

Seeking Debt Waivers of Small Amount Loans

Stephen Grace, Coordinator, Homeless Persons' Legal Clinic, LawRight

The link between poverty, debt and homelessness is both immediately evident and well established. If you are unable to afford basic living costs, a small short-term loan may seem the only viable option: an injection of cash to smooth over income fluctuations. In reality, these loans can trap people in a debt spiral, further entrenching their poverty.

Advocating for these loan debts to be waived is a key strategy to address individual hardship. As a

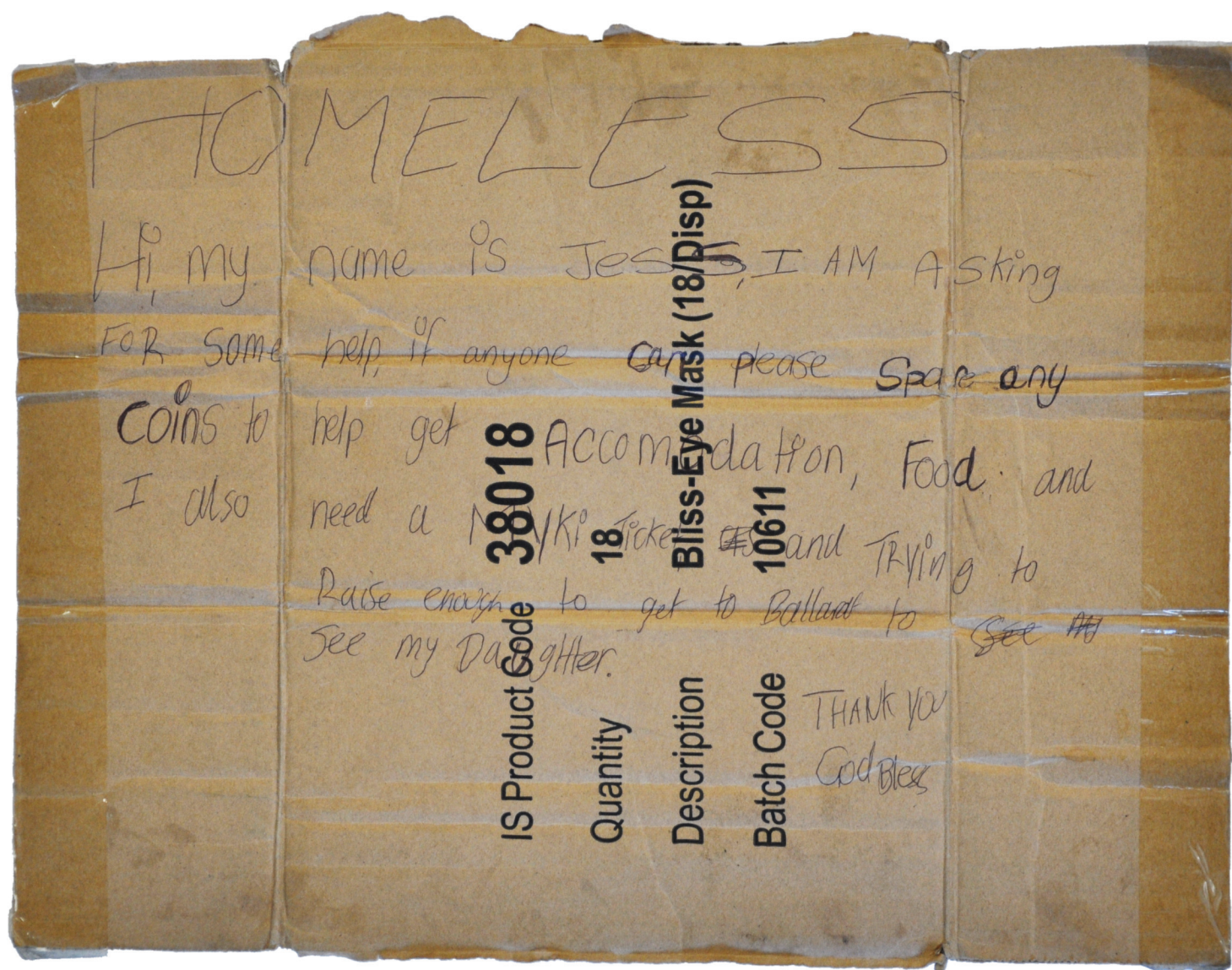
consequence, some debtors are left 'better off' if they do not repay the initial loan. We will discuss the legal rights and obligations imposed on a consumer and the available protections. We argue that a consumer is entitled to exercise these protections by asking for the debt to be waived.

