Consumer Credit Legal Centre NSW

August 2010

Submission to Consultation Paper 135:

Mortgage Early Exit Fees: Unconscionable fees and unfair contract terms

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 17,000 calls for advice or assistance during the 2009 financial year.

A significant part of CCLC's work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive

Our Submissions

1. In response to the Consultation Paper 135 Mortgage Early exit Fees: unconscionable fees and unfair contract terms June 2010 we take this opportunity to make these submissions.

2. CCLC has provided advice to numerous consumers in relation to exit fees, both as deferred establishment fees, early termination fees and break fees.

3. Further, CCLC has run 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 attach a copy of the decision[1].

4. We take this time to raise the concerns of consumers and the impact of these fees on ordinary people by way of case studies, and from CCLC's casework. We contend that exit fees, whether they be Deferred Establishment Fees (DEF), a fee for early termination (ERF) or a break fee can have the effect of trapping borrowers in unsuitable loan products causing serious detriment.

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 over time reduced, 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.

[1] The decision was subsequently appealed by RHG to the District Court. The appeal was abandoned when the matter was settled on confidential terms.

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 theses costs were required to be disclosed or whether these costs are consistent with the CTTT decision of Broadfoot v RHG.

It has been 7 months since CCLC's submission and we have not received a response from COSL.

Proposed guidance on unconscionable fees

B1Q1 Do you agree with our proposed approach that any fee that is payable on early termination is likely to be an early termination fee? Please provide reasons.

5. Yes CCLC agrees with your interpretation. The only fees payable on termination should be the limited administrative costs associated with discharge of a mortgage. Any other costs must be early termination fees. Any other interpretation would mean that lenders would be able to avoid the intention of section 78(4) of the Credit Act.

6. CCLC contends that lender's simply hide behind the "it's in the contract" without any due regard as to what the fee is purportedly recovering. We consider ERF or DEF would always be unconscionable if they are not referable to an actual cost incurred by a lender or a loss of a lender.

B1Q2 Are there any situations where an early exit fee is more likely to be a deferred establishment fee to which the test in s. 78(3) applies? Please provide details.

7. It is almost impossible for a consumer to understand in what circumstances the fees would be "more likely" to be a deferred establishment fee. Consumers do not choose to pay a deferred establishment fee or a termination fee. In CCLC's experience the consumer is usually unaware of the fee or unclear on how it is calculated.

B1Q3 to B11Q5 not applicable to CCLC

B1Q6 Do you think our proposed guidance will affect competition for mortgage services (eg. By causing some firms to exit the market, or preventing some lenders from offering particular products)?

8. CCLC contends that the ASIC guidance will not affect competition at all. In CCLC's view, the early termination fees are hidden fees. They are hidden at the back of the loan so consumers do not compare the fees when shopping for the loan. CCLC contends that this represents very poor disclosure. It also means that the competition in this area has been non-existent due to lack of consumer awareness.

B1Q7 Do you expect that our proposed guidance will affect consumer behaviour, such as potentially increasing or decreasing the rate at which consumers switch mortgages?

9. CCLC believes that the guidance will not have any effect on the rate consumers switch mortgages. There has been a large shift away from non-bank lenders to the major banks in recent times. The reasons for this shift appear to be uncompetitive interest rates, uncertainty about the stability of non-bank lenders and increasing fees. CCLC expects this shift to be maintained for the near future as the Treasurer regularly comments on major bank interest rates.
10. CCLC believes that in the future the market may shift back when the cost overseas funding reduces. We do not believe hiding fees in contracts is competitive in the long term.

B1Q8 Is there any further guidance we should give?

11. Yes. CCLC has a huge amount of difficulty working out what the "reasonable costs" are and how the fee is calculated. CCLC has been involved in at least two recent cases (in the Consumer, Trader & Tenancy Tribunal (Broadfoot case) and the Credit Ombudsman Service Ltd (Case study 4)) where the lender has refused to give any evidence of how their "reasonable costs" are calculated. The lender just produces a hand typed list of its costs with no reasoning on how these amounts are calculated (or reasonable). In CCLC's view this does not constitute reasonable evidence of the costs.

