ONLINE PAYDAY LENDERS: TRUSTED FRIENDS OR DEBT TRAPS?

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The recent Senate inquiry into credit and hardship underscored the prevalence of predatory conduct in the payday lending industry. The rise of digitalisation has increased consumer access to high-cost payday loans and the ensuing risk of debt spirals. The article examines the marketing strategies of online payday lenders, revealing that the effect of mandatory warnings on the risk of harm are often diminished through website layouts. At the same time, lenders commonly offer fast, convenient cash in tandem with blogs that provide advice on managing finances and living well on a budget, obfuscating the distinction between advertising and altruism. The findings highlight the need for regulatory enforcement of laws aimed at safeguarding vulnerable financial consumers. Emerging challenges from the increasing digitalisation of payday lending and social media marketing raise the need for reforms to address gaps in the regulatory framework.

The rising use of digital platforms has significantly increased consumer access to payday loans[1] and led to growth in the payday lending industry.[2] Despite their apparent popularity, payday loans are controversial due to their propensity to cause harm to consumers.[3] The digitalisation of payday lending exacerbates these risks and raises additional issues. The rapid pace at which digitalisation and artificial intelligence have altered the industry has left regulatory frameworks struggling to keep pace with the changes, underscoring the need for reforms to meet the evolving needs of consumers.

The Senate inquiry report into credit and hardship asserts that fringe lending, including payday loans, poses an 'oversized risk' to vulnerable Australians in financial hardship.[4] The report highlights the increasing problem of households with limited access to mainstream finance in Australia. Over three million people, or 17% of the adult population in Australia, were affected by financial exclusion in 2014.[5] The Senate

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1 Payday loans or small amount credit contracts are defined in the article: see below nn 13–16 and accompanying text.

2 Digital Finance Analytics, *The Costs of Inaction in Payday Lending* (Report, 18 June 2018) 3 <https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/06/180605-DFA-PayDay-Impact.pdf>.

3 See generally Explanatory Memorandum, National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017 (Cth) ch 6 ('SACC Bill Explanatory Memorandum').

4 Senate Economics References Committee, Parliament of Australia, *Credit and Hardship: Report of the Senate Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (Report, 22 February 2019) 1.

5 Ibid 21.

inquiry report underscores the aggressive marketing of payday loans, asserting that such advertising strategies channel consumers towards high-cost payday loans instead of 'more suitable alternatives such as financial counselling or low interest loan schemes'.[6] The report also cites evidence of 'widespread non-compliance' with regulations aimed at safeguarding consumers from harm.[7] In addition, the report notes that

> these products appear not only to have been targeted at Australians in financial hardship – they seem to have been designed to take advantage of them. It is difficult to escape the conclusion that many providers' business models depend on vulnerable consumers who have limited awareness of other product options, limited negotiating power, and limited propensity to complain about improper or illegal behaviour.[8]

Developments in digital technology allow advertising to be more closely targeted towards individual consumers such that information comes up 'in their feed, whether it's Facebook or wherever, at the point in time when they're potentially vulnerable'.[9] In the words of Senator Jenny McAllister:

> The constant stream of ads, carefully targeted at young consumers, leverages the psychological principle of 'mere exposure' – where simply becoming familiar with a brand or product can make it seem more attractive.
>
> In the vision presented in the marketing, [payday] lending is no longer for the desperate. It's in fact a perfectly normal part of aspirational living.[10]

These observations raise the need for investigation into the marketing strategies and practices of payday lenders who use the internet as a medium of communication and a gateway for entry into payday loans. In line with this, the Senate inquiry report recommends a review of the online advertising of fringe financial products and services.[11] This article analyses the websites of payday lenders to investigate the extent to which the advertising practices of online payday lenders comply with existing legal protections for financial consumers from risk of harm. The analysis further considers whether existing laws provide adequate safeguards for financial consumers in the face of increasing digitalisation. In summary, the analysis reveals significant issues of substantive non-compliance with regulatory protections aimed at safeguarding consumers from harm, and gaps in the regulatory framework which highlight the need for intervention.

Part I examines the evolution of the online payday lending industry and concerns over risks of harm to vulnerable consumers. The regulatory framework for the protection of consumers is canvassed in Part II. The websites of payday lenders are described in Part III and issues of regulatory compliance are discussed. Part IV considers regulatory responses to these issues. Part V concludes.

I BACKGROUND

The significance of online payday loans and their impact on consumers is reflected in the size of the industry and the rising number of loans to consumers. Greater online access and the availability of payday loans as a 'quick, simple and confidential

6 Ibid 41.
7 Ibid 5.
8 Ibid 4.
9 Ibid 41, quoting Commonwealth, *Parliamentary Debates*, Senate, 12 December 2018, 39 (Corinne Proske).
10 Jenny McAllister, 'The Digital Age is a Pay-day Lenders' Feast', *Sydney Morning Herald* (online, 24 February 2019) <https://www.smh.com.au/national/the-digital-age-is-a-pay-day-lenders-feast-20190222-p50zmz.html>.
11 Senate Economics References Committee (n 4) 13 [1.73].

alternative' have contributed to an increasing use of payday loans.[12] At the same time, technological developments and the changing face of online interactions have led to the emergence of new challenges. Section A examines the phenomenal growth in the payday lending industry and the impact of digitalisation. Section B investigates concerns over the risks of harm from payday loans, and additional risks which arise through the use of digital platforms.

A The Evolution of the Online Payday Lending Industry

A small amount credit contract ('SACC') is defined in the *National Consumer Credit Protection Act 2009* (Cth) ('*NCCP*') as a contract for unsecured credit of $2,000 or less for a term of at least 16 days to one year.[13] A credit provider of SACCs must not be an Australian deposit-taking institution ('ADI'),[14] and the credit contract should not be a continuing contract.[15] SACCs are often referred to as payday loans and are commonly used by consumers with low incomes or those with poor credit records who face challenges obtaining loans from banks.[16]

Studies have observed an 'explosion' in the growth of the payday lending market over the past two decades.[17] The first payday lender is thought to have emerged in 1998, and by August 2000, 82 payday lenders were estimated to be operating in Australia.[18] In 2001, approximately 12,800 payday loans were estimated to be taken out each month.[19] Ali and Banks observe that the number of payday loans increased 'twenty-fold' in the subsequent decade.[20] The growth in the payday lending market is attributed to factors such as financial deregulation, rising levels of household debt and an increase in individuals with poor credit ratings.[21] Deregulation of the banking sector has led to banks being less willing to lend to consumers with low incomes or poor credit records.[22] Consequently, these consumers are compelled to seek credit from alternative sources, often at substantially higher costs than mainstream consumer lending rates.[23]

Reports such as the Australian Securities and Investments Commission's ('ASIC') *Payday Lenders and the New Small Amount Lending Provisions* reflect the difficulties in determining the size of the payday loan industry.[24] According to Wilson, '[i]ndustry estimates in early 2001 suggested the national market for payday lending to be about

12 Digital Finance Analytics (n 2) 3.
13 *National Consumer Credit Protection Act 2009* (Cth) s 5 ('*NCCP*').
14 An ADI is defined in s 5 of the *Banking Act 1959* (Cth) as an authorised deposit-taking institution, which is a body corporate that has been granted authority to carry on banking business in Australia.
15 *NCCP* (n 13) s 5.
16 Sally Andersen, 'Mapping the Terrain: The Last Decade of Payday Lending in Australia' (2011) 39(1) *Australian Business Law Review* 5, 6–8.
17 Jasmine Ali and Marcus Banks, 'Into the Mainstream: The Australian Payday Loans Industry on the Move' [2014] (3) *JASSA: The Finsia Journal of Applied Finance* 35, 36; Zac Gillam and the Consumer Action Law Centre ('CALC'), *Payday Loans: Helping Hand or Quicksand?* (Report, September 2010) 9.
18 Dean Wilson, *Payday Lending in Victoria: A Research Report* (Report, July 2002) 34 <https://consumeraction.org.au/wp-content/uploads/2012/05/DL65.pdf>.
19 Commonwealth, *Parliamentary Debates*, Senate, 13 August 2007, 133 (Cory Bernardi); Carl Packman, 'ASIC's Payday Lending Problem', *Independent Australia* (online, 11 April 2014) <https://independentaustralia.net/business/business-display/asics-payday-lending-problem,6372>.
20 Ali and Banks (n 17) 36.
21 Wilson (n 18) 34–5.
22 Ibid 35.
23 Australian Securities and Investments Commission ('ASIC'), *Payday Lenders and the New Small Amount Lending Provisions* (Report No 426, March 2015) 4 ('*Payday Lenders*'); Wilson (n 18) 35.
24 ASIC, *Payday Lenders* (n 23) 7.

$200 million annually'.[25] Statistics from ASIC indicate that the payday lending market has seen sustained growth. In December 2014, there were approximately 1,136 credit licensees operating in the payday lending industry.[26] The overall value of SACCs for the 12 months to June 2014 was estimated at close to $400 million.[27] ASIC observed that the overall value of SACCs had increased by approximately 125% since 2008.[28] Analysis by Credit Corp Group Ltd revealed that $1.2 billion of loans were issued as SACCs in the 2015 financial year.[29] This comprised '2.2 million individual loans to 540,000 consumers'.[30]

The size of the payday lending industry is further reflected in a survey by Digital Finance Analytics which found that approximately $736 million worth of payday loans were written in 2016.[31] The survey indicated that from April 2016 to June 2018, 'just over 3 million discrete payday loans have been written, worth in total around $1.85 billion by around 1.6 million households. These loans would have generated something in the order of $250 million in net profit to the lenders'.[32] According to Digital Finance Analytics, 'around one fifth of borrowers or around 332,000 households, were new payday borrowers'.[33] Women are disproportionately represented among users of payday loans and this trend appears to be increasing over time.[34] In 2017, 40% of women accessing payday loans were single parents.[35] This is significantly higher than the distribution of single female parent families across the general population at 15%.[36] Single-parent women are more likely to use payday loans for household expenses than the general population.[37] They are also are 'more likely to have multiple concurrent loans, compared with other female segments and the general population', although solo women are increasingly taking out payday loans.[38]

Growth in the payday lending industry is particularly strong in the online lending sector. Statistics indicate that the online payday lending market grew from 4% of the payday lending market in 2008 to 75% in 2017.[39] Online payday lenders commonly emphasise the 'speed, ease and convenience of obtaining a loan' through the internet.[40] Features of internet-based lending which contribute to their attractiveness include the convenient application process. Many users have access to payday lenders through mobile devices.

Among the marketing strategies used is the fast approval and electronic transfer of funds to consumers, often within a day or a few hours.[41] Payday lenders commonly

25 Wilson (n 18) 34.
26 ASIC, *Payday Lenders* (n 23) 24.
27 Ibid 7.
28 Ibid.
29 Credit Corp Group, Submission to the Treasury, *Review of the Small Amount Credit Contract Laws* (15 October 2015) 3 [1.2].
30 Ibid.
31 Digital Finance Analytics (n 2) 3.
32 Ibid 7.
33 Ibid 1.
34 Good Shepherd Microfinance and Digital Finance Analytics, *Women and Pay Day 2018* (Report, January 2018) 3.
35 Ibid 5. In contrast, 6% of men using payday loans were male single parents: Digital Finance Analytics (n 2) 6.
36 Good Shepherd Microfinance and Digital Finance Analytics (n 34) 5.
37 Ibid 8.
38 Ibid 5–6.
39 Digital Finance Analytics (n 2) 3.
40 Gillam and CALC (n 17) 12.
41 Ali and Banks (n 17) 40.

facilitate the application process by obtaining consumers' bank statements electronically from third-party service providers.[42] Payday lenders' websites commonly offer tips on managing finance and adopt marketing strategies that appeal to young adults.[43] For instance, one major provider of payday loans markets itself as 'fun and cool, with quirky television ads and a chatty social media presence'.[44] Many lenders market payday loans in a manner that mimics mainstream finance, using terms such as 'micro-credit' or 'Visa prepaid cards'.[45]

B Concerns

The increasing use of digital platforms to enter into payday loans heightens concerns over the risks of harm and predatory conduct which have been associated with payday loans for over a decade. Developments in digital technology and social media intensify these risks and raise additional challenges. This section explores the risk of increasing indebtedness, subsequently turning to a discussion of issues arising from the shift towards internet-based media. Payday loans have been highlighted as having higher risks of harm to vulnerable consumers.[46] These include 'falling into a debt spiral through the repeated or continued use of high-cost [SACCs]'.[47] The high cost of payday loans has been associated with some borrowers becoming increasingly indebted over time as greater proportions of their income are channeled towards repayment of the loans and their associated fees.[48] The potential detrimental consequences of being caught in such a 'debt spiral' include severely diminished capacities to channel credit to improve their standards of living, which may in turn adversely affect their health and wellbeing.[49]

Statistics suggest that a significant number of payday borrowers are affected by increasing indebtedness. Digital Finance Analytics posits that 'over a 5-year period around 15% of payday borrowers will get into a debt spiral which leads to events such as bankruptcy … A larger number fall into family or relationship issues'.[50] The Senate inquiry report observes 'growth in the proportion of SACCs and similar debts in the total debts of personal bankruptcies and insolvencies'.[51] The Australian Financial Security Agency ('AFSA') found that in the 2017–18 financial year, 'bankrupts owed a median of $1,200 to payday lenders', while '[d]ebt agreement debtors owed a median of $950 to payday lenders, and that occurred in around 40% of debt agreements'.[52]

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42 See Part III(B)(7).

