

CONSUMER CREDIT REGULATION AND RIGHTS-BASED SOCIAL JUSTICE: ADDRESSING FINANCIAL EXCLUSION AND MEETING THE CREDIT NEEDS OF LOW-INCOME AUSTRALIANS

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I INTRODUCTION

A lack of access to safe and affordable small amount credit is experienced by approximately 15.6 per cent of Australians.¹ Financial exclusion of this kind leads to social exclusion, and arises as a result of social inequity and economic discrimination in the consumer credit market. In this article I argue that it is a matter of rights-based social justice that this inequity be addressed through consumer credit regulation.

This article begins with an exploration of a ‘rights-based’ social justice, drawing on a human rights discourse that extends beyond political and civil rights to economic and social rights. It is argued that these rights should be protected by state regulation in the same way that civil and political rights should be. Such economic and social rights can be found in the concept of ‘services of general economic interest’ recognised in Europe,² which are necessary to enable a person to lead a ‘normal’ life in the context in which he or she lives, in order to avoid social exclusion. A focus on equality of opportunity – in this case referring to the opportunity to participate in the distribution of credit ‘stakes’ in the market – is helpful in conceptualising how just social outcomes might be achieved with regard to consumer credit.

The nature of financial exclusion, and the injustices that flow from it, will then be explored. A failure to address financial exclusion leaves people in a position where, due to an inability to access affordable credit to enable necessary purchases or meet emergency bills, full social participation is precluded. Where credit can be accessed but it is unsafe and exploitative, poverty and over-

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1 Chris Connolly et al, ‘Measuring Financial Exclusion in Australia’ (Financial Exclusion Indicator Report, The Centre for Social Impact – University of New South Wales for National Australia Bank, May 2011) 4, 8, 27 <http://www.csi.edu.au/assets/assetdoc/3c1698bd3334ed55/NAB-Financial-Exclusion-Report_Final.pdf>.

2 *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1, art 36.

indebtedness become entrenched, thus cementing economic and social disadvantage. The benefits of financial inclusion, where safe and affordable credit products are available, will be discussed.

Financial exclusion is a social and economic problem which involves a lack of equality of opportunity and which is a form of economic discrimination. A failure to address this problem amounts to a failure to address inequity and discrimination in the consumer credit market. The extensive use of credit in the context of a modern consumerist society is beyond doubt, and equality of access to safe and affordable credit to meet credit needs, without causing over-indebtedness and substantial hardship, is an important goal in that context. Small-amount personal lending, often referred to as microfinance, provides an alternative to charitable and welfare models of poverty alleviation and addresses a right to access credit, which brings with it a sense of inclusion, dignity and social benefits not offered by welfare or charitable 'handouts'.

In proposing a regulatory solution to the problem, I consider the role that banks, community sector organisations and community development finance institutions might play in providing safe and affordable small amount personal credit to low-income Australians. Tax incentives to encourage investment in small loans programs, and a ratings system based on the United States ('US') *Community Reinvestment Act of 1977*, 12 USC §§ 2901–8 ('CRA') whereby banks and other authorised deposit taking institutions might be rated on their contributions to such programs, will be explored. I also argue that compliance with the responsible lending regime under the *National Consumer Credit Protection Act 2009* (Cth) ('NCCPA') must be well monitored and enforced in order to minimise the harms of high cost, exploitative credit products, while at the same time allowing for flexibility and an individualistic, tailored approach in assessing a low-income consumer's capacity to repay without substantial hardship.

II SOCIAL JUSTICE AND THE LAW

In this article it will be argued that Australian consumer credit regulation should be informed by a rights-based social justice approach in order to facilitate equal opportunity of access to consumer credit and address financial exclusion.