12. Consumers should be able to expect a process that lenders need to go through to evidence their costs. That process and the evidence can then be checked by an EDR Scheme. In this way, consumers can have confidence that the costs being charged are reasonable and actually being incurred.

13. A large difficulty with early termination fees (including deferred establishment fees) is that the fee can be changed throughout the loan with the use of the unilateral variation clause in the loan contract.

A recent case study on point is that when RHG ceased making new loans it unilaterally increased its termination fee. This is problematic because it would indicate that the fee has nothing to do with the costs of termination but in fact just represents an attempt to profit.

14. Another issue is that some lenders have "early" repayment fees that continue for the life of the loan. See the Broadfoot detailed case study below. CCLC contends that this is inappropriate and unconscionable as the lender must have recovered its costs after the loan has run for over 5 years. ASIC should issue guidance to the effect that this type of fee would usually be unconscionable as it has nothing to do with early repayment.

15. CCLC contends that a key part of the process for lenders should be:

    a. For deferred establishment fees – setting the fee as an amount from the beginning of the loan and clearly disclosing the amount. The fee cannot be unascertainable.
    b. Requiring that the cost only be disclosed as an amount
    c. Be able to provide evidence of their reasonable costs which would include:
        i. Payments to third parties and receipts for those payments
        ii. Independent verification of the other reasonable costs incurred.
    d. Fees over the course of the entire loan that purport to recover up front costs should be presumed to be unconscionable.

What is a reasonable estimate of the lender's loss for the purposes of section 78(4)?

B2Q1 Do you agree with the proposed guidance on when an early exit fee is likely or unlikely to be unconscionable for the purposes of the test in section 78(4) of the Code? Please provide reasons.

16. CCLC supports the guidance but notes that there is a real risk that lenders will simply rename costs to fit within any guidance ASIC may develop. The only way to stop this type of avoidance happening is to develop a detailed process for providing evidence of the real costs behind the fees. Although this issue is covered in paragraph 57 it does not provide any guidance to lenders on what evidence may be required. CCLC contends that examples should be given on the evidence (and what constitutes reasonable evidence) that may be requested by ASIC.

B2Q2 Are there any other types of loss which you believe form, or do not form a reasonable estimate of loss arising from early termination, apart from those listed at paragraph 54?

17. CCLC contends that the reasonable costs must be limited to the matters listed in paragraph 54. Otherwise, there is a risk that new and novel costs will just keep occurring. CCLC believes that costs to third parties for the set up of the loan should not be included in a deferred establishment fee. The reasoning behind this is that those costs must be disclosed in detail as part of the disclosure in the loan contract. Hiding them in a deferred establishment fee payable for early termination represents an attempt to undermine the objective of "truth in lending"[2].

B2Q3 to B2Q5 not applicable

B2Q6 Do you think the proposed guidance will affect competition for mortgage services?

18. Please see answer for B1Q6.

B2Q7 Do you expect that our proposed guidance will affect consumer behaviour, such as potentially increasing or decreasing the rate at which consumer's switch mortgages?

19. Please see answer for B1Q7.

B2Q8 Is there any further guidance we should give?

20. Please see answer above for B2Q8.

What are the reasonable establishment costs for the purpose of section 78(3)?

B3Q1 Do you agree with our proposed guidance on when an establishment fee is likely or unlikely to be unconscionable for the purposes of the test in section 78(3) of the Code? Please provide reasons.

21. Yes. CCLC repeats its comments on the importance of giving guidance to lenders on what ASIC expects when it states "We expect lenders to keep records on how they calculate early exit fees". CCLC believes "early exit fees" should be amended to "establishment costs".

B3Q2 Are there any other types of loss which you believe form, or do not form, part of a lender's reasonable estimate of loss arising from the establishment costs, apart from paragraphs 60 and 63? Please provide details.

[2] *Australian Finance Direct Limited v Director of Consumer Affairs Victoria [2007] HCA 57* Kirby J at [29]

22. CCLC believes that reasonable costs should be limited to the types listed in paragraph 60. This is to ensure the consumer's have certainty about what costs are reasonable and those that cannot be included.

