

## THE PAYDAY LENDING CAMPAIGN: WHAT'S BEEN WON?

### Background Paper

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### INTRODUCTION

The problem of pay day lenders was first recognised not by community lawyers but by financial counsellors and community workers, who have traditionally worked in close proximity with community based lawyers.<sup>1</sup> A pay day loan is a small-amount loan advanced in order to “tide borrowers over”<sup>2</sup> until next pay day.<sup>3</sup> The loan period is brief (typically 14 days), and the loan itself is usually no larger than \$250.00.<sup>4</sup> Given the reluctance of Banks and other mainstream financial institutions to provide these kind of loans for customers on low incomes, Australia has seen the emergence of a plethora of lenders who specialise (usually exclusively) in this type of loan since the first “payday lender” opened its doors in 1998.<sup>5</sup> Research by the Consumer Law Centre found that payday loans met a real need for low value, short-term credit to smooth out, or cover for inadequate income (58% of respondents in a street survey said that the loan was to pay utility or bills or to cover day-to-day living expenses).<sup>6</sup>

<sup>1</sup> Wilson, Dean Payday Lending in Victoria – A Research Report, Consumer Law Centre Victoria Ltd, 2002 7

<sup>2</sup> Therese Wilson, The inadequacy of the current regulatory response to payday lending (2004) 32 ABLR 193

<sup>3</sup> Consumer Affairs Victoria: Financial Services Factsheet *Pay day lenders and the Consumer Credit Code* October 2003

<sup>4</sup> Therese Wilson, The inadequacy of the current regulatory response to payday lending (2004) 32 ABLR 193

<sup>5</sup> [http://www.creditcode.gov.au/content/downloads/FRINGE\\_RL.pdf](http://www.creditcode.gov.au/content/downloads/FRINGE_RL.pdf) accessed 3 May 2007 12

<sup>6</sup> Wilson, Dean Payday Lending in Victoria – A Research Report, Consumer Law Centre Victoria Ltd, 2002 66.

## 1. WHAT IS THE PROBLEM WITH PAYDAY LENDING?

### THE NATURE AND NEED FOR LOW-COST SHORT TERM LOANS AMONGST LOW INCOME EARNERS

The attractiveness of payday lenders stem from the swiftness and ease in which they provide loans (especially after the initial visit), the lack of credit checks, the absence of an annual rate of charged interest, and the very fact they are prepared to offer such loans at all.<sup>7</sup> As the Consumer Law Centre's report into pay day lending highlights "customers reported that they liked the sense of independence, privacy and self esteem that comes with having access to credit otherwise denied to them by mainstream financial service providers."<sup>8</sup>

Despite the perceived benefits, there are vicious drawbacks to these kind of loans. Significant fees are attached to the loans, the full extent of which are often obscured by lenders through the use of terms such as "administrative fees, processing fees and membership costs."<sup>9</sup> In addition to this there are often outright hidden costs charged by lenders.<sup>10</sup> When these are converted to annual interest rates, the fees charged can range from between 235% to 1300% per annum.<sup>11</sup> Most lenders encourage their customers to repay via direct debit, and even where customers opt to pay by cash they are often required to sign a direct debit authority to receive a loan. There consequences of this are three-fold, and all serve to disempower the consumer. Firstly, the direct debit authority gives the lender first priority over the borrower's income.<sup>12</sup> Most people are unaware that this can be cancelled at their discretion without the lenders knowledge, and payday lenders certainly do not make this fact clear.<sup>13</sup> Lastly they so often serve to place customers in a position of further debt, as banks will charge their own penalty fees when a borrower has insufficient funds in their account to repay the direct debit charge.<sup>14</sup>

When loans are not repaid by the due date, there is often a refinancing or 'roll over' option where the loan can be extended for a further period upon payment of an additional fee. Over time this leads to borrowers paying amounts far in excess of the original loan amount, and having paid none of the original loan off at all.<sup>15</sup> This kind of lending practice facilitates and arguably encourages customers to lock themselves into