43 Gillam and CALC (n 17) 12.

44 Tom Cowie, 'Rise of the Online Payday Lenders', *Sydney Morning Herald* (online, 6 September 2014) <https://www.smh.com.au/national/rise-of-the-online-payday-lenders-20140904-10c7lc.html>.

45 Gillam and CALC (n 17) 118; Part III(B)(3) below.

46 Paul Ali, Cosima McRae and Ian Ramsay, 'The Politics of Payday Lending Regulation in Australia', (2013) 39(2) *Monash University Law Review* 411, 417–18; Denise McGill, Stephen Corones and Nicola Howell, 'Regulating the Cost of Small Loans: Overdue or Overkill?' (2012) 30(3) *Company and Securities Law Journal* 149, 151; ASIC, *Payday Lenders* (n 23) 4 [2].

47 ASIC, *Payday Lenders* (n 23) 4 [3].

48 Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 53.

49 Ibid 54.

50 Digital Finance Analytics (n 2) 1.

51 Senate Economics References Committee (n 4) 22, citing Australian Financial Security Agency, Submission No 4. 1,891 bankrupt estates included debts to payday lenders, which is around 17% of bankrupt estates: Senate Economics References Committee (n 4) 22, quoting Evidence to Economics References Committee, Senate, Canberra, 24 January 2019, 3 (David Bergman).

52 Senate Economics References Committee (n 4) 22, quoting Evidence to Economics References Committee, Senate, Canberra, 24 January 2019, 3 (David Bergman).

Statistics indicate that the number of financially stressed households using payday loans has increased from just over 7,000 in 2005 to 397,000 in 2017.[53] Payday loans are commonly used as emergency cash for household expenses such as food, children's needs, medical expenses, healthcare, utilities bills or to repay an existing loan.[54] Consumer advocates have raised concerns over the risk of predatory conduct in such circumstances.[55]

Likewise, news reports highlight perceptions that some payday lenders target vulnerable consumers,[56] charging exorbitant fees and lending irresponsibly.[57]

The increasing use of the internet as a means of marketing and entering into payday loans has given rise to further concerns. Consumer Action Law Centre's ('CALC') study of the display of mandated warnings on lenders' websites found that warnings were often not displayed in a manner which drew consumers' attention to them. For example, warnings were placed at the bottom of the web page such that users would only see the warning if they scrolled down.[58] Some warnings were incomplete or incorrect, or displayed in a font which was difficult to read.[59]

The study by CALC found that consumers who fill out an application but do not complete it are 'likely to be subjected to significant follow-up sales pressure, in the form of emails and text messages, urging them to complete' the application.[60] Further, payday lenders' marketing 'often blurs the line between being a credit provider and offering financial "tips" and advice'.[61] Gillam and CALC assert that the tendency to market payday loans in a manner that mimics mainstream finance 'obfuscates the real nature of the business being conducted and appropriates a socially positive term for application to an historically negative practice'.[62]

The experiences of several borrowers featured in news reports highlight some of the challenges posed by online payday loans.[63] The borrowers found that applying for payday loans online was quick and easy; however, they did not clearly understand the

53 Good Shepherd Microfinance and Digital Finance Analytics (n 34) 2.

54 Ibid 8.

55 'Game of Loans', *Four Corners* (Australian Broadcasting Corporation, 2015) <https://www.abc.net.au/4corners/game-of-loans/6352956>.

56 Stephen Long and Mario Christodoulou, 'Payday Lender Good2Go under ASIC Microscope Accused of Lending to Drug Addicts, Gamblers', *ABC News* (online, 31 March 2015) <https://www.abc.net.au/news/2015-03-30/good2go-loans-investigated-by-asic/6357166>; Nicole Chettle, 'Cash Converters to Refund Thousands of People for Charging Up to 633 Per Cent Interest on Loans', *ABC News* (online, 18 June 2015) <https://www.abc.net.au/news/2015-06-18/cash-converters-reach-settlement-partial-refund-loans/6556018>.

57 Chettle (n 56); Thuy Ong and Michael Janda, 'Nimble to Refund Customers $1.5m for Irresponsible Payday Loans after ASIC Action', *ABC News* (online, 24 March 2016) <https://www.abc.net.au/news/2016-03-23/nimble-pay-day-lender-to-refund-customers-asic/7269832>.

58 CALC, *What Warning? Observations about Mandated Warnings on Payday Lender Websites* (Report, August 2013) 6.

59 Ibid 7–18.

60 Gillam and CALC (n 17) 12.

61 Ibid.

62 Ibid 118.

63 Chettle (n 56); 'Payday Lenders Target Vulnerable Women', *Life Matters* (ABC Radio National, 23 May 2018) <https://www.abc.net.au/radionational/programs/lifematters/vulnerable-women-and-payday-loans/9772366>; Emily Piesse, 'Perth Mother on Disability Pension Charged $760 for $175 Loan by Short-Term Credit Agent Cigno', *ABC News* (online, 1 December 2018) <https://www.abc.net.au/news/2018-12-01/mother-left-with-430-pc-loan-to-short-term-credit-agent-cigno/10571730>; Kathryn Diss, 'Payday Loans Increase as Households Pushed into Risky Credit from Non-Bank Lenders', *ABC News* (online, 21 February 2019) <https://www.abc.net.au/news/2019-02-21/payday-loans-increase-as-households-pushed-into-risky-credit/10827342?pfmredir=sm>.

costs involved when they entered into the loans and only realised the high cost of borrowing when they subsequently received notices to repay the loan and fees.[64] One single mother who relied on Centrelink benefits said, '[i]t was super easy, I just clicked a few buttons and they said they'd get back to me within 24 hours, and they did. They said the loan had been approved and the money was in my bank'.[65] The amount of indebtedness doubled due to fees, and she was unable to keep up with repayments. The young mother emphasised that 'the risks should be laid out a lot more'.[66]

Likewise, another young mother recalled that it seemed like 'easy money', citing that using such loans was common among her friends.[67] Drawn by advertisements on television, she filled in the application online without calculating the amount of fees.[68] She was unable to repay the loan and became bankrupt, commenting that she felt she had been 'fool[ed]'.[69] Similar experiences have been recounted by others such as a 22-year old with an intellectual disability who saw a Facebook advertisement as a 'quick fix' when her daughter's first birthday was approaching.[70]

II THE REGULATION OF ONLINE PAYDAY LENDING

A Specific Laws Relating to SACCs

The *NCCP* and *National Credit Code*[71] were enacted in 2009 to alleviate the risks of harm and deter predatory conduct against vulnerable financial consumers.[72] Payday lenders must comply with the licensing requirements and responsible lending obligations set out in the *NCCP*. Following concerns over the potential for increasing indebtedness, the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) ('*Enhancements Act*') introduced specific reforms including caps on the cost of borrowing.

1 Licensing

Payday lenders must be licensed by ASIC to engage in credit activities and are required to comply with various obligations.[73] These include ensuring that their credit activities are engaged in efficiently, honestly and fairly.[74] They must have internal dispute resolution procedures that comply with ASIC's requirements and be members of an approved external dispute resolution scheme.[75] They should advise consumers of their obligation to assess the suitability of credit contracts for consumers.[76]

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64 See above n 63.
65 Diss (n 63).
66 Ibid.
67 'Payday Lenders Target Vulnerable Women' (n 63) 0:02:05–0:02:38.
68 Diss (n 63) 0:02:51–0:03:00.
69 Ibid 0:05:33–0:05:36.
70 Piesse (n 63).
71 *NCCP* (n 13) sch 1 ('*National Credit Code*').
72 Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) ch 4.
73 *NCCP* (n 13) s 29, ch 2 pt 2-2 div 5. Engaging in credit activities without a licence may incur a civil or criminal penalty: *NCCP* (n 13) s 29. It is worth nothing that providers of buy-now-pay-later products do not currently need to be licensed as they fall outside the definition of 'credit contracts': *National Credit Code* (n 71) ss 4, 6.
74 *NCCP* (n 13) s 47(1)(a).
75 Ibid ss 47(1)(h), (i). Payday lenders are required to inform consumers of the availability of internal and external dispute resolution mechanisms: ibid s 126(2)(e).
76 Ibid ss 126(1), 126(2)(f), 132.

2 *Responsible Lending Obligations*

Issues relating to responsible lending obligations are relevant to online payday loans in light of the Senate inquiry's finding of aggressive marketing that channels consumers to payday loans when cheaper options for managing debt are available.[77] The responsible lending obligations[78] prohibit payday lenders from providing credit assistance to consumers unless they have made a preliminary assessment of the credit contract's suitability for the consumer.[79] The assessment involves making reasonable inquiries and taking reasonable steps to verify the consumer's financial situation.[80] Payday lenders are required to obtain and consider account statements from the consumer's financial institution for a period of at least 90 days immediately preceding the assessment.[81]

The *NCCP* sets out several situations in which a credit contract is presumed to be unsuitable for the consumer, such as where they would suffer substantial hardship complying with the financial obligations of a proposed credit contract.[82] Where a SACC is contemplated, there is a rebuttable presumption that the consumer would suffer substantial hardship under a new SACC where a consumer is in default of a SACC, or has had two or more SACCs within the past 90 days.[83] The penalties for suggesting an unsuitable credit contract, or assisting a consumer to enter into an unsuitable credit contract, include civil penalties and criminal penalties of up to 2 years' imprisonment.[84]

Additional safeguards apply in relation to consumers who derive 50% or more of their gross income from payments under the *Social Security Act 1991* (Cth).[85] Measures were introduced to protect a substantial proportion of vulnerable consumers' incomes by placing limits on the percentage of income that can be used towards repayment of SACCs. The amount of repayments under one or more SACCs, including a proposed new SACC, must not exceed 20% of the consumer's gross income for that payment cycle.[86] The reforms ostensibly purport to guard vulnerable consumers against the encroachment of loan repayments on their income such that they lack basic necessities which social security benefits are meant to provide.