B3Q3 to B3Q5 not applicable

B2Q6 Do you think our proposed guidance will affect competition for mortgage services (eg by causing some firms to exit the market or preventing some lenders from offering particular products)?

23. See answer to B1Q6.

B3Q7 Do you expect that our proposed guidance will affect consumer behaviour, such as potentially increasing or decreasing the rate at which consumer's switch mortgages?

24. See answer to B1Q7.

B3Q8 Is there any further guidance we should give?

25. See answer to B1Q8.

Detailed Case Study – Broadfoot v. RHG

Problems with disclosure

26. In the Broadfoot's RHG contract the fee was disclosed as follows:

    The Originator Charge (for payment to the Originator)
    Early repayment fee: payable if you repay the whole of your loan within 3 years of the settlement date an amount equal to 2.5% of the loan amount plus approved increases to the loan amount (if any). If you repay your loan after 3 years from the settlement date but before 4 years after the settlement date, an amount equal to 2% of the loan amount plus approved increases to the loan amount (if any). If you repay your loan after 4 years from the settlement date but before the end of the loan term, an amount equal to 2 months interest at your then current interest rate on the daily average balance owing on your loan account over the month preceding the payment – not ascertainable.

27. Further, RHG characterises the fee in the RAMS Mortgage Corporation Limited Home Loan Agreement General Terms and Conditions 15 March 2004 as:

We calculate interest rates and fees and charges on your loan, so that over the term of the loan, we will cover our costs of making and administering the loan and make a normal commercial profit.
For example, we incur a significant part of the administrative costs associated with your loan when the loans are established, and we recover those costs from the interest and other amounts you pay during the term of the loan.
If you repay your loan early, we may suffer a loss on the loan because we may recover our costs of establishing and continuing to provide the loan at a normal commercial return on the loan.
We are entitled under the Consumer Credit Code to charge an Early Repayment Fee to recover part or all of that loss from you.

28. In the Broadfoots instance the exit fee was calculated as a percentage rate or 2-monthly-interest payments, depending when the loan was repaid. It was also described as an "Early Repayment Fee paid to the Originator". The Originator was not a party to the credit contract. As such the Broadfoots sought to argue that as the fee was paid to a third party RHG was required to show it was a fee actually paid, or it would fall foul of s30 of the Uniform Consumer Credit Code (s32 of the NCC). Senior Member Balding was not satisfied that RHG had any obligation to pay the Originator as RHG did not rely upon it in arriving at its estimate of its losses. The obvious question to the consumer is why was it drafted that way if it was not paying the Originator but rather recovering the following costs[3]:

    a. The application processing;
    b. The valuation cost;
    c. The Settlement cost;
    d. The Mortgage Insurance;
    e. Upfront Securitisation;
    f. The upfront franchise/broker fee paid to the loan writer;
    g. The ongoing costs of servicing the loan;
    h. The ongoing costs in relation to the trail provided to the loan writer;
    i. The overheads of RHG in relation to the trail paid to the loan writer; and
    j. The loss of profits

[3] Statutory declaration of Adriana Care

29. The costs sought to be recovered by RHG appeared to be both fees incurred at the establishment of the loan (DEF) in addition to a fee for early termination (ERF). This would obviously cause a great deal of consumer confusion.

30. We would consider that many of the fees RHG purported to recover are illegitimate for the purposes of a fee payable for early termination (s78(4)). The list of fees above demonstrates why it is important that the ASIC guidance clearly limit the types of fees that can be included for the purposes of calculating the lender's reasonable costs.

31. Senior Member Balding found in her decision that RHG failed to take into account the valuation fees, the mortgage insurance fees, the annual fees and settlement costs actually paid by the Broadfoot's in arriving at the estimates of loss relied upon.

32. Further, after the expiry of the 4 years the ERF reverted from a flat percentage to "2 monthly interest payments". The ERF of 2 monthly repayments still equates to an average percentage of 1% on the loan balance depending on the prevailing interest rate at the time. The higher the interest rate applicable at the time of discharge the larger the percentage. For example, even if the balance outstanding on the mortgage was $10,000 at an interest rate of 6%, if the debt is discharged the exit fee under the RHG loan would be equivalent to 1% of the outstanding loan amount. This appears to be in direct contradiction of the theory behind an "early" repayment fee.