A rights-based approach to social justice draws upon human rights discourse, taking the concept of state regulation to protect human rights beyond the protection of civil and political rights, extending it to economic and social rights. In this way, human rights discourse becomes linked to social justice concerns and satisfies what Habermas describes as the 'moral promise to respect the human dignity of every person equally'.³ Habermas identifies human dignity as the moral source of human rights, and then argues for a broader conceptualisation of human rights so as to essentially encompass social justice concerns and give rise

3 Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 *Metaphilosophy* 464, 469.

to a 'responsiveness to the legitimate claims of marginalized and underprivileged populations to inclusion'.⁴

Examples of the economic and social rights which should arguably be protected by state regulation include a right to an adequate standard of living and social inclusion,⁵ and a right to access services which should be regarded as 'services of general economic interest' as articulated in the *Charter of Fundamental Rights of the European Union*.⁶ Wilhelmsson has explained the concept of services of general economic interest as encompassing services necessary to enable a person to lead a 'normal' life in the context in which he or she lives. These are services to which such a person should be regarded as having a 'social right':

Many financial services and information society services are now central to the infrastructure of society, and the consumer cannot reasonably be expected to live without them. These aspects of those services can be treated as social rights in the same way that services provided by 'traditional' public utilities are.⁷

Drawing on Habermas' and Wilhelmsson's work, I argue that achieving social justice requires human rights concepts to be extended to include economic and social rights, such as access to services; and that questions of equality of opportunity in being able to access those services then arise.

Fineman argues strongly that the state should be held responsible for ensuring equality of opportunity to overcome societal disadvantage, refusing to 'tolerate a system that unduly privileges any group of citizens over others'.⁸ She states that:

True equality of opportunity carries with it the obligation on the state to ensure that access to the societal institutions that distribute social goods, such as wealth, health, employment, or security, is generally open to all, and that the opportunities these institutions provide are evenly distributed so that no persons or groups of persons are unduly privileged while others are disadvantaged to the extent that they can be said to have few or no opportunities.⁹

Jacobs' work on equal opportunities¹⁰ is helpful when considering how such equality might be realised through state regulation. Jacobs takes issue with the concept of 'natural inequalities', arguing that all inequalities are socially constructed. He refers to the 'possibility that with different social institutions and

4 Ibid 479.

5 Penelope Weller, 'Human Rights and Social Justice: The Convention on the Rights of Persons with Disabilities and the Quiet Revolution in International Law' (2009) 4 *Public Space: The Journal of Law and Social Justice* 74, 80–1.

6 [2000] OJ C 364/1, art 36.

7 Thomas Wilhelmsson, 'Services of General Interest and European Private Law' in Charles E F Rickett and Thomas G W Telfer (eds), *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, 2003) 149, 154–5.

8 Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251, 274.

9 Ibid 256–7.

10 Lesley A Jacobs, *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice* (Cambridge University Press, 2004).

practices, the relevant social inequalities might not exist' on the basis that such 'inequalities have their origins in the design of social circumstances'.¹¹

Jacobs refers to the work of researchers into the concept of 'inequality by design,' and to their conclusions that nature does not determine the level of inequality which human beings experience. It is the social and political response to a person's natural endowments which leads to inequality. He quotes them as follows:

Appeals to nature ... cannot satisfactorily answer even the first question: Why do some *individuals* get ahead and some fall behind? Certainly, genetic endowment helps. Being tall, slender, good-looking, healthy, male, and white helps in the race for success, and these traits are totally or partly determined genetically. But these traits matter to the degree that society makes them matter – determining how much, for example, good looks or white skin are rewarded. More important yet than these traits are the social milieux in which people grow up and live.¹²

The significance of an understanding that all inequalities are socially constructed is that socially constructed inequalities can be addressed through regulating to alter the relevant social framework.¹³ Jacobs asserts that this is to be done on a case by case basis, 'focussing on particular institutions and practices and the opportunities they engender'.¹⁴ In doing so, Jacobs describes three types of fairness that must be achieved in the course of the competitive processes through which goods and services are distributed in society: procedural fairness, stakes fairness and background fairness. Procedural fairness is the fairness which surrounds the rules and regulations governing the particular competition; stakes fairness concerns the distribution of the resources at stake in the competition; and background fairness takes into account the 'initial starting positions or backgrounds' of those involved in the competition and regulates the competitive process 'with a sensitivity to remedies for these inequalities'.¹⁵ In effect, background fairness strives for a 'level playing field'. By ensuring that competitive processes for the allocation of goods and services involve these types of fairness, regulation can be used to 'remedy unequal opportunities in civil society'.¹⁶

It is important to note here the emphasis on equality of opportunity rather than equality of distribution. It is not argued that the distribution of goods and services needs to be 'equal'. Rather, a 'fair' distribution is sought, based on equality of opportunity. As Raz argues, there is no 'intrinsic value' in *distributional* equality as opposed to equality of *opportunity* giving rise to

11 Ibid 61–2.

12 Ibid 66, quoting Claude S Fisher et al, *Inequality by Design: Cracking the Bell Curve Myth* (Princeton University Press, 1996) 9 (emphasis added).