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<sup>7</sup> Therese Wilson, The inadequacy of the current regulatory response to payday lending (2004) 32 ABLR 193

<sup>8</sup> Wilson, Dean Payday Lending in Victoria – A Research Report, Consumer Law Centre Victoria Ltd, 2002 10

<sup>9</sup> Interview with financial counsellor Banyule Community Health Service 10 May 2007

<sup>10</sup> Ibid

<sup>11</sup> Queensland Office of Fair Trading 2000, *Payday Lending – A Report to the Minister of Fair Trading*, QOFT, Brisbane <http://www.consumer.qld.gov.au/oft/oftweb.nsf> accessed 4 May 2007.

<sup>12</sup> D Wilson (2002) p 48.

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Syvret P, "The quick and the debt", *The Bulletin* (6 February 2001) p 30

“an uncontrollable debt spiral.”<sup>16</sup> Prior to amendments to the Uniform Consumer Credit Code,<sup>17</sup> payday lenders would often take security over borrowers’ property, such as their motor vehicle, white goods or furniture, possession of which the lender alleged to be entitled to in the event of default.<sup>18</sup> Such schemes have been dubbed ‘blackmail securities’ by consumer advocates and are seen to be the most explicit example in the gamut of payday lenders unconscionable lending practices.<sup>19</sup>

### PAY DAY LENDERS TARGETTING LOW-INCOME EARNERS

The final and in many ways overarching problem of payday lenders is the very fact that they target people on low incomes whose access to legal support and information is already severely curtailed. As Dean Wilson points out in the Consumer Law Centres report into payday lending in Victoria “advertising is targeted at low income consumers under financial stress and businesses located in predominantly socially disadvantaged areas.”<sup>20</sup> This point has been contested by many payday lenders, who characteristically state that “we most certainly do not target the poor ... The majority of our members are employed on average earnings of \$30,000.”<sup>21</sup> This statement contradicts broad research by consumer advocates that conclude that the average payday borrower is likely to be aged in his or her late 20s or early 30s, on an income (from either a full time job or social security) of approximately \$24,000 per annum.<sup>22</sup> Furthermore, it is all too clear that payday lending outlets are predominately located in low-income suburbs, and the suggestion that payday loans are used by low-income earners is wholly endorsed by financial counsellors.<sup>23</sup> Ultimately the problem was identified by “consumer advocates, financial counsellors, community workers, and governments, including government regulatory agencies.” There are few choices for low-income earners they can use exploitative credit options such as payday lending or they could use nothing at all.<sup>24</sup> Given the level of debt, poverty and over-commitment in Australia today the latter option is effectively non-existent.<sup>25</sup>

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<sup>16</sup> Ibid

<sup>17</sup> Uniform Consumer Credit Code

<sup>18</sup> Queensland Office of Fair Trading 2000, *Payday Lending – A Report to the Minister of Fair Trading*, QOFT, Brisbane <http://www.consumer.qld.gov.au/oft/oftweb.nsf> accessed 4 May 2007 n, 4

<sup>19</sup> Care Inc Financial Counselling Services, Consumer Credit Legal Centre (NSW), Consumer Credit Legal Service Inc. (Vic), Consumer Law Centre of the ACT, Consumer Law Centre Victoria (undated): *Joint consumer submission in relation to the MCCA’s Discussion Paper on Long Term Regulation of Fringe Credit Providers* p 4. cited in Nicola Howell, ‘Poverty, Credit and Social Justice: Examining the Links’ (Paper Presented at the Australian Lawyers and Social Change Conference, Canberra, September 2004)

<sup>20</sup> Wilson, Dean *Payday Lending in Victoria – A Research Report*, Consumer Law Centre Victoria Ltd, 2002 9

<sup>21</sup> Quote from the then Managing Director of Australian Money Exchange, a large payday lending chain at the time (but now in liquidation) cited in Therese Wilson, *The inadequacy of the current regulatory response to payday lending* (2004) 32 ABLR 193

<sup>22</sup> Wilson D, “Payday lending in Victoria – A research report”, Consumer Law Centre Victoria Limited, July 2002.