33. It seems incomprehensible that in the final 5 years of a loan term that a lender could in good faith seek to recover a fee for the establishment costs of a loan (being the fees RHG purported to recover as set out above). The ongoing costs in relation to servicing a loan, one would assume would be fixed into the margin in respect of the prevailing interest rate and as such the non-establishment fees purportedly being recovered also appear to CCLC to be illegitimate.

34. The adoption of a percentage based or 2-monthly-payment based method of calculating the ERF appeared to CCLC to be a methodology used to avoid the disclosure requirements of the UCCC (NCC). The use of a percentage-based calculation meant that at all material times the fee is "not ascertainable". This appears to fly in the face of the spirit of truth in lending, in respect of seeking to recover fees or costs incurred at the establishment of a loan; as it would seem

to CCLC that such costs would be known or ascertainable by the lender at the time they are incurred for many of the costs. As such it appears to CCLC that there is no transparency in the imposition of a fee on a mortgage that is percentage based seeking to recover a fixed set of fees.

35. As a consequence of the ERF not being ascertainable the lender has no obligation to include the fee in its comparison rate (s166 NCC [old s146R UCCC]). A comparison rate is important for a consumer to be aware of the true cost of credit. Where the lender is incurring significant "administrative costs" at the inception of a loan, but will only charge these costs where it is contingent that the loan is repaid early the lender is avoiding disclosing the true cost of credit. As such, we contend that is anti-competitive to avoid including certain fees in a lender's comparison rate by having those fees or costs calculated as a percentage of the loan contingent on an event where any such cost is ascertainable at the time the loan is written.

36. Further, in the Broadfoots instance it appeared to CCLC that RHG was seeking to recover costs that had specific disclosure requirements in the Code, being payments to third parties such as brokers or loan writers (s15M UCCC). It is clearly recognised in the law that any fee to third parties needs to be disclosed and that of penalties that a fee for breach needs to be a genuine pre-estimate of loss. Whilst electing to terminate a contract early where there is a right to do so is not a breach per se, it is clear from the wording of s73(4) that it seeks to limit the amount that can be recovered to those that appear to exceed a reasonable estimate of the credit provider's loss in relation to that particular credit contract.

37. If the proposition that a loan only becomes profitable after a number of years because the lender has absorbed the cost of some or all of the establishment fees is true then the natural corollary being a fee on establishment should reduce inversely as the loan progresses. A decrease in the fees are seen, such as in Broadfoot where it decreased from 2.5% to 1.5%, however it then stagnated at 1% due to the 2 monthly interest only payment requirement. For a DEF one would assume eventually over time the fee should be zero as it is expected the lenders interest rate would correct once a loan became profitable.

38. CCLC concedes that an ERF could be the recovery of a "honeymoon rate" where a credit provider has reduced the interest rate for an

introductory period. Tellingly, the Broadfoots had on the face of the contract a reduced interest rate for the initial period of the mortgage. However, RHG did not rely on this as being a part of their loss. The Broadfoot's home loan stated in relation to the annual percentage rate that there is a discount of 0.7% for the first repayment cycle, 0.6% for the second repayment cycle and 0.2% for the third repayment cycle. On investigation CCLC obtained the standard variable rates prevailing at RHG at the time, and it appeared to CCLC (although was not an issue canvassed at the hearing) that the reduction of the interest rates in the Broadfoot's loan was still higher then the standard variable rate of RHG at the time. Whilst a discount may be given for the variable rate of the particular product type it does not follow that RHG is bearing any financial burden, but is making a calculated advertisement of promising a discount but in fact merely applying a different interest rate above its basic home loan variable interest rate.