We start by outlining the framework around small amount credit contracts and the legal protections available to consumers.

Small Amount Loans and the Debt Spiral

Small amount loans emerged in Australia in the late 1990s.¹ These loans offer small amounts of credit at high interest over a short space of time.

Supporters of small amount loans argue that they provide access to credit to those otherwise excluded from mainstream credit products, credit that is essential to respond to unexpected costs or purchases. They



assert that consumers exercise free and informed choice when entering these agreements.²

Consumer advocates view these loans differently. Their objections are multiple and varied, but regularly include:

- the terms of the loans, including the associated costs, are not commonly understood by the borrower³
- these loans are rarely entered on a one-off basis
- borrowers are likely to be experiencing financial hardship, with the majority receiving a Centrelink benefit⁴
- borrowers are likely to be experiencing significant physical, psychological or emotional health problems⁵
- the main reason for taking a loan is to cover basic living expenses, including utility bills, rent or food⁶
- rather than alleviate financial pressures, these loans exacerbate a person's circumstances of hardship
- companies that offer these loans target vulnerable people.

Research in this area predominantly supports the position taken by consumer advocates. These types of loans and the practices of these companies are commonly recognised as predatory⁷ and the target client base is, by definition, vulnerable. As noted by Marcus Banks in his report *Caught Short: 'poverty pervades the lives of most borrowers interviewed'*.⁸

Legal Limits on Credit Providers

Consumers of small amount loans are protected by two main mechanisms;⁹ limits on the fees and charges associated with the loans; and a requirement that lenders assess the suitability of a loan. These mechanisms are designed to prevent or minimise the harm caused to consumers, rather than offer remedies.¹⁰

However, when a consumer defaults under a credit contract, a credit provider may negotiate repayment or enforce their legal rights through the courts. They may also make a negative listing on the consumer's credit history.

Limits on fees and charges

Australian legislation limits the costs and fees that lenders of small amount credit contracts can charge: a 20 per cent establishment fee and charges of four per cent a month (flat rate), which amounts to 48 per cent a year. If more than 50 per cent of a consumer's income is made up of Centrelink payment, repayments cannot be more than a fifth of the income of the consumer. Lenders are still able to charge additional fees for defaults or enforcement, although there are limits imposed.¹¹

In practice, even when these 'caps' are applied, the cost to a consumer can be exorbitant. Borrowing \$500 for two months, you will be required to pay an establishment fee of \$100 and monthly fees of \$20: a cost of \$140 (plus the amount you have borrowed). This is effectively interest of 170 per cent a year before including default or enforcement fees.

Assessing suitability

Lenders of small amount loans are required to take reasonable steps to



determine if a loan will be 'not unsuitable' for the consumer.

Lenders must:

- make enquiries about the purpose of the loan
- make reasonable enquiries and take reasonable steps to verify a consumer's financial circumstances, which includes reviewing 90 days of bank statements
- make an assessment as to whether the loan will be unsuitable.¹²

A loan will be unsuitable if complying with the obligations under the loan would cause the consumer substantial hardship or the loan would not meet the consumer's requirements.

In some instances, such as when a consumer is currently in default under another small amount loan or has taken two similar loans in the last 90 days, there is a presumption that the loan will be unsuitable.¹³

If a creditor provides a loan that is unsuitable, a consumer should be placed in the position they would have been before taking the loan, usually by refunding the fees and charges.

Consumer Protections

It has long been recognised that a person, even a debtor, should be entitled to keep his or her basic wage or income: that they do not become '*a mere slave or personal chattel of his Creditors*'.¹⁴ In practice, the law offers this protection in a number of ways.

Social security payments are considered 'absolutely inalienable',¹⁵ meaning that a creditor has no right to access this income to repay a debt without the consent of the consumer. Additionally, if a consumer is declared bankrupt, they are entitled to earn an income up to a threshold amount before being required to make a contribution towards their debt.¹⁶ They are also entitled to retain some essential property, such as personal belongings or trade tools. As the income threshold begins at over \$50,000, the income of many consumers experiencing poverty is protected during bankruptcy. Similar provisions apply to enforcement action through state courts.¹⁷

For consumers experiencing poverty, these are strong legal protections to their limited income.