3 *Caps on the Costs of Borrowing*

One of the ways in which the reforms sought to alleviate the risks of harm to consumers was by imposing limits on the amount which lenders can charge consumers for the cost of borrowing.[87] Establishment costs are capped at 20% of the adjusted credit amount.[88] Lenders are permitted to charge up to 4% per month of the adjusted credit

77 Senate Economics References Committee (n 4) 41.
78 *NCCP* (n 13) ch 3.
79 Ibid ss 115(1)(c), (2)(a), 116(1)(b), (2)(b).
80 Ibid s 117.
81 Ibid s 117(1A).
82 Ibid s 131(2)(a).
83 Ibid s 131(3A).
84 Ibid s 123.
85 Ibid s 133CC; *National Consumer Credit Protection Regulations 2010* (Cth) reg 28S(2) ('*NCCPR*').
86 *NCCPR* (n 85) reg 28S(3).
87 Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 62–4. Payday lenders are prohibited from charging establishment fees if any of the credit is used to refinance another SACC: *National Credit Code* (n 71) s 31A(1A).
88 *National Credit Code* (n 71) s 31A(2). The adjusted credit amount refers to the amount loaned under the contract and excludes any advances for fees: *National Credit Code* (n 71) ss 204(1), (3).

amount as monthly fees.[89] The stipulated fee caps do not include default and enforcement fees. Nonetheless, the maximum amount that can be recovered by lenders if the consumer defaults in loan repayments is twice the amount of the adjusted credit amount.[90]

4 Mandatory Warnings

The *Enhancements Act* sought to alleviate risks to consumers posed by the use of SACCs through mandatory warnings which alert consumers to alternative, cheaper options for managing debt.[91] Online payday lenders must display warnings on their websites in the manner prescribed by the regulations.[92] The payday lender's homepage and any web page containing information about the benefits or characteristics of SACCs must have a hyperlink in the prescribed form.[93] The hyperlink should have the words 'Warning about Borrowing' in Arial font size 12 points or larger and be accompanied by a boxed icon '⚠'.[94] The hyperlink should lead to a second and more comprehensive mandatory warning.[95]

The second warning should contain information about alternative low-cost measures for dealing with debt, such as financial counselling and payment plans with utilities providers.[96] The prescribed form of the warning is set out in Schedule 9 of the *National Consumer Credit Protection Regulations 2010* (Cth) ('*NCCPR*') as follows:

> **Do you really need a loan today?***
>
> It can be expensive to borrow small amounts of money
> and borrowing may not solve your money problems.
>
> Check your options before you borrow:
>
> - For information about other options for managing bills and debts, ring 1800 007 007 from anywhere in Australia to talk to a free and independent financial counsellor
> - Talk to your electricity, gas, phone or water provider to see if you can work out a payment plan
> - If you are on government benefits, ask if you can receive an advance from Centrelink: Phone: 13 17 94
>
> The Government's MoneySmart website shows you how small amount loans work and suggests other options that may help you.
>
> *This statement is an Australian Government requirement under the *NCCP*.

Thirdly, a warning identical to the prescribed warning shown above must immediately appear when a link to a web page where a SACC may be applied for is

89 Ibid s 31A(3).
90 Ibid s 39B.
91 Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 54.
92 *NCCP* (n 13) s 124B. Civil and criminal penalties apply for failure to comply with the provisions.
93 *NCCPR* (n 85) regs 28XXB(a)–(b).
94 Ibid. Schedule 8 sets out the prescribed hyperlink warning icon.
95 Ibid regs 28XXB(c)–(d).
96 Ibid sch 9.

clicked.[97] Further, the regulations state that the application form for a SACC must not be accessible until the warning is closed or acknowledged.[98] The rationale underpinning the mandatory disclosure of the availability of alternative measures for dealing with debt is described in the Explanatory Memorandum as helping 'consumers to make better and more informed financial decisions and to seek out lower cost alternatives to relatively higher cost short-term credit'.[99]

B Consumer Protection Legislation

The *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') provides further safeguards for consumers of payday loans. Legislative prohibitions against misleading advertising are important in light of the Senate inquiry's finding of predatory marketing strategies in the payday lending industry.[100] As seen in Parts III and IV, such concerns are accentuated in the social media space. Section 12DA of the *ASIC Act* prohibits conduct in relation to financial services that is misleading or deceptive, or is likely to mislead or deceive. In ascertaining whether conduct is misleading, it is necessary to consider the conduct 'as a whole and in context' and whether the 'ordinary or reasonable consumer is likely to be led into error'.[101] The 'dominant message' of advertising material is of crucial importance.[102]

The *ASIC Act* further prohibits unconscionable conduct in relation to the supply of financial services.[103] Section 12CC of the *ASIC Act* states that in determining whether conduct is unconscionable, matters such as the strength of the consumer's bargaining position vis-à-vis the payday lender and the extent to which the lender unreasonably failed to disclose risks are considered.[104] The use of unfair tactics and the imposition of conditions that are not reasonably necessary for the protection of the legitimate interests of the lender are also relevant.[105] The courts may have regard to the requirements of industry codes in determining whether lenders have engaged in unconscionable conduct.[106] Consequently, ASIC's regulatory guide on advertising financial products and services is relevant to the question of what may be regarded as unconscionable.[107] The prohibition against unconscionable conduct in the *ASIC Act* encompasses the notion of 'special disadvantage', which may arise from circumstances such as poverty, illness, infirmity of body or mind, lack of education, age or gender.[108]

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97 Ibid reg 28XXB(e).

98 Ibid reg 28XXB(f).

99 Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 53.

100 Senate Economics References Committee (n 4) 41.

101 *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73.

102 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 653 [45], 656 [52] (French CJ, Crennan, Bell and Keane JJ).

103 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA–12CB ('*ASIC Act*').

104 Ibid ss 12CC(1)(a), (i).

105 Ibid ss 12CC(1)(b), (d).

106 Ibid ss 12CC(1)(g), (3).

107 ASIC, 'Advertising Financial Products and Services (Including Credit): Good Practice Guide' (Regulatory Guide No 234, November 2012) ('Regulatory Guide').

108 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 63 [8] (Gleeson CJ), quoting *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J). See also *Bridgewater v Leahy* (1998) 194 CLR 457, 490 [115] (Gaudron, Gummow and Kirby JJ) for a discussion of emotional dependence as a factor for disadvantage.

ASIC's regulatory guide warns against the use of language or tactics in advertising which convey misleading impressions to ordinary and reasonable members of the advertisement's audience.[109] This includes using terms or phrases in a manner which fosters misleading impressions of risks so as to understate them.[110] Images may have the effect of detracting from or reducing the prominence of qualifying statements.[111] ASIC highlights the potential for consumer confusion where 'advertising material is presented in a "high trust" environment or context where a consumer would not ordinarily expect to see paid advertising, such as social media and blogs'.[112] In such circumstances, there is a need to clearly distinguish advertising from news content about financial products to avoid consumers being misled.

C *Privacy Act 1988* (Cth)

Privacy principles impose restrictions on the manner and extent to which entities such as credit providers may collect information from consumers. The principles are aimed at safeguarding the privacy of personal and credit information,[113] requiring that payday lenders should only collect information that is reasonably necessary.[114] In addition, payday lenders should collect information from consumers by lawful and fair means.[115] It is an offence for them to disclose consumers' personal information to others.[116]

III EMPIRICAL RESEARCH

A Methodology

The research examines websites of payday lenders who market SACCs to consumers through internet-based media and facilitate applications for SACCs through online platforms. Payday lenders were identified through searches using terms such as 'need cash now' or 'fast cash'. Sixteen payday lenders were randomly selected from a list of 52 online payday lenders compiled by the author in August 2018. Lenders were not selected on the basis of whether they were representative of the industry. The aim of the study was to investigate regulatory compliance in a random selection of payday lenders, and to analyse evidence of lenders' practices without making any claims about overall levels of compliance in the industry. The websites were analysed on the basis of variables such as their main marketing strategies, how quickly loans could be obtained, warnings about borrowing, disclosure of fees and their prominence, complaints mechanisms and whether applicants were required to provide internet banking or myGov usernames and passwords.[117]

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109 ASIC, 'Regulatory Guide' (n 107) 45, reg 234.164(c).
110 Ibid 26, reg 234.93.
111 Ibid 34, reg 234.123.
112 Ibid 38, reg 234.136.
113 *Privacy Act 1988* (Cth) sch 1, s 6N (definition of 'credit information').
114 Ibid sch 1, r 3.2 ('*Australian Privacy Principles*'). See also s 6 (definition of 'APP entity').
115 Ibid r 3.5.
116 Ibid s 80Q(1).
117 In the interest of maintaining the anonymity of payday lenders whose websites were examined, references to websites are not included in the discussion below.

B Description of Payday Lenders' Websites

The online payday lenders' websites commonly market their small loans as fast, simple, hassle-free or convenient, flexible, and borrowers may 'apply from anywhere'. There is a strong emphasis on fast and easy cash on most websites, reflected in phrases such as 'need money? No worries', 'fast cash' or 'same day loans' featuring prominently. Eleven of the 16 websites show photos of happy, smiling people that convey the impression that the people in the photographs are enjoying themselves with an emphasis on good relationships. Payday lenders commonly cite testimonials from satisfied customers. In highlighting the speed of their loans, 15 lenders say that funds will be available the same day or the next business day. Five lenders state that funds will be in borrowers' bank accounts within 60 minutes of approval, often saying in fine print that it is subject to business hours.

Online payday lenders frequently highlight the convenience of applying for loans through internet-based platforms. Statements such as 'online applications – avoid paperwork', 'apply in minutes' and 'no painful face to face meetings' are put forward as selling points. Fourteen payday lenders state that they are willing to assist people regardless of credit history, or those that major banks turn away.[118] Nine payday lenders specifically mention that applicants with bad credit and Centrelink recipients will be considered. Two lenders state that they specialise in loans to people with poor credit such as single mothers and Centrelink recipients.

1 Warnings about Borrowing

Thirteen websites have hyperlinks marked 'warning about borrowing' on their homepage. Three websites do not have the warning hyperlink on their homepage as required by regulation 28XXB of the *NCCPR*.[119] The rules require the warning hyperlink to be in 12 point Arial font.[120] Most warning hyperlinks meet the requirements of font size and type. However, two payday lenders do not meet the requirement of font size, with one using 10 point font for its warning hyperlink and another using 11 point. Although not all websites use Arial font for the warning hyperlink, most of them use styles similar to Arial such as Sans Serif or other fonts similar in appearance to Arial. Two websites do not have the boxed icon.

Nonetheless, warnings are typically placed at the bottom of the page and users have to scroll down past quite a lot of information to find the warning link. The warning link is often placed among many other hyperlinks leading to a wide range of information, often at the bottom of the lists of hyperlinks and among insignificant information. A user usually has to scroll past multiple, more prominent and colourful 'apply now' tabs and other more eye-catching material to find the warning.

Clicking on the warning hyperlink usually brings up the full warning required by the *NCCPR*. On some websites, the warning is obscured by large pictures such as a photo of money placed above the warning, requiring users to scroll down to read the full warning, or text saying 'any questions when applying use live chat' or 'welcome – let's get started'. It is common to find bright, larger and more conspicuous tabs on the

118 These include claims of assistance to 'Australians who are financially excluded' and access to financial solutions for all.

119 Section 124B of the *NCCP* (n 13) requires credit licensees to comply with the requirements of the *NCCPR* (n 85) in relation to their websites.

120 *NCCPR* (n 85) reg 28XXB(a).

warning page with words such as 'continue', 'apply now', 'member login' or 'close'. These tabs with larger font are often placed above the warning, while the font used for the warnings is often smaller and lighter. The layout commonly makes the text of the warning less conspicuous while the bright, colourful tabs seem to draw the readers' attention away from the more dense, smaller text. One of the payday lenders has altered the wording and set out a watered down '[s]mall loans such as those offered by [payday lender] can be useful in your time of need, but can be expensive' instead of the mandated '[i]t can be expensive … borrowing may not solve your problems'. Some lenders do not put the warning heading in bold as required by the *NCCPR*. One payday lender does not have the warning heading 'WARNING – Do you really need a loan?' at all.

The regulations state that an identical warning should appear when a person clicks on a link that would take them to a web page where they can apply for a loan. There are a number of websites that do not do this. After clicking on 'apply', users are required to fill in considerable amounts of information before the warning finally appears, sometimes several pages after the application has begun.

2 Costs

Payday lenders adopt varied approaches to the disclosure of costs. Four websites do not disclose any fees at all and two websites provide information which appears to be misleading. Among the most transparent are lenders who display tables or loan calculators clearly showing the amounts borrowed, fees, and the total amount that must be repaid after specified periods. Few lenders adopt such transparency on costs, however. Eight of them set out the 20% establishment fee and monthly fee in less conspicuous parts of the website or in smaller, lighter font. Three websites require borrowers to follow one or more links to find information on the costs of borrowing. Two of these web pages placed information on costs among other details such as frequently asked questions.