13 Jacobs, above n 10, 61.

14 Ibid 23.

15 Ibid 16–17.

16 Ibid 19.

fairness.¹⁷ One needs to focus on the distribution that will address a social injustice, rather than achieving an equal distribution for the sake of it.

On the basis that social injustice, in the form of inequality of opportunity and disadvantage, can arise from socially constructed inequalities, such injustice can be addressed through regulatory intervention in social constructs. This can include intervention in the competitive structures through which goods and services are distributed. Social injustice, in the form of inequality of opportunity with regard to access to services of general economic interest, can and should be overcome through state regulation. In this article I argue that financial exclusion is a form of social injustice that should be addressed through consumer credit regulation.

III FINANCIAL EXCLUSION AS INJUSTICE

A What Is Financial Exclusion?

The term ‘financial exclusion’ has been in use in the United Kingdom (‘UK’) since at least the mid-1990s and was defined there as ‘those processes that prevent poor and disadvantaged social groups from gaining access to the financial system’.¹⁸ Financial exclusion subsequently came to be viewed in the UK as a lack of access to the *mainstream* financial system, which includes banks, building societies and credit unions.¹⁹

In Australia, a ‘working definition’ of financial exclusion was proposed as: ‘the lack of access by certain consumers to appropriate low cost, fair and safe financial products and services from mainstream providers’.²⁰ This definition is interesting for emphasising the cost and safety of available products, which largely distinguishes between mainstream credit products and some alternative or ‘fringe’ credit products such as payday loans, which will be discussed below. This is echoed by a reference to the appropriateness of products in a definition provided by the European Commission, which refers to people’s difficulties in accessing ‘financial services and products in the mainstream market that are appropriate to their needs and enable them to lead a normal social life in the

17 Joseph Raz, ‘On the Value of Distributional Equality’ (Research Paper No 41/2008, Oxford University Legal Research Paper Series, 23 October 2008) 6 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1288545>.

18 Andrew Leyshon and Nigel Thrift, ‘Geographies of Financial Exclusion: Financial Abandonment in Britain and the United States’ (1995) 20 *Transactions of the Institute of British Geographers* 312, 312.

19 Elaine Kempson et al, ‘In or Out? Financial Exclusion: A Literature and Research Review’ (Financial Services Authority, 2000) 21.

20 Chant Link & Associates, ‘A Report on Financial Exclusion in Australia’ (Research Report, ANZ Bank, 2004) 5 <<http://www.anz.com/aus/aboutanz/community/programs/pdf/FinancialExclusion-FinalReport.pdf>>.

society in which they belong'.²¹ By taking into account social context, what will amount to financial exclusion in one part of the world may not in another. In Australia, for example, not being able to access safe and affordable credit to purchase a personal computer for a child to complete homework on will amount to financial exclusion, as that child will be unable to lead what is regarded as a 'normal life' in the Australian context. The same could not be said in a developing country where no children have computers, or access to credit with which to purchase them.

Recent Australian research has found that 15.6 per cent of the adult population in Australia were either fully excluded or severely excluded from financial services in 2010, where fully excluded Australians had no transaction account, credit facility or basic insurance, and where severely excluded Australians had only one of these products. Most of the severely excluded lacked access to credit, and 54.5 per cent of the fully or severely excluded could not raise \$3000 in an emergency.²²

Financial exclusion in Australia has been found to have the greatest impact on people earning low incomes,²³ defined for the purpose of this article as those falling within the lowest two quintiles identified by the Australian Bureau of Statistics.²⁴ The lowest two income quintiles have been found to have the highest level of financial stress, where 'financial stress indicators' included an inability to raise necessary funds²⁵ in one week for something important; an inability to pay utility, phone, car registration or insurance bills on time; seeking financial assistance from family or friends, or a welfare or community organisation; pawning or selling something; and going without meals or heating.²⁶

Exclusion from access to mainstream sources of credit can be regarded as a failure of market competition. While the consumer credit market in general is a competitive one, there is certainly a lack of competition in the mainstream credit market when it comes to meeting the small amount credit needs of some

21 European Commission, 'Financial Services Provision and the Prevention of Financial Exclusion' (Report prepared for European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Inclusion, Social Policy Aspects of Migration, Streamlining of Social Policies, March 2008) 9 <<http://www.bristol.ac.uk/geography/research/pfrc/themes/finexc/pfrc0807.pdf>>.