<sup>23</sup> Field C, “Pay Day Lending – An Exploitative Market Practice” (2002) 27(1) *Alternative Law Journal* 36 at 37 and interview with Financial Counsellor at WHCLS

<sup>24</sup> Dean Wilson, “Payday lending in Victoria – A research report”, Consumer Law Centre Victoria Limited, July 2002 at 11

<sup>25</sup> Nicola Howell, ‘Poverty, Credit and Social Justice: Examining the Links’ (Paper Presented at the Australian Lawyers and Social Change Conference, Canberra, September 2004) at 2

## 2. WHAT STRATEGIES OR METHODS WERE UTILIZED BY THE CENTRES TO BRING ATTENTION TO THE PROBLEM?

### STRATEGIES USED BY COMMUNITY LEGAL SERVICES TO ADVOCATE FOR LAW REFORM

Prior to 1985 the laws governing debt and the legal system had remained static for 30 years and had never been subject to consumer input.<sup>26</sup> Financial counsellors, who at this time were some of the few professionals dealing squarely with the debt related legal problems faced by low income earners expressed the urgent need for law reform in this area. The Consumer Credit Legal Service (precursor of the Consumer Law Centre Victoria) in 1985 provided expert legal advice to financial counsellors and worked for legal reform.<sup>27</sup> Since this time consumer lawyers in Community Legal Centres have generally targeted their attentions to reform of the *Consumer Credit Code*, and some of the tools they have used have included submissions to the Government; case studies and reports; research; and media comment.<sup>28</sup> In all of these the assistance of financial counselors and community workers has been of paramount importance, as this has been the primary way that community lawyers have been able to be in touch with the experiences of the users of payday lenders.<sup>29</sup>

### REPORTS BY COMMUNITY LEGAL CENTRES

The key research report in this area by a Community Legal Centre was the publication entitled “*Payday Lending in Victoria- A Research Report*” written by Dean Wilson for the Consumer Law Centre of Victoria and funded by the Victorian Consumer Credit Fund.<sup>30</sup> The report was released during a national campaign that the Consumer Law Centre Victoria and other Community Legal Centres around Australia spearheaded nationally to protect consumers from pay day lending based on experiences of clients in the community.<sup>31</sup> The research focused on the experiences of 78 customers of payday lenders through the completion of short ‘kerb side’ surveys in the direct vicinity of payday lenders, and the experienced highlighted by 12 in depth interviews of customers of payday lenders.<sup>32</sup> Additionally, Wilson drew his conclusions from a comprehensive literature review and from in-depth interviews with financial counsellors and community workers.<sup>33</sup> It was intended to be “an important contribution to the policy debate surrounding payday lending and the practices of exploitative credit providers” and

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<sup>26</sup> Financial Counsellors and the Legal System Denis Nelthorpe Consumer Credit Legal Service Victoria at <http://www.aic.gov.au/publications/proceedings/03/nelthorpe.pdf> 3 accessed 4 May 2007

<sup>27</sup> Ibid

<sup>28</sup> Nicola Howell, ‘Poverty, Credit and Social Justice: Examining the Links’ (Paper Presented at the Australian Lawyers and Social Change Conference, Canberra, September 2004) 8

<sup>29</sup> Interview with Financial Counsellor Banyule Community Health Service 10 May 2007

<sup>30</sup> Wilson D, “Payday lending in Victoria – A research report”, Consumer Law Centre Victoria Limited, July 2002

<sup>31</sup> Ibid

<sup>32</sup> Nicola Howell, ‘Poverty, Credit and Social Justice: Examining the Links’ (Paper Presented at the Australian Lawyers and Social Change Conference, Canberra, September 2004) 8