Significantly, the manner in which the costs of borrowing are disclosed on websites commonly requires prospective borrowers to work out for themselves the actual cost of their loan. Although some websites have loan calculators, these usually set out the amounts of regular instalments which would need to be paid, without showing any breakdown of costs such as the amount of the loan principal and the amount of fees. It is uncommon to find any loan calculator which shows the total amount of fees in dollar terms that borrowers would have to pay for the amount loaned.

In addition to a lack of clarity and transparency on the costs of borrowing, some payday lenders' descriptions of costs were questionable. One payday lender that targets borrowers with poor credit does not set out costs for their small or bad credit loans but does list home loan interest rates as approximately 5%, far lower than the usual cost of payday loans. This raises questions as to whether the home loan rate was provided to give an impression of lower costs than what borrowers would incur on small loans.

3 Normalising Payday Lending, Members and Incentives for Referrals

Payday lenders commonly use labels or products that appear to mimic mainstream finance, at the same time avoiding or distancing themselves from the stigma associated with payday loans. These include labelling their payday loans as Visa debit cards, 'cash advances' or 'micro loans'. One payday lender promotes the use of their Visa prepaid cards on their website as follows:

> Once you've almost paid off your first [payday lender] loan, you may become eligible for a [payday lender] Visa Prepaid Card*, which means the next time you apply for a loan,

> you can elect to have the funds paid straight onto your card within seconds once you have confirmed your loan! We'll give you the heads up when it's available to you and even show you how to get your hands on these smart little cards.

Twelve of the 16 payday lenders offer membership or similar arrangements to those who have taken a loan from them, stating that getting a loan is easier and quicker for existing or past borrowers. Separate members' login options are frequently available. One lender states that 'most of our clients return to us many times', while another cites an example of a loyal customer who has used their loans for 10 years.

Three payday lenders offer financial incentives to those who refer their services to their friends. These include statements such as 'share the LOVE. Refer a friend – get a $100 cash reward' and an offer of a $20 gift card for every new customer referred to them.

4 Presenting Themselves as Altruistic, Responsible Lenders

Fourteen of the 16 payday lenders present themselves as altruistic or responsible lenders, stating for example that 'we understand how it feels because we have been there ourselves' and 'things have since changed for us and we would like to help change them for you too'. It is common for payday lenders' websites to feature blogs giving finance tips. Despite claims of altruism, some payday lenders do not comply with legal requirements such as mandatory warnings, or engage in misleading conduct.

For instance, one payday lender states that, 'we make sure we know exactly what's coming in and going out and that you only get what you can afford'; 'know that you'll be welcomed at [payday lender] and treated with the same respect and care that we would a dear friend in need'. On the same web page, they appear to misrepresent their small loans as being better and more affordable than payday loans. Nonetheless, the product offered is a small loan with the same costs as other payday loans.

Another payday lender advertises loans for the unemployed, single mothers and pensioners, and represents itself as 'specialists in providing loans to Centrelink recipients'. The website says 'at [payday lender] we have helped people from all walks of life for many different reasons. Read what some of our customers have said' and 'we help – call us on 1300 WE HELP'. Despite representing themselves as responsible lenders, there is no information about costs and the mandatory warning has been watered down. The lender promotes its assistance to customers with poor credit issues, stating that

> [s]ome customers stuck with a high interest loan are delighted with the real cash savings we can help them make … each week, each month, each year … just by being smarter about how they borrow. We coach our customers to get on the front foot to protect their personal credit profile to keep them in a stronger position for the day they do not need to borrow.

5 Blogs with Finance Tips

At least seven of the 16 lenders have blogs offering finance tips which include articles on living well on a budget and advice on managing money. The articles commonly refer to reputable sources or industry experts, presenting the advice in an authoritative manner. Many blog posts seem to be aimed at young families. Some payday lenders' blog posts are aimed at low-income consumers and people with poor credit. The blogs often feature matters of interest to young adults and students such as 'Facts Every Millennial Needs to Know About Saving and Finance', 'Smart Wealth Planning: 7 Financial Milestones to Reach in Your 20s' and 'Cheap Textbooks and Other Back to Uni Cost Savings Tips'.

On the same blog sites that provide finance tips, lenders often include articles promoting their products using the same blog format. At times, finance tips are combined with advertising material within the same article. For instance, at the end of the article 'Saving for a Gap Year? Here's 9 Tips You Need to Know', the article recommends taking a loan and talking to the payday lender hosting the blog. It ends with '[t]aking a gap year can be one of the most exciting and unforgettable experiences you encounter over the course of your life. Don't allow money problems to bring unnecessary stress and prevent you from making the most of the year'.

6 Social Media, Testimonials and Online Review Websites

Eleven of the 16 online payday lenders have links to social media or websites such as Trustpilot which focus on reviewing services. Facebook is the most commonly used social network among the payday lenders examined. At least nine lenders' websites have links to Facebook, and seven lenders are linked to Twitter. Google Plus is used by five lenders, while four lenders use Instagram. YouTube and Trustpilot are used by at least three lenders each. One lender shows a Trustpilot five-star rating and a trust score of 9.6 based on 1,716 reviews, and 13,000 Facebook 'likes' on its homepage. Another payday lender prominently displays five-star service awards from review website Word of Mouth and mentions 'outstanding Google reviews'.

Many websites cite testimonials from satisfied customers including statements that the payday lenders were 'life savers' and 'have always helped when needed'. Some testimonials indicate that the customers were repeat users of payday loans from particular lenders. One lender's application form has a box with a tick consenting to being contacted via non-traditional methods such as WhatsApp, Viber or Facebook Messenger.

The Facebook sites of payday lenders often reflect a fun and friendly social media presence. Posts on budgeting tips and healthy living are often interspersed between posts which promote their products and services. These are similar to finance tips blogs. At times, news items, such as updates on interest rates, are placed among posts on payday lenders' products and budgeting tips. One payday lender provides information on a charity that helps struggling families with cheap groceries, followed by a post advertising its services. This could engender the perception that the payday lender might be a similar charitable organisation.

Payday lenders' Facebook pages commonly convey values of social responsibility and engagement. One payday lender has a post of its staff donating blood while others promote 'Clean Up Australia Day', 'National Recycling Week' and 'World Book Day'. At times, trending hashtags of events, such as #unitetosavelives, or pop culture, are used. Some payday lenders offer giveaways of movie tickets or cash prizes. The popularity of payday lenders' Facebook pages is reflected in their thousands of followers and 'likes'. Two major payday lenders have close to 20,000 and 17,000 followers and 'likes' respectively. One payday lender's Facebook prominently displays a five-star Trustpilot rating, mixing posts on cash prize winners with advertisements of its payday loans. The combination of a friendly social media presence, helpful tips for healthy living on a budget and an appearance of social responsibility arguably fosters a higher degree of trust than would otherwise be associated with payday lenders. Advertising in this manner is subtle and would appear to catch consumers off guard more easily than conventional forms of advertising outside the higher-trust environment that social media engenders.

7 Internet Banking and myGov Usernames and Passwords

The majority of lenders use third-party service providers to obtain bank statements from applicants through internet banking. Applicants are asked to enter their internet banking username and password on the websites. For some lenders, this is mandatory and the application cannot be completed without entering these internet banking details. A few lenders allow the option of sending in paper bank statements through other means such as by fax or uploading documents. Twelve of the 16 lenders use hyperlinks which redirect applicants to websites that request the entry of internet banking usernames and passwords. The use of internet banking is marketed as being more convenient for applicants, faster and without the hassle of old-fashioned methods and paperwork. Some websites assure applicants that their internet banking details will be securely managed by a third party on a single-use basis and the payday lender will not see the information. At least one lender also asks applicants to provide their myGov login details.

C Possible Breaches of Relevant Laws

The advertising practices of payday lenders as revealed by the survey of their websites raise issues of compliance with the *NCCP* and the *ASIC Act*.

1 National Consumer Credit Protection Laws

As observed in Part III(B)(1), several payday lenders' websites do not comply with mandatory warning requirements. These include not displaying any mandatory warnings or required hyperlinks, using fonts smaller than the mandatory requirements, and not having the required boxed warning icon. The examination of full warnings required by the *NCCPR* reveals that one payday lender does not have the warning heading at all, another uses a watered-down warning, and some warning headings are not in bold. Likewise, there are issues of non-compliance with the requirement that a full warning should appear when a link to an application for a loan is clicked. Several websites are set up such that the warning emerges later in the application process, at times several pages later.

Notably, while the majority of payday lenders' websites comply with the warning requirements of the *NCCP* and *NCCPR*, the manner in which mandatory warnings are placed within websites commonly reduces the visual impact of the mandatory warnings. These include placing warning hyperlinks at the bottom of homepages among other links to miscellaneous information, such that they are only visible to web users who scroll down to the bottom of homepages. Practices which detract from the significance of warnings are further discussed in Part III(C)(2) below.

The *National Credit Code* prohibits any charges from being imposed on borrowers of SACCs apart from the permitted fees which are the establishment, monthly, default and government fees.[121] Despite the strict prohibition, one payday lender's website states that their loans have no fees, charging an annual percentage rate of 47.8% instead. This would appear to constitute a breach of s 31A of the *National Credit Code*.

2 ASIC Act

The analysis of payday lenders' websites raises significant issues in relation to misleading conduct and unconscionable conduct, which are prohibited by the *ASIC*

121 *National Credit Code* (n 71) s 31A(1).

Act.[122] The profiling of payday loan users in several studies indicates that many users of payday loans are vulnerable consumers on low incomes.[123] Banks et al's interviews revealed that 82% of women and 72% of men who used payday loans were receiving income support or a pension from Centrelink.[124] Further, 37% of those on Centrelink income support were on a disability support pension.[125] Statistics indicate that single mothers have the highest rate of multiple concurrent payday loans which are often used as emergency cash for household expenses.[126] In the broader population, payday loans are increasingly used to pay utility bills such as electricity.[127] These statistics suggest that many payday borrowers are disadvantaged and, accordingly, there is a greater need for caution in safeguarding such consumers from exploitation.

The *ASIC Act* prohibits unconscionable conduct in the supply of financial services.[128] The *ASIC Act* provides that industry codes and considerations such as the borrower's relative strength of bargaining position vis-à-vis the lender are relevant in ascertaining whether conduct may be unconscionable.[129] Several common practices observed in the study of payday lenders' websites suggest that consumers are being exposed to unfair practices at their point of vulnerability. These practices have further been called out by ASIC for their propensity to mislead.[130]

One pertinent matter highlighted in ASIC's report relates to effective communication of warnings on websites to consumers. The report states that lenders should 'avoid placing the warning statement at the bottom of a long page that requires consumers to scroll down to it'.[131] This is at odds with the practices of payday lenders who typically place the mandatory warning hyperlink at the bottom of the homepage.

ASIC's regulatory guide warns against the use of images that have the effect of contradicting, detracting from or reducing the prominence of qualifying statements.[132] The guide reasons that such images may make an advertisement more likely to mislead consumers. They posit that 'images in advertising … can create a particularly significant impression on consumers, potentially more significant than that created by written or spoken messages'.[133] The regulatory guide observes that 'the use of imagery associated with success, wealth, safety and security may particularly distract consumers from any contrasting messages about the risks and drawbacks of a particular product or service'.[134]

The survey of payday lenders' homepages reveals that web users are usually presented with prominent marketing messages of fast, easy cash, often accompanied by photographs of happy, smiling people. In contrast, warning hyperlinks are obscure,

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122 *ASIC Act* (n 103) ss 12CA, 12CB, 12DA.

123 Marcus Banks et al, *Caught Short: Exploring the Role of Small, Short-Term Loans in the Lives of Australians* (Final Report, August 2012) 16; Lucia Stein, 'The Complexity Surrounding Payday Loans', *ABC News* (online, 27 March 2017) <https://www.abc.net.au/news/2017-03-27/the-complexity-surrounding-payday-loans/8389754>.

124 Banks et al (n 123) 16.

125 Ibid.

126 Good Shepherd Microfinance and Digital Finance Analytics (n 34) 6–8.

127 Ibid 8.

128 *ASIC Act* (n 103) s 12CB.