Better Off With a Waiver

When negotiating with creditors, volunteer lawyers at LawRight's Homeless Persons' Legal Clinic (HPLC) will often invoke three distinct arguments:

1. A credit provider has failed in its obligations under the relevant legislation, exposing it to possible penalties.
2. In failing its legal obligations, a credit provider is not legally entitled to any fees or charges.
3. A consumer's income and possessions are protected.

Supported by details of the consumer's disadvantage, our volunteer lawyers regularly negotiate waivers of small amount loans, such that the consumer is not required to repay the amount that remains unpaid. In securing this outcome, a consumer is left 'better off' if they do not repay a portion of the original amount borrowed.

Some community expectations place a moral obligation on debtors to repay the amount borrowed. However, this expectation misunderstands the nature of this interaction and the obligations owed between a consumer and a credit provider.

The relationship between a credit provider and a consumer is legal in nature, created when two parties agree to enter a legal agreement. This legal relationship contains all of the rights and obligations of the agreement, including the consumer protections discussed above. When entering these agreements, small amount credit providers make an informed commercial decision in consideration of the various legal rights and consumer protections. Credit providers are also aware of the possibility of default (some credit providers use the possibility of default as justification for the exorbitant costs they charge). The same cannot be said for consumers, many of whom are unaware of their legal rights and do not exercise a true choice to enter these agreements. Consumers often enter these agreements due to a need for immediate funds rather than a strategic assessment of the cost of the loan.¹⁸

When negotiating a resolution of these debts, it is acceptable to hold these

companies to the standard imposed by the law and to assert the legal rights or protections offered to consumers. Where a legal protection is available, a consumer is entitled to rely on that protection in the same way that a credit provider will rely on its legal rights to enforce a debt. Taking this approach, consumer advocates can effectively assert a client's legal rights to resolve their debts, addressing an underlying cause of poverty.

Endnotes

1. Inquiry into Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, 2 December 2011, 5.32; Andersen S 2011 'Mapping the terrain: The last Decade of payday lending in Australia' *Australian Business Law Review* vol. 39 no. 1, pp.5–27, 5; Cf McGill D, Corones S and Howell N 2012 'Regulating the cost of small loans: overdue or overkill?', *Company and Securities Law Journal*, vol.30 no.3, pp.149–169.
2. Andersen S 2011, op cit, p.10. Banks M, Marston G, Karger H and Russell R 2012 'Caught Short: Exploring the role of small, short-term loans in the lives of Australians, Final Report', The University of Queensland, p.32.
3. Banks M, Marston G, Karger H and Russell R 2012, op cit, p.49.
4. *ibid*, p.16.
5. *ibid*, p.23.
6. *ibid*, p 32; Serpell A 2014 'Small amount loans and the Consumer Credit Amendment (Enhancement) Act 2012' *Company and Securities Law Journal*, vol.32 no. 1, pp.7–22.
7. See generally Anderson S 2013 'The Phenomenon of payday lending' *Australian Journal of Competition and Consumer Law*, vol. 21 no. 1, pp.20–34.
8. *ibid*, p.15.
9. Other general protections also exist, such as restrictions on unconscionable dealings or unjust terms.
10. Serpell A 2014, op cit, p.21.
11. *National Credit Code*, ss 31–32.
12. *National Consumer Credit Protection Act 2009* (Cth), ss 128–130; *Australian Securities and Investment Commission v Cash Stores Pty Ltd (in liq)* [2014] FCA 926 at [15]; ASIC Regulatory Guide 209: Responsible lending conduct (2014), p.4.
13. *National Consumer Credit Protection Act 2009* (Cth), s 131 (3A).
14. *Singh and Secretary, Department of Education, Employment and Workplace Relations* [2010] AATA 720 at [27].
15. *Social Security (Administration) Act 1999* (Cth) s 60.
16. See generally 'Division 4B — Contribution by bankrupt and recovery of property' of the *Bankruptcy Act 1966* (Cth).
17. See generally 'Chapter 19 — Enforcement of Money Orders' *Uniform Civil Procedure Rules 1999* (Qld).
18. Ali P, McRae C and Ramsay I 2013 'The Politics of Payday Lending Regulation in Australia' *Monash University Law Review*. vol.39, no.2, pp.421–451, p.419.