<sup>33</sup> Wilson D, “Payday lending in Victoria – A research report”, Consumer Law Centre Victoria Limited, July 2002 12

designed to “encourage and inform the debate about access to affordable credit for low income and vulnerable Australians.”<sup>34</sup> The report called for further regulation by extending the caps outlined in the Consumer Credit Code to apply throughout Australia.<sup>35</sup> It also called on Banks to expand their low-interest loan schemes and “enter the short-term credit market as a part of their social obligations to develop a commercially viable low-interest loan that was tailored to suit the needs of low income earners” and suggested a partnership with Government and community organisations to achieve this.<sup>36</sup> Finally it advocated the increased flexibility in the delivery of Centrelink advance payments for customers in need of short term loans.<sup>37</sup>

In addition, to this other reports have been released by Community Legal Centres to generate public and government support for changes to the law, and principally for reform to the Consumer Credit Code.<sup>38</sup> An example here was a report on the lending practices of AVCO (a prominent payday lender) which was compiled by Legal Aid NSW and the Consumers’ Federation of Australia in 1997.<sup>39</sup> This report included 70 case studies from around Australia, and it highlighted concerns about AVCO’s lending practices, particularly given that almost all of their customers were on low incomes.<sup>40</sup> Eight years on reports were still being produced by Community Legal Centres to highlight the issue. In 2005 a report by La Trobe University Law students was written ‘to suggest reforms to ensure better practices by lending bodies’<sup>41</sup> to more adequately regulate fringe credit providers such as payday lenders. The report itself was produced as a part of a Clinical Legal Education subject offered by La Trobe University in association with the West Heidelberg Community Legal Service (WHCLS) where law students were able to view first-hand the impact of payday lending and reckless lending generally on clients of the Legal Service.<sup>42</sup>

### THE BROADER CAMPAIGNS SPEARHEADED BY COMMUNITY LEGAL CENTRES

While the reports concretised the demands of the campaign, other strategies were used by Community Legal Centres to put the issue of payday lending into the National spotlight. Both the AVCO and the Payday Lending reports were accompanied by campaigns and media stunts to highlight the failings of the system as it currently stood. For instance, the now famous 'Avco dump' was a public protest which saw lawyers,

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<sup>34</sup> Wilson D, “Payday lending in Victoria – A research report”, Consumer Law Centre Victoria Limited, July 2002 7

<sup>35</sup> Ibid 10

<sup>36</sup> Ibid

<sup>37</sup> Ibid

<sup>38</sup> Nicola Howell, ‘Poverty, Credit and Social Justice: Examining the Links’ (Paper Presented at the Australian Lawyers and Social Change Conference, Canberra, September 2004) 8

<sup>39</sup> Nicola Howell, ‘Poverty, Credit and Social Justice: Examining the Links’ (Paper Presented at the Australian Lawyers and Social Change Conference, Canberra, September 2004) 8

<sup>40</sup> Legal Aid NSW and Consumers’ Federation of Australia (1997) *In whose interest? AVCO lending practices exposed* cited in Nicola Howell, ‘Poverty, Credit and Social Justice: Examining the Links’ (Paper Presented at the Australian Lawyers and Social Change Conference, Canberra, September 2004) 8

<sup>41</sup> Press Release for Donna Curnow, Natasha Jankovska, Susanna Kirpichnikov and Elizabeth McGrath, A Report on Reckless Lending – October 2005

<sup>42</sup> Ibid

financial counsellors, community workers and of course their clients dump the secured goods (chiefly old furniture) of a large number of debtors outside the front office of a financier.<sup>43</sup> Other demonstrations against the activities of payday lenders included a march down Smith Street in Collingwood to deliver a plastic shark to a financier to highlight their 'loan shark' style practices, and a similar action in Footscray where a plastic arm and a leg was delivered to a lender to highlight the huge cost of their hidden fees.<sup>44</sup>

