discriminate on the grounds of age in offering an insurance policy, or the terms or conditions upon which such a policy is offered, if certain conditions are satisfied.

[1] http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_final_report_120_.pdf
[2] p. 134

- The General Insurance Code of Practice and the Financial Services Council Code of Ethics and Code of Conduct should include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including mature age persons.[3]

These measures would be small but important steps towards empowering older NSW persons in their financial dealings.

3. The types of government and/or community support services sought by, or on behalf of, victims of elder abuse and the nature of service received from those agencies and organisations

From time to time, Financial Rights Legal Centre receives inquiries from consumers looking for services which we cannot provide.

For many years, when consumers were looking for advice in respect of reverse mortgage products and whether they were suitable, we would refer consumers to the free and independent National Information Centre on Retirement Investments Inc (NICRI). However, its funding was terminated and it was forced to close in Feb 2015.

NICRI had been an important source of 'independent' information for seniors on superannuation, retirement investments, financial advice, financial planners, estate planning, equity release finance and more. It was defunded by Government in late 2014, and its absence has left a gaping hole in advice services for seniors. Financial Rights regularly referred pensioners & retirees who were considering home equity release to NICRI. Now instead our legal centre has received many of NICRI's former clients but we are not in a position to provide a lot of preventative advice.

We currently receive vital referrals from other agencies about cases of suspected financial abuse, for example Case Study 2 - fraudulently obtained mortgage - was a referral from a financial counsellor. Financial counsellors operate throughout NSW and are funded through the State Government's Financial Counselling Services Program NSW administered by the Office of Fair Trading and the Financial Wellbeing and Capability Program administered by the Commonwealth Department of Social Services, and are a vital source of referrals in relation to a range of financial issues affecting older people in the community. In some cases a financial counsellor may be in a position to pick up on financial abuse issues that are hidden from all other observers. Financial counsellors are theoretically in all areas of NSW, but in our experience as central referral service, the coverage is in fact patchy and some large areas are seriously under-resourced.

Legal Centres, including specialist centres such as ours, are also a vital source of advice and assistance, often being able to follow through to resolve legal issues identified by financial counsellors and other community based services.

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[3] Recommendation 6.5
http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_final_report_120_.pdf

RECOMMENDATION

The Federal or State Governments should refund NICRI, or create a new free and independent service which provides information for seniors on superannuation, retirement investments, financial advice, financial planners, estate planning, equity release finance and more.

Ensure adequate funding of financial counselling and community legal centres.

4. The adequacy of the powers of the NSW Police Force to respond to allegations of elder abuse

No comment as to the adequacy.

Many financial service providers (FSP) when we raise disputes in respect of fraud (such as case study 2) request a copy of the police report made by the family member. It is true, that the conduct of the family member is a crime, and the existence of a Police report establishes that the conduct complained of it legitimate and not a fabrication of circumstances to persuade a FSP to bear the burden of the loss.

However, our clients are often distressed and reluctant to involve the Police. The circumstances of case study 2was a situation where the client was reluctant to report her daughter who was also in her view suffering a mental disorder. To our knowledge, the police did not pursue an investigation. Some would argue that is an "inadequacy" however, because our client it was a victim of elder abuse.

Our client wanted a referral and assistance to get her daughter help; she had previously been subject to mental health orders. Unfortunately, there were few resources our client could access outside of the Police and mental health for our client to access to assist her daughter in the grips of an overseas love scam.

5. Identifying any constraints to elder abuse being reported and best practice strategies to address such constraints

As a community legal centre we sometimes see examples of elder abuse as outlined in the case studies above. The difficulty for us is meaningful referrals for victims to obtain support beyond the legal support we can provide.

As outlined above, there can be reluctance for older persons to report instances of elder abuse by family members to the Police. As solicitors, we are duty bound to keep all information confidential except within the recognized exceptions under the Legal Profession Act and Rules which requires a higher standard than simply instructions or a suspicion of financial abuse.