39. Further we consider that a ERF being calculated from a settlement date where a settlement date is described or defined by reference to an extension to a loan (an increase of an existing facility) also potentially unfair. It is normal or expected for consumers to borrow against property and increase their mortgage for consumption, such as in the Broadfoots case of borrowing to purchase a car or to pay for medical expenses or renovation to the secured property. The Broadfoots had brand loyalty, they had stayed with the same lender since the loans inception in 1996. There decision to leave RHG was legitimate on the basis that the cost was high and there were cheaper loans on the market. The Broadfoots were seeking to exercise their rights as a consumer to move to a more affordable loan product but were trapped by a fee that was not easily understandable.

In response to ASIC'c approach to Early Termination Fees (s78(4)) contained in paragraph 53-57.

40. <u>Break fee of fixed rate mortgage</u>: CCLC contends the calculation of a break fee should be clearly disclosed in the contract both as a formula, in plain language and as hypothetical explanation in order for consumers not to be confused or misled by misrepresentations or misunderstandings at the time a loan is fixed. In support of this proposition, we can attest that we received regular calls to the CDH in respect of their break fees. Overwhelmingly the consumer reported 'misunderstanding' the fee at the time the loan was fixed. Furthermore, there were instances of consumers being confused as to how the exit fee was calculated.

41. In one instance, a caller reported to CDH that he was a trained actuary and had taken his fee to the Financial Ombudsman Service. He was able to prove that the lender had miscalculated the figure on his loan. Unfortunately, many consumers do not have access the skills of an actuary. We consider it important that the calculation appears in the contract, or is disclosed at the time the loan is fixed.

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 laon balnce (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"

42. Break fee on a fixed rate reverse mortgage: We would agree with the proposition in paragraph 108 that worked examples should be provided. In reverse mortgage products we would go one step further, due to the inherent vulnerability of an aged person (the minimum age being 60-65 years old), we contend that a person contemplating a reverse mortgage should be referred to NICRI for advice in relation to the product

43. We agree with the proposed guidance on transparency in explaining early exit fees in paragraphs 100-101. We also, consider that where the method of calculation of a break fee changes a consumer should be notified at the time the loan is fixed. A range of fees should be given as examples depending in different interest rate changes.

44. As outlined by Member Balding in Broadfoot the difficulty with any consumer challenging the fee is the evidentiary burden is initially carried by the applicant. Further, the risks are high. Consumers in New South Wales could as the Broadfoots did, apply in the CTTT in relation to the fee. However, as at 1 July 2010 this remedy is no longer available [unless the loan was discharged and the fee imposed prior to 1 July 2010]. The benefits of the CTTT were that the costs were low and capped, and there conciliation was required by the CTTT. The CTTT also stated that no legal costs (for the other party) were payable for disputes under $10,000.

45. The downside of the CTTT was the risk of appeal and the costs associated with such an appeal [RHG did appeal Broadfoot however it was settled in District Court mediation on confidential terms]. In our experience the CTTT provided a convenient and cost effective mechanism for redress and that CCLC was able to advise clients how to traverse the CTTT without requiring to appear on their behalf. Now a consumer has to make an application to the Federal Magistrates Court or their Local Court for individual redress, making such redress more difficult as conciliation does not always form a part of the FMC or state process and invariably it is a more formal jurisdiction for a self-represented litigant with cost risks.

46. Whilst CCLC acknowledges that as at 1 July 2010 all lenders are members of external dispute resolution schemes such as the Credit Ombudsman Service or Financial Ombudsman Service we respectfully have concerns with the level of scrutiny of the fees by these services. Consumers have reported to CCLC that the EDR scheme will receive from the lender a breakdown of the fee, and then be told the material is "too commercially sensitive" to be released to the disputing consumer. As such, the consumer has no opportunity to try and discredit or challenge the evidence. Even if this information is provided it is usually assertions with no real evidence to back it up.

47. It may be prudent for ASIC to produce guidelines to the EDR schemes in respect of what is required of a lender to establish that a fee is not unconscionable as in the absence of a consumer's ability to "subpoena" such information or in light of the lender claiming some sort of privilege over such information from a consumer then it may be difficult for a consumer to self advocate through the EDR scheme. As

noted by Senior Member Balding in the Broadfoot's case the evidence is invariably held by the lender.

If you have any questions about the above submission please do not hesitate to contact Alexandra Kelly on (02) 82041370.