### **3. WERE THE STRATEGIES EFFECTIVE?**

#### KEY CHANGES TO THE UNIFORM CONSUMER CREDIT CODE

It is clear that the national campaign around payday lending by community legal centres did produce results. Indeed, by the time that the Consumer Law Centre of Victoria's seminal report was released amendments to the Uniform Consumer Credit Code (UCCC) had already been made in Queensland, bringing payday loans into the jurisdiction of the Code.<sup>45</sup> Under the uniform arrangements of the Code, these amendments were put into operation either automatically or through separate state legislation.<sup>46</sup> According to the Explanatory Memorandum to the UCCC, central to its purpose was to provide "truth in lending".<sup>47</sup> The legislation has sought to achieve this by requiring disclosure of fees and terms by lenders in loan documentation, and by placing restrictions on the way non repayment of a loan can be enforced. It requires the payday lender to disclose all relevant terms and conditions of the contract, including disclosure of an annual percentage interest rate in advertising and before a customer can enter into the contract.<sup>48</sup>

#### CRITIQUE OF THE CHANGES TO THE UNIFORM CONSUMER CREDIT CODE

The actual use of some of these changes is problematic. The legislation obviously assumes effective competition amongst lenders and real choice for consumers, whereas Dean Wilson points out by way of criticism that people using payday loans are some of the most vulnerable consumers in society and thus "have little to no market power. Information and disclosure may guard against the most flagrant abuses but do not equate with "choice" as they commonly do with more affluent customers"<sup>49</sup> When a payday loan is still the only option for low-income customers to receive small amounts of cash fast, disclosure of an annual percentage interest rate is unlikely to make any difference to their decision to go ahead with the loan.

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<sup>43</sup> Financial Counsellors and the Legal System Denis Nelthorpe Consumer Credit Legal Service Victoria at <http://www.aic.gov.au/publications/proceedings/03/nelthorpe.pdf> 3 accessed 4 May 2007

<sup>44</sup> Interview with Financial Counsellors Banyule Community Health Service 10 May 2007

<sup>45</sup> Consumer Credit (Queensland) Amendment Act 2001 (Qld).

<sup>46</sup> Wilson, Dean Payday Lending in Victoria – A Research Report, Consumer Law Centre Victoria Ltd, 2002 39

<sup>47</sup> Therese Wilson, The inadequacy of the current regulatory response to payday lending (2004) 32 ABLR 193

<sup>48</sup> Uniform Consumer Credit Code, ss 14, 15 and s 143.

<sup>49</sup> Wilson, Dean Payday Lending in Victoria – A Research Report, Consumer Law Centre Victoria Ltd, 2002 11

## CHANGES TO BANKING PRACTICES

Upon recommendations from the Reports and subsequent Government Discussion Papers a number of mainstream lenders have developed partnerships with community organizations to offer affordable low value loans. For instance, The Brotherhood of St Lawrence, in partnership with the Bendigo Bank, now offers a small value loan of between \$500 and \$2,000 with repayments tailored to suit a limited budget.<sup>50</sup> These loans are an affordable credit option that helped to establish a credit rating for entry into the mainstream credit system.<sup>51</sup> This is however, one very small step in the march towards a more equitable lending system in Australia.

## ENFORCEMENT OF THE LAW AND THE REALITY OF LENDING PRACTICES TODAY

When assessing the effectiveness of the Community Legal Centres strategies it is vital to remember that a changed law may not necessarily make life better for those suffering at the bottom of our society if the laws are not enforced, complied with or if there is no effective remedy for consumers who have suffered a breach of their rights under the Code.<sup>52</sup> Consumer disputes are for small amounts of money are notoriously unlikely to be litigated as those whose rights are breached cannot afford recourse to justice.<sup>53</sup> Legal Aid funds are limited for consumer protection matters; and community legal centres have a very limited capacity to take on consumer and credit cases.<sup>54</sup> The feedback from financial counsellors in 2007 is mixed. They report that low-income consumers are somewhat less affected by the exploitative practice than they were, but Payday Lenders still operate. One financial counsellor reports that due to the campaign “many Payday lenders ended up closing their doors due to the bad publicity but just as many changed their names and reopened as a similar business. Social action is good when you can change legislation, but if you just target one company they will close down and reopen under another name, or another company will start up where the others left off”.<sup>55</sup>