There are limited free resources for independent advice in relation to transactions (such as mortgages, deeds and guarantees). Community legal centres are not resourced, funded or

insured to advice on the entry into financial products. Access to free Legal Aid is limited, subject to means and merit tests. Remedies from private solicitors can be expensive, and dwindle away the clients remaining assets.

Our legal centre will only provide advice to clients directly; we do not accept instructions from third parties as a means of advising clients. We from time to time, obtain receive calls from 3rd parties who are worried or concerned about a family member, but we are not well-placed to provide assistance.

6. Identifying any strength based initiatives which empower older persons to better protect themselves from risks of abuse as they age

Older persons should always be encouraged to get their own independent legal advice before entering into any major financial transaction, especially where they are not receiving a benefit.

Having an independent information telephone service like NICRI to call and get advice about financial products was a valuable resource for older consumers.

7. The effectiveness of NSW laws, policies, services and strategies, including the 2014 Interagency Policy Preventing and Responding to Abuse of Older People, in safeguarding older persons from abuse

No comment. We were not aware of such a protocol until this Inquiry.

8. The possible development of long-term systems and proactive measures to respond to the increasing numbers of older persons, including consideration of cultural diversity among older persons, so as to prevent abuse

As the case studies indicate, elder abuse can occur in culturally diverse communities. Some of these communities are vulnerable due to the isolation of the party, with reliance on their children and family members as translators.

9. The consideration of new proposals or initiatives which may enhance existing strategies for safeguarding older persons who may be vulnerable to abuse, and

The Australian Bankers Association has developed an excellent industry guide for protecting vulnerable costumers from potential financial abuse. That Guide states that bank employees should be trained to look for signs that could indicate a customer is being financially abused including:

- The older person withdraws a large or unusual amount of cash while accompanied by a new acquaintance

- The older consumer appears to be coerced into making transactions by a family member, friend or other person or does not understand or is not aware of recently completed transactions
- The older consumer remains silent while another party does all the talking
- The older consumer appears withdrawn and fearful (particularly of the person with them.
- The older consumer gives implausible explanations or is confused about what they are doing with their money
- The older consumer makes unusual, erratic or uncharacteristic transactions, such as sudden withdrawals from multiple branches or banking channels within a short space of time
- The older consumer appears to make transactions they would not be capable of doing, such as using an ATM or debit card despite being housebound or in hospital
- The older consumer registers for Internet banking, when all their prior banking has been at a branch
- The older consumer indicates they should have enough money to pay bills (e.g. they complain of having no heating despite the fact they can afford it)
- The older consumer expresses concern about missing funds, or personal or financial documents
- The older consumer indicates their mail is no longer being delivered to their home. [12]

There are actions lenders and financial service providers can do to help prevent financial abuse. For example:

- The use of family members as a translator should be discouraged for any transaction, financial service providers should be providing access to the Telephone and Interpreting Service (or equivalent);

- employees can ask clear, factual and non-threatening questions to learn the reasons for a suspect transaction, or thoroughly check the third party's authorisation and documentation to act for the older customer. In case study 1, the bank called our client a number of times, and accepted his broken English authority to speak to his son. He was never provided a translator to be clearly informed of his situation.

- Employees should question a form that has the customer's signature at the bottom but the rest of the form is filled out in a different handwriting. Employees should talk to their supervisor or internal compliance and fraud departments if a vulnerable customer is accompanied by a potential abuser, in order to get help to try to separate the customer from their companion so they can speak alone.

- Employees should not let anyone else speak for the customer unless they have the appropriate legal authority to do so. If an employee is very concerned they should consider delaying the transaction, transfer or payment if the customer is in immediate danger of losing money and refer the matter to a senior bank officer or legal counsel.