129 Ibid s 12CC.

130 See above nn 133 and 147 and accompanying text.

131 ASIC, *Payday Lenders* (n 23) 30.

132 ASIC, 'Regulatory Guide' (n 107) 34, reg 234.123.

133 Ibid 34, reg 234.122.

134 Ibid 34, reg 234.124.

typically located in the midst of other links to miscellaneous information at the bottom of the homepage. In the process of scrolling to the bottom of the homepage, web users are presented with significantly more eye-catching, visually appealing advertising before the warning hyperlink becomes visible.

Likewise, on web pages where full mandatory warnings are located, one payday lender placed a large picture of many banknotes above the warning, such that web users would need to scroll down to read the full warning. The picture of money represents wealth and arguably detracts from the warning, reducing the impact of the advice on the risks of borrowing. The survey reveals that payday lenders commonly place the full mandatory warning among or beside other brighter, coloured and more conspicuous images or tabs marked 'continue' or 'next', which lead the user to the next web page. These layouts appear to diminish the impact of warnings which were intended to 'help consumers to make better and more informed financial decisions and to seek out lower cost alternatives to relatively higher cost short-term credit contracts'.[135]

Such practices are arguably contrary to ASIC's regulatory guide. Further, when examined against the dominant marketing messages put forward by payday lenders on their websites, these practices collectively point to systemic issues of misleading and unconscionable conduct. The survey of websites indicates that payday lenders commonly portray themselves as altruistic and responsible lenders, use terms that mimic mainstream financial products, and many have blogs offering finance tips. Commentators have argued that terms such as 'microloan' sound similar to 'microfinance', which is a low interest loan widely used in developing countries to help those who are excluded from mainstream finance.[136] Payday lenders' websites commonly feature testimonials from satisfied customers, with some citing product review websites such as Trustpilot. These practices appear to mask the risks of harm associated with payday loans, suggesting that the underlying aims of reforms on mandatory warnings have not been duly realised.

Several cases lend strength to the argument that such conduct is likely to be misleading. In *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd*, Meriton withheld negative reviews from the TripAdvisor website to create 'a more positive or favourable impression of the quality or amenity of the [Meriton] properties'.[137] The conduct was designed to minimise 'awareness of prospective patrons about the frequency and kinds of negative experiences encountered by its customers' and fostered an 'unduly favourable impression'.[138] Such conduct was found to be misleading, and constituted a breach of consumer protection law.[139] Likewise, in *Australian Competition and Consumer Commission v HJ Heinz Company Australia Ltd*,[140] Heinz sold a product for young children, holding it out as healthy and natural.[141] The impression was conveyed through pictures of fruit and vegetables[142] and

135 Explanatory Memorandum, Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 (Cth) 5.
136 Gillam and CALC (n 17) 118.
137 (2017) 350 ALR 494, 542 [183], 547 [203] (Moshinsky J).
138 Ibid 548 [205] (Moshinsky J).
139 Ibid 550 [213] (Moshinsky J). This was a breach of s 18 of sch 2 of the *Competition and Consumer Act 2010* (Cth) ('*Australian Consumer Law*'), an equivalent of s 12DA of the *ASIC Act* (n 103).
140 (2018) 363 ALR 136.
141 Ibid 139–40 [7]–[15] (White J).
142 Ibid 139 [7] (White J).

phrases such as '99% fruit and veg'.[143] Heinz was found to have engaged in misleading conduct by representing that the product was beneficial for children's health when the product was high in sugar and could cause dental health problems.[144]

The common marketing strategies of online payday lenders as outlined above, and the diminishing of the effect of mandatory warnings, are at odds with the risks of harm to payday borrowers documented by studies and reiterated in the Revised Explanatory Memorandum to the Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth).[145] The recent Senate inquiry found evidence of widespread non-compliance with regulations such as responsible lending obligations.[146] The problem is compounded when payday lenders engage in misleading practices and breach, or fail to give substantive practical effect to, regulations such as requirements of mandatory warnings. In addition, many payday lenders' websites have blogs on finance tips that typically mix advice on managing money with promotional material on payday lenders' products. These practices are contrary to ASIC's regulatory guide and appear to be unconscionable.

ASIC's regulatory guide highlights the potential for consumer confusion when advertising material is presented in a '"high trust" environment or context where a consumer would not ordinarily expect to see paid advertising, such as social media and blogs'.[147] The regulatory guide emphasises the need to clearly distinguish between advertising and news content to avoid consumer confusion.[148] The survey of payday lenders' blogs showed that it is often difficult to distinguish between finance tips and promotion of payday lenders' products. At times, financial advice and statements encouraging the use of payday loans are found within the same article. It is common for payday lenders' blogs to have articles promoting their products interspersed between articles on managing money, children's activities or other ways of maximising lifestyles on a budget. This may be confusing for readers, who may be misled into thinking that the recommendations on the payday lenders' products form part of impartial advice from well-meaning experts.

The *ASIC Act* prohibits misleading representations in connection with the supply of financial services.[149] These include misleading representations concerning the 'approval, performance characteristics, uses or benefits' of financial services.[150] Section 12DF further prohibits 'conduct that is liable to mislead the public as to the nature, the characteristics, [or] the suitability for their purpose' of any financial services. The common practice of combining finance tips with advertisements of payday lenders' services could foreseeably result in readers of the blogs mistaking the 'advice' on payday loans as part of the recommendations on budgeting. By placing material promoting their loans in the midst of information on healthy financial management, payday lenders appear to be holding their products and services out as useful and

143 Ibid 139 [8] (White J).
144 Ibid 177 [244], 186 [314] (White J).
145 Gillam and CALC (n 17); Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancement) Bill 2012 (Cth).
146 Senate Economics References Committee (n 4) 5 [1.27].
147 ASIC, 'Regulatory Guide' (n 107) 38, reg 234.136.
148 Ibid.
149 *ASIC Act* (n 103) s 12DB(1). Financial products and services are defined in the ss 12BAA–12BAB of the *ASIC Act* and 'credit' is defined in s 2B(3) of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
150 *ASIC Act* (n 103) s 12DB(1)(e).

beneficial means of managing money while downplaying the risks and costs involved. These practices arguably breach the prohibitions against misleading conduct. Statements which encourage consumers to use high-cost payday loans to finance lifestyles beyond their means can hardly be considered as 'suitable for their purpose' or in keeping with responsible lending obligations. The vulnerability of many payday borrowers further strengthens the argument that such practices are unconscionable and in breach of the *ASIC Act*.

3 *Privacy Act 1988 (Cth)*

The survey of websites revealed that 12 of 16 (75%) payday lenders obtain bank statements from applicants through online access to the applicant's internet banking account. Applicants are redirected to websites which request their internet banking username and password. At least one of the websites surveyed also requested myGov usernames and passwords. Some payday lenders provide assurance that applicants' internet banking details will be securely managed by a third party on a single-use basis. Nonetheless, banks advise against such disclosure of usernames and passwords, and industry experts have raised concerns regarding risks to the safety of personal data.[151] Likewise, the Department of Human Services advises against sharing myGov login details with anyone, and suggests changing passwords if these details have been disclosed to third parties.[152]

ASIC's *ePayments Code* states that 'a user must not voluntarily disclose one or more pass codes to anyone, including a family member or friend'.[153] Such disclosure could lead to the applicant being liable for loss that results from unauthorised transactions, if the disclosure of passcodes has contributed to the unauthorised transactions.[154] ASIC's report on payday lenders observes several risks to consumers arising from the disclosure of internet banking details to third party software providers, stating that 'it appears that consumers are not protected under the *ePayments Code* if they access their internet banking portal via a third-party software provider's system and the third party was not promoted, endorsed or authorised by the consumer's banking institution'.[155] In addition, it is uncertain whether consumers have access to external dispute resolution schemes if they have complaints against the third-party software providers.[156]

Concerns also arise in relation to the *Privacy Act 1988* (Cth). The *Australian Privacy Principles* state that information should be collected only if it is reasonably necessary, and such collection should take place by lawful and fair means.[157] The disclosure of internet banking usernames and passwords does not appear to be reasonably necessary. Further, these details may be used to access significant amounts of information available on the applicant's internet banking account, far more than is necessary for a payday loan application, with potentially detrimental consequences for the applicant.

151 Ariel Bogle, 'Payday Lenders Ask Customers to Share myGov and Banking Passwords, Putting Them at Risk', *ABC News* (online, 8 January 2018) <https://www.abc.net.au/news/science/2018-01-08/payday-lenders-ask-for-mygov-banking-passwords-security/9249086>.

152 Ibid.

153 ASIC, *ePayments Code* (29 March 2016) 18 [12.2].

154 Ibid 16–17.

155 ASIC, *Payday Lenders* (n 23) 38.

156 Ibid.

157 *Australian Privacy Principles* (n 114) rr 3.2, 3.5.

Many payday loan users are vulnerable and in financial stress and, as a result, may perceive that they have little choice in the matter.[158] Some payday lenders require applicants to provide internet banking details as a condition of the application, without providing any option of supplying bank statements through other means such as email or uploading attachments. These circumstances raise doubts as to whether payday lenders requiring internet banking usernames and passwords as a precondition to loan applications complies with the privacy principle that the collection of information should take place through lawful and fair means.

Requiring the disclosure of internet banking passwords, and exposing vulnerable consumers to risks flowing from such disclosure, arguably not only breaches the *Australian Privacy Principles* but also the prohibition against unconscionable conduct in the *ASIC Act*.[159] The use of undue influence or pressure, or unfair tactics, and the imposition of conditions that are not reasonably necessary for the protection of the legitimate interests of the lender are factors relevant to a determination of whether unconscionable conduct has occurred.[160] The likelihood of unconscionable conduct is higher when payday lenders require vulnerable, financially stressed consumers to disclose internet banking passwords as a mandatory requirement for the application to proceed. Vulnerable consumers in financial stress are in a significantly weaker bargaining position and, due to limited alternatives, may feel compelled to disclose internet banking usernames and passwords in order to be considered for a loan. The considerable risks to consumers who are in a disadvantaged position, and the fact that lenders could obtain the required bank statements without exposing vulnerable consumers to such risks, arguably contribute to the argument that compelling applicants to disclose internet banking passwords is unconscionable in the circumstances.

IV REGULATORY RESPONSES

A Enforcement

The possible breaches of regulations discussed above suggest the need for more enforcement particularly in relation to the provisions of the *ASIC Act* on misleading representations and unconscionable conduct.[161] ASIC's enforcement initiatives in recent years appear to have focused largely on responsible lending obligations. Several investigations by ASIC have led to payday lenders entering into enforceable undertakings for breaches of responsible lending obligations. For instance, Cash Converters Pty Ltd was required to refund $10.8 million to consumers for failing 'to make reasonable inquiries into consumers' income and expenses, particularly in situations where the small amount loan was presumed by the credit legislation to be unsuitable'.[162]

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158 Therese Wilson, Nicola Howell and Genevieve Sheehan, 'Protecting the Most Vulnerable in Consumer Credit Transactions' (2009) 32(2) *Journal of Consumer Policy* 117, 125.

159 *ASIC Act* (n 103) s 12CB.

160 Ibid ss 12CC(1)(b), (d).

161 *ASIC Act* (n 103) ss 12CA–12CB, 12DB–12DC.