22 Connolly et al, above n 1, 4, 8, 27.

23 Chant Link & Associates, above n 20, 5. The impact of financial exclusion on those on low incomes has also been noted in the UK and continental Europe: see Georges Gloukoviezoff, 'The Link between Financial Exclusion and Over-Indebtedness' (Working Paper for Financial Services Provision and Prevention of Financial Exclusion, Alternative Financing Network for the European Commission, 2008) <<http://gloukoviezoff.files.wordpress.com/2009/01/wp-link-fe-oi.pdf>>. Similarly, it has been noted in the US: see Julian Sosa, 'Bank on Battles Financial Exclusion in the United States' on Center for Financial Inclusion, *Center for Financial Inclusion Blog* (19 May 2010) <<http://cfi-blog.org/2010/05/19/bank-on-battles-financial-exclusion-in-the-united-states/>>.

24 See Australian Bureau of Statistics, *Household Income and Income Distribution, Australia, 2005–06* (ABS Catalogue No 6523.0, 2 August 2007).

25 As at 2002, such necessary funds were quantified at \$2000: Bob McColl, Leon Pietsch and Jan Gatenby, 'Household Income, Living Standards and Financial Stress' in Australian Bureau of Statistics, *Australian Economic Indicators, June 2001* (ABS Catalogue No 1350.0, 31 May 2001). In 2011, they were quantified at \$3000: Connolly et al, above n 1, 27.

26 McColl, Pietsch and Gatenby, above n 25.

consumers, particularly those on low incomes. Cartwright links this to a perceived lack of profitability in offering these products, noting that '[a]bsence of clear choice results, not from inadequate competition, but from a competitive financial services industry taking an economic decision only to offer more profitable products'.²⁷

An increased emphasis on banks pursuing the most profitable products and customers is largely a consequence of the deregulation of the financial system in Australia that took place in the 1980s.²⁸ While in Australia the Wallis Inquiry²⁹ predicted increased competition in the financial services market that would bring about affordable financial services for all Australians, such competition has failed to emerge in relation to servicing the needs of low-income consumers.³⁰

In addition to concerns regarding profitability, another explanation for a failure on the part of mainstream institutions to provide credit services to low-income consumers is based around assumptions concerning the risk of lending. This risk is often overestimated, as demonstrated by evidence arising out of loans programs conducted by community sector organisations and community development finance institutions in Australia.³¹ It may be that the risk assessment model applied by mainstream lenders to low-income borrowers is inadequate to accurately and fairly determine those borrowers' propensity and capacity to repay. Standard credit scoring models used in Australia automatically exclude most low-income consumers from being eligible for loans. A report in relation to a pilot low interest loans program in 2005 noted that:

Computerised credit approval systems would have automatically declined most of the loan applicants. The pilot's manual approach, however, took into account bill and rent payment histories, strategies for managing cash flow and individual budgets.³²

The point is that, whereas standard computerised credit assessment models applied by mainstream lenders will automatically exclude many low-income Australians from access to credit, a more tailored and appropriate credit assessment will not. A risk assessment which takes into account a more general

27 Peter Cartwright, *Banks Consumers and Regulation* (Hart Publishing, 2004) 212.

28 See generally Dean Wilson, 'Payday Lending in Victoria – A Research Report' (Consumer Law Centre Victoria Ltd, 2002) 35.

29 Stan Wallis, 'Financial Systems Inquiry: Final Report' (Final Report, Australian Government Publishing, Department of Treasury, 18 March 1997).

30 See generally Chris Connolly and Khaldoun Hajaj, 'Financial Services and Social Exclusion' (Report, Financial Services Consumer Policy Centre, University of New South Wales, March 2001).

31 Ingrid Burkett and Genevieve Sheehan, 'From the Margins to the Mainstream: The Challenges for Microfinance in Australia' (Research Report, Brotherhood of St Laurence and Foresters Community Finance, December 2009). Note also a finding that the average default rate in Brotherhood of St Laurence's Progress Loan, offered in partnership with ANZ Bank, was 1.2 per cent, compared with the average 'mainstream' personal loan default rate of approximately five per cent: Vawser and Associates, 'Progress Loans: Towards Affordable Credit for Low-Income Australians' (Research Report, Brotherhood of St Laurence and ANZ Bank, 2009).