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[12] Australian Bankers Association, Industry Guide: Protecting vulnerable costumers from potential financial abuse, June 2013. Available at: file://cclcnswts/redirected/juliad/Downloads/ABA_Industry_Guideline_Financial_Abuse%20(1).pdf

Additional Case Studies of Elder Financial Abuse

Case study 11 - Unsuitable Loans for Daughter's Business

Mrs B owned her house outright. She had bought it decades ago with her husband and paid it off. Mrs B had a daughter that wanted money for her business and asked her mother for help. Mrs B got a loan of $60,000 only in her own name through a private individual around 1999 and gave those funds to her daughter for her daughter's business. At the time Mrs B had gotten her own legal advice.

From the beginning of the loan her daughter made interest only repayments. The loan agreement was only for 1 year at a time but each year when it was not paid off it kept getting extended. Mrs B's daughter put Mrs B's name as director/shareholder of the business at various points, but Mrs B never had any real involvement with the business.

In 2006, Mrs B's daughter wanted more money and said that if Mrs B didn't agree, she would have to move away to WA. Mrs B didn't want her daughter to move away so she got a second loan, this time for $120,000, through a non-bank lender. Mrs B was shocked to find out that the first $60,000 loan had not been repaid, so $60,000 of the new loan was used to refinance the first loan and the additional $60,000 all went to her daughter.

Mrs B signed whatever documents her daughter gave her, self-declared her income as $35,000 even though her bank account statement only showed her pension as income (this had been redacted, so the description of the funds as the "pension" couldn't be seen). Mrs B did provide a rates notice to the lender which had her pension rebate on it. Additionally, the ABN for the daughter's business was only two weeks old at the time of the loan. Mrs B's daughter was the contact person on the paperwork and the daughter witnessed her mother's signature on the mortgage.

Mrs B's daughter couldn't make the required repayments and stopped making payments all together. Mrs B's son paid off the loan for a while (about $50,000 worth according to Mrs B), he hadn't been involved with the decision to take out the loan but didn't want his mother to lose her house. When Mrs B's son wasn't able to pay the loan, Mrs B's daughter paid a bit more here and there. Mrs B eventually had to start paying off the loan with her pension funds, meaning she had very little to live on. At this stage Mrs B still owed just under $100,000. During this time Mrs B also gave her daughter $3000 from an advance on Mrs B's credit card which has never been repaid to Mrs B.

When the Financial Rights Legal Centre started assisting Mrs B it was clear she could not afford to pay off the loan with her pension funds, and she had received no benefit from either loan. Financial Rights lodged a complaint in the Credit Industry Ombudsman but the case was ultimately conciliated directly with the lender. The client accepted an offer of a life tenancy, reduced interest on the loan to 5% for life of loan, and Mrs B would need to pay $250/fortnight in loan repayments as long as she could, but if her situation changed and she couldn't afford to pay anything, she won't be required to pay and she can still stay in the property.

Mrs B accepted the lender's offer, and has decided she won't lend her daughter another penny.

Case study 12 - Unsuitable Line of Credit

Our clients, a couple in their late fifties went to a well-known non-bank lender to enquire about applying for a reverse mortgage over their (then) unencumbered home. They were then contacted by a broker who signed them up to a low-doc line of credit with the non-bank lender for $280,000 in Feb 2006 (they thought incorrectly that they were dealing with the lender at the time).

The lender's loan portfolio was subsequently sold. In 2012 the new lender demanded repayments because the couple had reached their credit limit. It was at this point that our clients realised that this was not a reverse mortgage. We raised a dispute with the lender, and unable to resolve the issue directly, lodged a complaint with the Financial Ombudsman Service ("FOS"). FOS found that our clients had no capacity to repay the loan from the outset and determined that all the interest and fees be waived, plus an amount for compensation.

Unfortunately out clients could not afford the remaining loan (over $190,000) and had to sell their home. However, they did have several hundred thousand dollars in sale proceeds after repayment of the loan with which to re-establish themselves.

Concluding Remarks

Thank you again for the opportunity to comment on Elder Abuse in NSW. If you have any questions or concerns regarding this submission please do not hesitate to contact the Financial Rights Legal Centre on (02) 9212 4216.

Kind Regards,

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