162 ASIC, 'Cash Converters to Pay over $12M Following ASIC Probe' (Media Release No 16-380MR, 9 November 2016). Cash Converters were issued 30 infringement notices and fined $1.35 million: ibid. Nimble Australia Pty Ltd refunded $1.5 million to consumers and contributed $50,000 to Financial Counselling Australia following ASIC's finding that Nimble had breached responsible lending obligations: ASIC, 'Payday Lender Nimble to Refund $1.5 Million Following ASIC Probe' (Media Release No 16-089MR, 23 March 2016) ('Payday Lender Nimble to Refund $1.5 Million'). ASIC's investigation into conduct by Money3 Corporation Ltd in relation to

Fewer enforcement proceedings have centred on consumer protection provisions relating to advertising practices such as misleading or unconscionable conduct in recent years.[163] ASIC observed in relation to Money3 Corporation Ltd that the payday lender had engaged in misleading conduct. The investigation found that consumers could be misled into believing that flexible repayments were allowed when a large fee could be incurred for variation of repayments.[164] In 2014, the Federal Court held that Cash Store Pty Ltd had breached responsible lending obligations and had engaged in unconscionable conduct.[165] The unconscionable conduct in question concerned the sale of consumer credit insurance to customers when it was unlikely that the insurance could ever provide any benefit to them.[166] ASIC also brought proceedings against Paid International Ltd, formerly known as First Stop Money Ltd, for misleading online advertising of 'instant decisions' and approvals 'within minutes'.[167] ASIC found that the assessments of loan applications took up to 72 hours, and further asserted that it was not possible for the payday lender to make decisions instantly or within a few minutes while carrying out the assessments required under the responsible lending obligations.[168] Other breaches of regulations which have been the subject of enforcement action against payday lenders include charging consumers excessive fees[169] and unlicensed credit activities.[170] Borrowers have brought class actions against payday lenders for compensation over claims of excessive fees.[171] To date, none of ASIC's enforcement

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fixed fee loans found that the product was unsuitable for most of the financially vulnerable consumers who used it, and that Money3 had breached its responsible lending obligations.

163 ASIC's media releases indicate that several enforcement proceedings in relation to misleading advertising took place approximately five or more years ago. For instance, in 2013, ASIC issued an infringement notice to Ferratum Australia Pty Ltd for misleading advertising of 'free $100 loans' and Nimble Australia Pty Ltd altered its advertising in response to intervention from ASIC over potentially misleading claims: ASIC, 'Small Amount Lender Pays Infringement Notice Penalty for "Free" Loan Offer' (Media Release No 13-284MR, 21 October 2013); ASIC, 'ASIC Concerns Sees Payday Lender Change Advertising' (Media Release No 13-112MR, 23 May 2013). See also ASIC, 'ASIC's Payday Lending Outcomes' (June 2017) <https://www.aph.gov.au/~/media/Committees/corporations_ctte/ASIC_Oversight/2017/Tabled_Doc_ASIC_payday_lending_outcomes_002.pdf?la=en>.

164 ASIC, 'Money3 Provides Over $100,000 in Refunds to Consumers as ASIC's Payday Lending Crackdown Continues' (Media Release No 15-168MR, 1 July 2015). In 2012, enforcement action was taken against Cash Today Pty Ltd for failure to disclose interest rates appropriately: ASIC, 'ASIC Takes Action on Payday Loan Advertising' (Media Release No 12-197MR, 17 August 2012).

165 *Australian Securities and Investments Commission v Cash Store Pty Ltd (in liq)* [2014] FCA 926, [86], [94]–[95] (Davies J).

166 Ibid [94] (Davies J). The majority of the customers were low-income earners or on Centrelink benefits: ASIC, 'Payday Lender Engages in Unconscionable Conduct and Breaches Consumer Credit Laws' (Media Release No 14-220MR, 2 September 2014).

167 ASIC, 'Small Amount Lender Pays 30,600 Dollar Penalty for Misleading Online Advertisements' (Media Release No 14-065MR, 2 April 2014).

168 Ibid.

169 ASIC, 'ASIC Suspends Payday Lender's Credit Licence' (Media Release No 15-262MR, 21 September 2015); ASIC, 'Payday Lender Penalised for Overcharging Consumers' (Media Release No 16-027MR, 9 February 2016).

170 ASIC, 'ASIC Bans Former Director of Payday Lender from Credit Activities for Ten Years' (Media Release No 16-281MR, 30 August 2016); ASIC, 'ASIC Bans Director of Unlicensed Payday Lender (Media Release No 17-336MR, 6 October 2017).

171 Cash Converters reached a settlement for payment of $23 million to 37,500 past customers in New South Wales who had allegedly been charged 633% for cash loans and 145% for personal loans. The charges were in excess of the applicable interest rate cap of 48% at that time: Chettle (n 56). Similarly, a class action by 30,000 customers in Queensland who claimed that they had been overcharged by Cash Converters led to a settlement of $16.4 million: David Chau, 'Cash Converters Settles Class Action for $16.4 million', *ABC News* (online, 22

actions appear to have focused on the specific issues raised in the survey of websites in Part III(B) such as the advertising of payday loans in the midst of blogs presenting finance tips, despite ASIC's regulatory guide clearly emphasising the need to distinguish between advertising and other content to avoid consumer confusion.[172]

ASIC's enforcement policies have been criticised by the Hayne Royal Commission, which emphasised the need for stronger regulatory enforcement.[173] The analysis in Part III(C) reveals significant issues of misleading conduct and unconscionable conduct, reflecting the need for regulatory enforcement. Despite ASIC's statement that lenders should 'avoid placing the warning statement at the bottom of a long page that requires a consumer to scroll down to it',[174] the survey of payday lenders' websites indicates that this practice remains widespread. Payday lenders have paid scant attention to ASIC's regulatory guide on presenting advertising material in 'high trust' blogs and social media.[175]

B Reforms

The Senate inquiry into credit and hardship recommended the introduction and passage of reforms proposed in the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017 ('SACC Bill').[176] The report observed that '[m]any of the perceived shortcomings in current regulation would be addressed by the SACC Bill'.[177] The Committee recommended that ASIC should 'review how financial products and services (including credit) are advertised and issue an updated regulatory guide to how credit products interact with consumers in an online environment'.[178] Apart from this recommendation, issues arising from online payday lending have not gained traction in recent reform initiatives. Despite about four years of consultations, reports, exposure draft legislation and tabling as a Private Member's Bill, the SACC Bill has not been passed.[179] The Bill has since lapsed and will need to be reintroduced in Parliament for the reforms to be enacted. Previous reform initiatives which culminated in the *Enhancements Act* were strongly contested and have been described as a 'series of political compromises following a highly charged and polarised debate framed by the conflicting interests of consumer and welfare advocates … and the payday loan industry'.[180] Following opposition by industry lobby groups, proposed protections for consumers were reduced in significant areas, leading to weaker and less effective reforms.[181] Consequently, consumer advocates have highlighted the need for additional reforms to strengthen protections for vulnerable consumers. The survey of websites discussed in Part III(B) highlights the need for

October 2018) <https://www.abc.net.au/news/2018-10-22/cash-converters-settles-class-action-$16.4-million/10403750>.

172 ASIC, 'Regulatory Guide' (n 107) 38, reg 234.136.

173 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 424–46.

174 ASIC, *Payday Lenders* (n 23) 30.

175 ASIC, 'Regulatory Guide' (n 107) 38, reg 234.136.

176 Senate Economics References Committee (n 4) 4 [1.21].

177 Ibid 50 [3.94].

178 Ibid 13 [1.73].

179 'Are We There Yet? (The Mysterious Case of the Vanishing SACC Bill)', *Consumer Action Law Centre* (Web Page, 19 June 2018) <https://consumeraction.org.au/are-we-there-yet-the-mysterious-case-of-the-vanishing-sacc-bill/>.

180 Ali, McRae and Ramsay (n 46) 450–1.

181 Ibid 412–13.

further reforms to address emerging challenges in an increasingly digitalised fringe lending industry.

In this section, subsection 1 canvasses the reforms proposed in the SACC Bill. Subsection 2 considers gaps in the regulatory framework and the need for specific measures to strengthen regulatory protections for consumers in the increasing digitalisation of payday loans. In subsection 3, risk warnings are examined. The problem of poverty which frequently underpins the use of payday loans is discussed in subsection 4. Subsection 5 investigates implications of payday lenders requesting consumers' internet banking passwords.

1 SACC Bill

The marketing strategies of online payday lenders examined in Part III(B) and the Senate inquiry report raise issues of responsible lending. Several reforms proposed in the SACC Bill are aimed at alleviating problems relating to responsible lending which have persisted despite the existing laws. Key reforms in the SACC Bill include the introduction of a rule that restricts repayments under payday loans to a maximum of 10% of a consumer's net, or after tax, income.[182] The reforms extend the safeguard of protected earnings to all consumers, in place of existing rules which protect earnings of consumers whom rely substantially on Centrelink benefits. Existing laws seek to protect consumers who derive 50% or more of their gross income from Centrelink payments by limiting the proportion of income that can be used towards repayments of payday loans.[183] The proposed reform protects a higher proportion of income from being channelled towards repayments of payday loans, allowing 10% of net income to be used as repayments in comparison with the 20% limit of gross income under existing rules.[184] The SACC Bill aims to provide greater incentives for compliance by stipulating that payday lenders who breach the prohibition 'will lose their entitlement to any establishment fee and monthly fees'.[185] Payday lenders who require or accept repayments in excess of permitted amounts face prospects of criminal penalties.[186]

The rule replaces rebuttable presumptions of unsuitability which have been found to be ineffective in curbing problems of repeat borrowing and debt spirals.[187] Under existing laws, consumers are presumed to suffer substantial hardship under a new SACC where a consumer is in default of a SACC, or has had two or more SACCs within the past 90 days.[188] The presumption may be rebutted if the contrary is proven. ASIC's review found that 62% of the 288 files examined indicated that payday lenders entered into loans with consumers when presumptions of unsuitability were triggered.[189] Many of the lenders did not explain how the presumptions were rebutted.[190] ASIC took the

182 Exposure Draft Explanatory Materials (n 3) 10–11 [2.11].
183 *NCCP* (n 13) s 133CC; *NCCPR* (n 85) reg 28S(2).
184 Exposure Draft Explanatory Materials (n 3) 13 [2.24].
185 Ibid 14 [2.25].
186 Ibid 16–17 [2.43].
187 Ibid 11 [2.12], 15. ASIC's report found that in a majority of files reviewed, consumers had 'taken out two or more small amount loans with the same payday lender within the review period. Some consumers had as many as five or six loans with the same payday lender': ASIC, *Payday Lenders* (n 23) 32.
188 *NCCP* (n 13) s 131(3A). Several other situations which give rise to presumptions of unsuitability are set out in s 131 of the *NCCP* (n 13).
189 ASIC, *Payday Lenders* (n 23) 32 [162].
190 Ibid 33 [167].

view that, in the circumstances, lenders were unlikely to have complied with responsible lending obligations.[191]

The survey of websites in Part III(B) indicates that payday lenders frequently offer membership to borrowers which enables them to obtain subsequent loans faster and more easily. Such practices that encourage repeat borrowing are associated with higher risks of debt spirals.[192] The reforms are aimed at reducing the incidence of borrowers increasingly channeling income towards the high cost of payday loans by limiting the proportion of income that can be used to repay payday loans. The Bill prohibits payday lenders from making unsolicited credit offers.[193] It also seeks to address the problem of payday lenders 'artificially extending the life of SACC loans by "front-loading" repayments early in the loan', a practice that allows payday lenders to 'receive additional monthly fees with no benefit to the consumer'.[194]

2 Emerging Challenges in an Increasingly Digitalised Payday Lending Industry

Statistics canvassed in Part I(A) reveal that the proportion of payday loans entered into through the internet, including mobile devices, rose from 4% of the payday lending market in 2008 to 75% in 2017.[195] The increasing use of digital technology as a medium of marketing and entry into payday loans raises questions regarding the adequacy of existing regulations in addressing new challenges that arise.

Among these is the use of algorithms by payday lenders in assessing borrowers' creditworthiness.[196] Studies have raised concerns around the opacity and the lack of accountability over the use of complex algorithmic models, and the accuracy of data mined.[197] ASIC's investigations found that Nimble Australia Pty Ltd's algorithms failed to adequately consider consumers' financial information, leading to breaches of responsible lending obligations.[198] According to ASIC,

> Nimble failed to consistently recognise where consumers had obtained repeat loans from payday lenders within a short period of time. Even where repeat loans were properly identified, Nimble did not take sufficient or appropriate steps as required by law before providing a loan to the consumer.[199]

Increasingly sophisticated credit algorithms which predict potential borrowers' creditworthiness are thought to be rather opaque.[200] Artificial intelligence or predictive analytics are programmed to learn how to perform specific tasks on their own and at times their decisions cannot be explained, although efforts are being made to develop

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191 Ibid 33.

192 Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 58 [4.30].