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<sup>50</sup> Brotherhood of Saint Lawrence and Good Shepherd Youth and Family Service, Submission to Consumer Affairs Victoria Consumer Credit Review (2005) 3 cited in Donna Curnow, Natasha Jankovska, Susanna Kirpichnikov and Elizabeth McGrath, A Report on Reckless Lending – October 2005 12

<sup>51</sup> [http://www.creditcode.gov.au/content/downloads/FRINGE\\_RI.pdf](http://www.creditcode.gov.au/content/downloads/FRINGE_RI.pdf) accessed 3 May 2007 12

<sup>52</sup> Nicola Howell, ‘Poverty, Credit and Social Justice: Examining the Links’ (Paper Presented at the Australian Lawyers and Social Change Conference, Canberra, September 2004) 13

<sup>53</sup> Nicola Howell, ‘Poverty, Credit and Social Justice: Examining the Links’ (Paper Presented at the Australian Lawyers and Social Change Conference, Canberra, September 2004) 13

<sup>54</sup> Ibid

<sup>55</sup> Interview with Financial Counsellor Banyule Community Health Service 10 May 2007

## **CONCLUSION: SHOULD COMMUNITY LEGAL CENTRES BE INVOLVED IN LAW REFORM CAMPAIGNS LIKE THE CAMPAIGN AGAINST PAYDAY LENDING?**

Given the structural disadvantage typically faced by payday lender borrowers,<sup>56</sup> and the growing gap between the rich and poor in Australia the task of Community Legal Centres to engage in law reform campaigns has never been more urgent. As the Federal Government's own website maintains "the fringe credit market has diversified and significantly increased in size in the past few years and the Uniform Consumer Credit Code, which regulates most consumer credit in Australia, may not be providing sufficient protection for clients of fringe credit providers."<sup>57</sup>

This highlights the need for law reform. By incorporating a variety of strategies such as case studies, media stunts and more detailed research Community Legal Centres can bring the public's attention to the issue and thereby bring pressure to bear on the Government to legislate for change.<sup>58</sup> As consumer lawyers, financial counsellors and community workers bear witness to the direct impact of payday lenders on the poor practices of industry, it is vital that such networks are fostered to best champion law reform changes to the current regulatory frameworks.<sup>59</sup>

It is certainly true that the delivery of traditional legal assistance to those in need can effectively redress some of the inequalities faced by individuals in their experience of the legal system. However, as Marc Galanter famously pointed out "*litigation is typically a claim by a repeat player against a one shot defendant*"<sup>60</sup> where repeat players such as financiers have a direct interest in the future legal consequences and "*enjoy great advantages of experience, information, and credibility; possess infinitely greater resources, and can benefit from economies of scale.*"<sup>61</sup> Therefore a Community Legal Service that failed to incorporate law reform into their activities fails to recognise the fact that in our society there is no such thing as an even playing field, and that not all legal need can be met given the current (and dwindling) funding levels of operation of Community Legal Centres in Australia.<sup>62</sup>

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<sup>56</sup> Wilson, Dean Payday Lending in Victoria – A Research Report, Consumer Law Centre Victoria Ltd, 2002 71

<sup>57</sup> [http://www.creditcode.gov.au/content/downloads/FRINGE\\_RI.pdf](http://www.creditcode.gov.au/content/downloads/FRINGE_RI.pdf) accessed 3 May 2007 8

<sup>58</sup> Nicola Howell, 'Poverty, Credit and Social Justice: Examining the Links' (Paper Presented at the Australian Lawyers and Social Change Conference, Canberra, September 2004) 13

<sup>59</sup> Ibid

<sup>60</sup> Abel, Richard. The Paradoxes of Legal Aid in Cooper & Dhavan (eds), *Public Interest Law* (1986) 379, 385

<sup>61</sup> Ibid

<sup>62</sup> Samantha Maiden 'Legal centres lose cash over bias' *The Australian* (New South Wales) October 02, 2006 <http://www.theaustralian.news.com.au/story/0,20867,20509123-2702,00.html> at 2 June 2007

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