193 Exposure Draft Explanatory Materials (n 3) 11 [2.15].

194 Ibid 11 [2.13].

195 Digital Finance Analytics (n 2) 3.

196 Pearson posits that algorithms will be increasingly used to inform decisions on creditworthiness in Australia: Gail Pearson, 'The HEM and Hayne's Normative Principles: Credit Data and the Individual' (2019) 13(2–3) *Law and Financial Markets Review* 131.

197 Nizan Geslevich Packin and Yafit Lev-Aretz, 'On Social Credit and the Right to Be Unnetworked' [2016] (2) *Columbia Business Law Review* 339, 349.

198 Georgia Wilkins, 'Online Payday Lenders under Scrutiny following Nimble Investigation', *Sydney Morning Herald* (online, 24 March 2016) <https://www.smh.com.au/business/consumer-affairs/online-payday-lenders-under-scrutiny-following-nimble-investigation-20160324-gnq3kz.html>.

199 ASIC, 'Payday Lender Nimble to Refund $1.5 Million' (n 162).

200 Matthew Adam Bruckner, 'The Promise and Perils of Algorithmic Lenders' Use of Big Data' (2018) 93(1) *Chicago-Kent Law Review* 3, 44.

more transparent credit-scoring algorithms.[201] The opacity surrounding algorithmic decision-making suggests the likelihood of challenges in monitoring the extent to which responsible lending obligations are met. Further, credit algorithms have access to Big Data,[202] which allows unconventional types of data such as social media or spending habits to be taken into account in credit-scoring.[203] These raise the need for greater transparency, as in the European Union where reforms provide individuals with the right to receive an explanation for algorithmic decisions.[204]

A further issue relates to the use of social media by payday lenders. Social media has a significant role in influencing trust in consumers.[205] Positive reviews from other social media users are especially influential.[206] One study observes that 'the single most powerful impetus to buy is often someone else's advocacy'.[207] Psychologists examining the impact of 'likes' in social media have found that teenagers can be conditioned to be more accepting of risky behaviour through positive social media responses, increasing the likelihood of their engagement in such behaviour.[208]

As observed in Part III(B), more than two-thirds of the payday lenders are linked to social media. Three payday lenders cite highly positive Trustpilot ratings. Various payday lenders' Facebook pages have thousands of 'likes', and major lenders have 17,000 to 20,000 'likes' and followers. Their large following suggests that many Facebook users are getting regular feeds from these payday lenders. Consequently, tens of thousands of Facebook users are subject to payday lenders' advertising strategies that foster trust in payday lenders, including the portrayal of payday lenders as helpful, friendly and socially responsible. Posts that promote healthy living and good budgeting alongside payday lenders' products and services would seem to increase the perception of these loans as helpful, while the risks of harm remain hidden.

Although the *NCCP* requires websites to have mandatory warnings of risks, there are no similar requirements of risks disclosure for social media advertising. Social media advertising is significantly more intrusive, as followers receive regular updates from payday lenders alongside posts from family and friends. Such advertising further

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201 Ibid 44–5.

202 Big Data is defined as a 'generic term that designates the massive volume of data that is generated by the increasing use of digital tools and information systems': Financial Stability Board, *Artificial Intelligence and Machine Learning in Financial Services: Market Developments and Financial Stability Implications* (Report, 1 November 2017) 35.

203 Bruckner (n 200) 41.

204 Persons subject to automated decision-making have the right to receive meaningful information about the logic involved, and the significance and envisaged consequences of such processing. The rules are aimed at ensuring fair and transparent processing: *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 19/1, arts 13–14, 22; Bryce Goodman and Seth Flaxman, 'European Union Regulations on Algorithmic Decision Making and a "Right to Explanation"' (Fall 2017) *AI Magazine* 50.

205 M Nick Hajli, 'A Study of the Impact of Social Media on Consumers' (2014) 56(3) *International Journal of Market Research* 387; Simon Hudson and Karen Thal, 'The Impact of Social Media on the Consumer Decision Process: Implications for Tourism Marketing' (2013) 30(1–2) *Journal of Travel and Tourism Marketing* 156.

206 Hajli (n 205) 391; Lauren E Sherman et al, 'The Power of the *Like* in Adolescence: Effects of Peer Influence on Neural and Behavioral Responses to Social Media' (2016) 27(7) *Psychological Science* 1027.

207 David C Edelman, 'Branding in the Digital Age: You're Spending Your Money in All the Wrong Places' (December 2010) *Harvard Business Review* <https://hbr.org/2010/12/branding-in-the-digital-age-youre-spending-your-money-in-all-the-wrong-places>.

208 Sherman (n 206).

blurs the distinction between payday lenders as profit-making businesses, conditioning consumers to the perception of payday lenders as 'friends'.

Social media is at times a source of peer pressure that can invoke feelings of inferiority, envy and frustration.[209] Viewing posts by family and friends of success, good times and holidays has been found to foster perceptions that others have better and happier lives.[210] Social media advertising ostensibly allows vulnerable consumers to be exploited at their point of vulnerability. At such times, the prospect of easy money for holidays or other ways of improving the quality of life is arguably an attractive option, particularly when the lender appears friendly and socially responsible.

The potential for predatory conduct in an environment of trust fostered by social media underscores the need for regulatory intervention to safeguard social media users from risks of debt spirals associated with payday loans. There is a need for transparency on the high cost of these loans and the availability of cheaper alternatives for managing debt. Risks posed to teenagers by the advertising of payday loans on social media raise the need for restrictions on the advertising of payday loans through social media platforms. The Australian Competition and Consumer Commission's ('ACCC') recent inquiry highlights significant gaps in the regulatory framework for digital platforms.[211] The ACCC observes that many of the regulations aimed at safeguarding consumers from harm which apply to more traditional forms of media do not extend to digital platforms.[212] As a result, consumers are exposed to inappropriate advertising on digital platforms and concerns have been raised over the 'little effective regulation to protect children from targeted online advertising'.[213] The growth of digital platforms creates 'new opportunities for marketers of unhealthy commodities' such as alcohol and gambling due to the minimal regulatory restrictions, lack of transparency, reduced parental surveillance and lower costs.[214] Concerns over inappropriate advertising of harmful products are magnified in light of the use of artificial intelligence to profile consumers and target advertising to exploit or exacerbate consumers' vulnerabilities.[215]

The observations raise the question of whether social media should be regulated to restrict harmful content and advertising. At present, social media sites are primarily self-regulated, although in some countries legislation has been introduced to restrict specific harmful content.[216] In Australia, the *Enhancing Online Safety Act 2015* (Cth) established the eSafety Commissioner, whose functions include promoting online safety for Australians.[217] The legislation is aimed primarily at cyberbullying and the Commissioner may require social media providers to remove offending material.[218] Notably, Google has banned the advertising of payday loans on the ground of protecting

209 Edson C Tandoc Jr, Patrick Ferrucci and Margaret Duffy, 'Facebook Use, Envy, and Depression among College Students: Is Facebooking Depressing?' (2015) 43 *Computers in Human Behavior* 139, 142–3.

210 Ibid.

211 Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019).

212 Ibid 165–204.

213 Ibid 194.

214 Ibid, citing Public Health Association of Australia, Submission to Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (18 February 2019).

215 Ibid 516.

216 *Netzwerkdurchsetzungsgesetz* [Network Enforcement Act] (Germany) 1 September 2017, BGB1 I, 2017, 3352, for instance, restricts hate speech: William Echikson and Olivia Knodt, *Germany's NetzDG: A Key Test for Combatting Online Hate* (Report No 2018/09, Court Extremism Project, November 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300636>.

217 *Enhancing Online Safety Act 2015* (Cth) s 15(1)(b).

218 Ibid ss 18–19, 29.

users from deceptive or harmful financial products.[219] The concerns over harmful advertising raised in the ACCC's Digital Platforms Inquiry suggest that a similar prohibition may be warranted in relation to the advertising of payday loans on social media. The eSafety Commissioner's broad functions under the *Enhancing Online Safety Act 2015* (Cth) arguably extend to such advertising, although further reforms are needed to provide the Commissioner with the power to require the removal of harmful advertising from social media. Nevertheless, the extent to which social media should be regulated is contested,[220] and against a background of strong opposition by industry lobby groups that succeeded in reducing consumer safeguards in the *Enhancements Act*,[221] it may be necessary to canvass potentially less controversial reforms.

3 Warnings

While prohibiting the advertising of payday loans on social media may provide better protection for consumers, a more conservative alternative would be to extend mandatory warnings on the risks posed by payday loans to lenders' social media sites. Warnings should be sufficiently prominent and effective in communicating the risks of debt spirals. Such safeguards are particularly vital for young consumers who are frequent users of social media.[222] Personal insolvency statistics indicate that debtors between 18 to 29 years were the highest users of debt agreements from 2011 to 2016, and excessive use of credit was the primary cause of personal insolvency.[223] Several studies have highlighted the problem of debt among young Australians, attributing this to easy access to credit and a lack of financial literacy.[224] Law reformers could draw on existing rules on the advertising of gambling, alcohol and smoking to safeguard young consumers from exposure to harmful advertising.[225] These include graphic health warnings on cigarette packages[226] which have been found to be effective in deterring adolescents from smoking.[227] Likewise, warnings in relation to payday loans could be better targeted to more effectively communicate the risks to young Australians. Nonetheless, the effectiveness of warnings in an online environment is thought to be limited.

Studies have examined the extent to which internet users pay attention to information presented on digital platforms with a clickwrap. A clickwrap is a 'digital

219 'Financial Products and Services: Advertising Policies', *Google* (Web Page) <https://support.google.com/adspolicy/answer/2464998?hl=en-AU>.

220 Echikson and Knodt (n 216) 4–6.

221 Ali, McRae and Ramsay (n 46) 413.

222 Gwenn Schurgin O'Keeffe, Kathleen Clarke-Pearson and Council on Communications and Media, 'Clinical Report: The Impact of Social Media on Children, Adolescents and Families' (2011) 127(4) *Pediatrics* 800.

223 Vivien Chen, Lucinda O'Brien and Ian Ramsay, 'An Evaluation of Debt Agreements in Australia' (2018) 44(1) *Monash University Law Review* 151, 171–5.

224 Jennifer Rayner, *Generation Less: How Australia is Cheating the Young* (Schwartz Publishing, 2016) 46–8; Nicki Dowling et al, 'Financial Management and Young Australian Workers' (2008) 27(1) *Youth Studies Australia* 26; Sophie Elsworth, 'Young Adults Drowning in Debt', *Herald Sun* (online, 14 July 2013) <https://www.heraldsun.com.au/business/save-kids-who-drown-in-debt/news-story/31329b2e85a3d92e92a200bff77c5738?sv=2a50752335fb0b5ef0915928ba6c1633>.

225 *Broadcasting Services (Online Content Service Provider Rules) 2018* (Cth); *Broadcasting Services Act 1992* (Cth) s 123; *Tobacco Advertising Prohibition Act 1992* (Cth) s 15.

226 *Competition and Consumer (Tobacco) Information Standard 2011* (Cth).

227 Judith McCool et al, 'Graphic Warning Labels on Plain Cigarette Packs: Will They Make a Difference to Adolescents?' (2012) 74(8) *Social Science and Medicine* 1269; Lalla Ilhame Sabbane, Tina M Lowrey and Jean-Charles Chebat, 'The Effectiveness of Cigarette Warning Label Threats on Nonsmoking Adolescents' (2009) 43(2) *The Journal of Consumer Affairs* 332.

prompt that enables the user to provide or withhold their consent to a policy or set of policies by clicking a button',[228] a format used by payday lenders when presenting mandatory warnings about borrowing. The studies indicate that information presented in this manner is often ignored by internet users, many of whom proceed to click the 'consent' button without reading the terms.[229] This is illustrated in Obar and Oeldorf-Hirsch's experiment in which users were asked to sign over their first-born child as a condition for access to a social networking service.[230] Over 93% of users agreed to this condition and more than 98% did not notice it.[231] Information overload and perceptions that the terms were boring or pointless contributed to users clicking on the 'proceed' button without reading the conditions.[232] These along with other empirical findings suggest that warnings alone may be an inadequate means of preventing harm to consumers,[233] and a prohibition as suggested above may be warranted.

The SACC Review in 2016 raised the question of whether the warning of risks as required by existing laws is effective.[234] The Review drew attention to the content of the warning and the manner in which it is displayed, seeking feedback on whether the statements could be improved. The discussion in Part III(B)(1) illustrates the inadequacy of warnings on many payday lenders' websites when viewed in the context of marketing messages and layouts used. In addition to the layouts, the wording prescribed by the existing rules on mandatory warnings appears to be inadequate. The words '[d]o you really need a loan today? It can be expensive to borrow small amounts of money and borrowing may not solve your money problems' do not appear to sufficiently highlight the risk of debt spirals and consequences of increasing indebtedness that have been raised in law reform documents and reports.[235] The advertising strategies of payday lenders, reflected in the use of blogs and social media, suggest that payday loans are being marketed to young people including students. Teenagers and millennials who lack financial knowledge and experience may not fully appreciate the consequences of taking a loan, the costs involved or their capacity for repayment.[236]

In an environment of trust fostered by payday lenders' social media presence, risk warnings need to be communicated more clearly and effectively in a manner appropriate to the target audience. The SACC Review's Final Report recommended that ASIC should be given the power to modify the requirements of the mandatory warning statement to maximise the impact on consumers.[237] The Report envisaged some flexibility in determining the content of the warning, when it should be given and the

228 Jonathan A Obar and Anne Oeldorf-Hirsch, 'The Clickwrap: A Political Economic Mechanism for Manufacturing Consent on Social Media' (2018) 4(3) *Social Media and Society* 1, 3.

229 Ibid 9–10.

230 Jonathan A Obar and Anne Oeldorf-Hirsch, 'The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services' (2020) 23(1) *Information, Communication and Society* 128.

231 Ibid 143.

232 Ibid 138–40, 142.

233 A survey of Australian consumer behaviour on digital platforms indicated that 18% of users 'read privacy policies or terms and conditions of internet sites most or every time': Rebecca Varley and Neha Bagga, *Consumer Views and Behaviours on Digital Platforms* (Final Report, November 2018) 25.

234 Treasury, *Review of the Small Amount Credit Contract Laws* (Final Report, March 2016) 84–5.

235 Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 53; Senate Economics References Committee (n 4) 21–2 [2.14]–[2.16].

236 Eboni S Nelson, 'Young Consumer Protection in the "Millennial" Age' [2011] (2) *Utah Law Review* 369, 378.

237 Treasury, *Review of the Small Amount Credit Contract Laws* (Final Report, March 2016) 83.

type of media. Such flexibility was thought to allow a more 'nuanced and effective approach' to warning statements and the capacity to take into account 'different media for delivery of warnings (including addressing any new media that develop) and the behavioural biases of consumers'.[238] In the context of social media, useful strategies might include using media which young people can relate to, clearly setting out the high cost of payday loans, risk of increasing indebtedness and consequences such as financial stress and possible bankruptcy. Millennials are known as visual and experiential learners.[239] Visual representation of how debt spirals occur and real-life experiences of borrowers, such as personal narratives, may be more effective in communicating these risks than text on its own. A level of financial education may be necessary and, in an online environment, users could be linked to videos which explain the risk of debt spirals. The use of digital multimedia such as short explanatory videos to explain risks and consequences of payday loans is recommended by FinCoNet, an international network of supervisory authorities for financial consumer protection.[240]

Wilson, Howell and Sheehan argue that consumers' ability to grasp the implications of information disclosed is affected by literacy levels, including financial literacy, and their understanding of cost calculations.[241] They posit that one of the ways of facilitating a better understanding of important information is to provide a statement of key information in plain language.[242] In the context of online payday lending, this could include calculations of the total cost of borrowing in dollar terms, clearer and more detailed information on the risks, and where to find cheaper options for credit such as no or low-interest loans. Nonetheless, for low-income vulnerable consumers in financial difficulty, risk disclosure may have a limited impact on their decisions. Emotions such as the 'humiliation of admitting an inability to understand' are thought to play a role in risk-taking.[243] Further, the lack of available options coupled with desperate need for credit are at times stronger determinants of consumers' choices than considerations of risks or costs.[244] Hence, there is a need for measures to increase the availability of low-cost credit and cheaper options for managing debt such as financial hardship variations.

4 *The Problem of Poverty*

Studies have revealed that many consumers who use payday loans have insufficient income and resort to using payday loans as they are 'the most readily accessible or only feasible credit option to meet a cash shortfall'.[245] As Financial Counselling Australia observed, '[t]he fundamental issue with payday lending is poverty. Too many people simply do not have enough to live on, and turn to payday lenders to make ends meet'.[246]

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238 Ibid.

239 Nicholas J Barnes and Stephanie Jacobsen, 'Meet the New Class, Same as the Old Class? Millennials and Their Surprising Learning Preferences' (2015) 15(7) *Journal of Higher Education Theory and Practice* 24; Raymond Papp and Erika Matulich, 'Negotiating the Deal: Using Technology to Reach the Millennials' [2011] (4) *Journal of Behavioral Studies in Business* 1.

240 FinCoNet, 'Digitalisation of Short-Term, High-Cost Consumer Credit: Guidance to Supervisors' (February 2019) 13.

241 Wilson, Howell and Sheehan (n 158) 123–4.

242 Ibid 135.

243 Ibid 134.

244 Ibid 125; Gillam and CALC (n 17) 61–2, 230, 240–1, quoting CALC and Open Mind Research Group, 'Exploring Pay Day Loans' (Research Paper).

245 Ali, McRae and Ramsay (n 46) 420.

246 Financial Counselling Australia, 'What Financial Counsellors Say about Payday Lending' (Research Report, October 2011) 15.

Hence, in restricting the use of payday loans through reforms such as the SACC Bill, there is a need to provide consumers with alternative sources of credit at lower costs. The need for cheaper alternative sources of credit to reduce reliance on payday loans was examined in a Discussion Paper released by the Treasury in 2012.[247] In the recent Senate inquiry report on credit and hardship, the Committee noted that limited government support has been provided to low-cost credit facilities which could have 'far reaching benefits for financially stressed Australians in need of credit'.[248] The report suggests measures such as tax incentives to encourage the provision of affordable alternatives including no or low-interest loans.[249]

It is surprising that in considering cheaper alternatives to payday loans, the Senate report did not explore the right to seek a variation of credit contracts on grounds of financial hardship.[250] These provisions were designed to provide respite to consumers in financial stress, and are potentially a significant means of reducing the need for payday loans. Section 72 of the *National Credit Code* allows consumers who have difficulty meeting payment obligations to seek a variation of credit contracts on grounds of financial hardship. Consumers have similar rights in relation to utilities providers under state regulations.[251] The mandatory warning required by the *NCCP* refers to this by suggesting that consumers talk to their utilities providers regarding a payment plan.[252] The financial hardship provisions are cost-effective for consumers and could potentially have a greater impact in assisting vulnerable consumers in meeting day-to-day expenses.

Studies suggest that the financial hardship provisions could be better utilised to assist consumers in financial difficulty. In particular, there is a need for greater accessibility and flexibility on the part of creditors in accommodating consumers in financial difficulty. A study by Ali, Bourova and Ramsay found that most hardship variations involve extensions of time or payment by instalments.[253] In that study, creditors were rarely willing to reduce amounts owed on grounds of hardship, a variation that is in many cases necessary for consumers who rely on Centrelink benefits.[254] The study further found that 'staff of service providers frequently showed a lack of understanding of the realities of living on a low income' and were reluctant to engage with consumers who tried to self-advocate.[255] By addressing these issues, the financial hardship provisions could potentially provide respite from financial stress for more low-income consumers, reducing the need for payday loans.

5 Internet Banking Passwords

The common practice of payday lenders requesting internet banking usernames and passwords allows payday lenders and third-party software providers access to

247 Treasury, 'Strategies for Reducing Reliance on High-Cost, Short-Term, Small Amount Lending' (Discussion Paper, April 2012).
248 Senate Economics References Committee (n 4) 16.
249 Ibid 16–17.
250 *National Credit Code* (n 71) s 72.
251 Paul Ali, Evgenia Bourova and Ian Ramsay, 'Responding to Consumers' Financial Hardship: An Evaluation of the Legal Frameworks and Company Policies' (2015) 23(1) *Competition and Consumer Law Journal* 29, 34–41.
252 This is discussed in Part II(A)(4).
253 Paul Ali, Evgenia Bourova and Ian Ramsay, 'Financial Hardship Assistance Behind the Scenes: Insights from Financial Counsellors' (2017) 52(3) *Australian Journal of Social Issues* 241, 248–9.
254 Ibid 248–52.
255 Ibid 252–3.

substantially more extensive personal data than is necessary, with potentially detrimental consequences for consumers. Many users of payday loans are vulnerable consumers in financial stress, raising issues of unconscionable conduct and breaches of privacy principles. These concerns are heightened when payday lenders place mandatory requirements on applicants to provide their internet banking usernames and passwords as a condition to applying for payday loans.

ASIC's report states that

> payday lenders should prominently disclose to consumers any risks of using these [third-party software] providers (especially in circumstances where they may lose their protections under the ePayments Code) and not discourage consumers from providing their account statements through other methods.[256]

Despite ASIC's advice, the survey of websites indicates that payday lenders typically do not disclose the risks associated with the provision of internet banking or myGov usernames and passwords. Applicants were not advised that they could lose their protections under the *ePayments Code*. Some payday lenders declined to allow applicants other methods of supplying the required bank statements for loan applications, requiring them to enter internet banking usernames and passwords on a linked website in order to apply for a loan.

The widespread practice of payday lenders requesting internet banking details without disclosure of risks warrants a stronger prescriptive approach by the regulators. In view of the breaches of privacy principles and the likelihood of unconscionable conduct this practice entails, along with the risks to vulnerable consumers, intervention by regulatory authorities and investigation into the breaches of existing regulations is essential. The severity of consequences to consumers arguably warrants prohibition of the practice. Consumers risk substantial loss and compromise the security of personal information by disclosing their internet banking passwords. At the same time, they gain very little as downloading bank statements from internet banking portals and uploading or emailing them to payday lenders takes minimal time and effort. Payday lenders should be required to provide applicants with safer methods of submitting bank statements such as by uploading attachments on the web application or by email.

V CONCLUSION

Reforms are needed to address gaps in the regulatory framework that emerge from the increasing digitalisation of payday lending. The rising use of social media and artificial intelligence raises significant concerns in relation to targeted advertising and the lack of legal protections for consumers in the rapidly evolving digital space. Vulnerable consumers, particularly young Australians who are frequent users of social media, require safeguards to curb, or at the very least counter, the advertising messages of payday lenders as trusted friends who offer financial assistance.

The portrayal of payday lenders as 'friends in need' is reinforced by the common practice of hosting blogs that provide advice on how to live well on a budget. Thousands of 'likes' on social media and high ratings on third party review websites such as Trustpilot further strengthen perceptions of consumer trust. Thousands of social media followers receive regular posts presenting an image of payday lenders as helpful, friendly and socially responsible people who offer financial assistance in times of need.

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256 ASIC, *Payday Lenders* (n 23) 17.

Payday lenders' websites commonly emphasise the prospects of fast, convenient cash for people with poor credit histories. The websites often portray payday lenders as altruistic and responsible lenders, describing payday loans in terms that resemble mainstream financial products.

The image of payday lenders as 'trusted friends in need' is at odds with observations of the recent Senate inquiry of predatory conduct towards vulnerable consumers.[257] The findings of this study resonate with the latter. The dominant message presented by many payday lenders' websites of altruistic, responsible lenders offering fast, convenient cash masks the risks of harm through strategic website layouts which diminish the visual impact of mandatory warnings. In the largely unregulated social media space, the complete absence of risk warnings is of even greater concern. The findings of the study underscore the need for regulatory enforcement of consumer protection laws against misleading advertising and unconscionable conduct. At the same time, there is a need to alleviate the underlying problem of financial stress. One option is to better utilise existing financial hardship provisions, reducing reliance on high-cost payday loans.

257 Senate Economics References Committee (n 4) 4.