32 Rosanna Scutella and Genevieve Sheehan, 'To Their Credit: Learning About Personal Loans for People on Low Incomes' (Brotherhood Comment, Brotherhood of St Laurence, August 2006) 10
<<http://www.bsl.org.au/pdfs/commentaug06.pdf>>.

credit history linked with a process of relationship building with the borrower is likely to make a low-income consumer a far less 'risky' proposition. A better understanding of the particular credit needs and risk profiles of low-income Australians might assist in overcoming financial exclusion, through making more responsible credit products available to the financially excluded. This should be regarded as an important goal of social justice policy, given the unjust consequences of financial exclusion, and will be achieved through supporting organisations engaged in safe and affordable lending in the low-income market, as will be discussed below.

B What Injustices Flow from Financial Exclusion?

An inability to access safe and affordable credit gives rise to a clear social inequity, where those who can least afford it pay a high price for credit. As Cartwright notes, '[w]here credit is concerned, exclusion from mainstream providers means in practice a choice of high-cost credit from alternative providers. In relation to credit, financial exclusion unquestionably leads to the poor paying more'.³³

Notwithstanding difficulties in accessing safe, affordable credit products, those on low incomes are likely to need access to small amount personal credit in order to purchase or replace essential household items or to meet emergency bills. This has been recognised as an undesirable but often unavoidable reality: 'while borrowing money to supplement a low income may not be desirable it may, in some circumstances, be unavoidable – either to buy essential household items or to make ends meet'.³⁴

Those unable to access credit from mainstream credit providers in such circumstances will rely on informal credit arrangements and networks or turn to high cost alternative credit providers where necessary, often when larger amounts are required. This pattern of credit use has been revealed in UK research, and explained as follows:

Households on a low income regularly help one another out at the end of the week or fortnight. Mothers and daughters, sisters and even close female friends often have such reciprocal lending arrangements involving goods or small amounts of cash.

Few, however, have someone they can turn to for larger sums in an emergency – such as an unexpectedly high bill. People in these circumstances often have little choice but to use moneylenders or pawnbrokers and, consequently, to pay their high charges.³⁵

Where there is an inability to access any form of credit, social exclusion – in the sense of a person being unable to lead a 'normal life in the society in which they belong' – can result. An example of this might be an inability to purchase

33 Cartwright, above n 27, 212.

34 Kempson et al, above n 19, 41.

35 Elaine Kempson and Claire Whyley, *Kept Out or Opted Out?: Understanding and Combating Financial Exclusion* (Policy Press, 1999) 25 <<http://www.bristol.ac.uk/geography/research/pfrc/themes/finexc/pfrc9902.pdf>>.

suitable clothing or pay for transportation, in order to attend a job interview or participate in other activities.³⁶

The pressure experienced by financially excluded families can be demonstrated by empirical research undertaken in 2005, dealing with some of the broader social consequences for Australians unable to access safe and affordable credit to purchase essential items such as washing machines or refrigerators.³⁷ Forty people, who in the end were able to resolve their difficulties through a 'No Interest Loan Scheme,' were interviewed as to the impact of financial exclusion upon them. Their responses indicated that:

- 70 per cent had experienced health problems, 'not sleeping, constantly tired; raw hands from washing clothes by hand; too tired to do things with the children';
- 47.5 per cent had experienced family tensions, 'harassing kids not to get their clothes dirty; buying fresh food is time consuming';
- 32.5 per cent had experienced financial pressures, 'had to throw away food that has gone off because of a faulty fridge; [l]aundromat costs very high; shopping everyday costs more, including petrol';
- 20 per cent had experienced social isolation, 'feeling out of it or a lack of belonging because the family doesn't have a DVD, TV or computer; embarrassment as children feel they are not the same as their friends, such as the house having an old sofa, and this affects the development of friendships';
- 7.5 per cent had experienced educational pressures, 'students penalised for wearing casual clothes because their school uniforms were dirty; students penalised for not having typed school assignments because there is no computer at home'.³⁸

One of the research participants described the difficulties associated with not being able to replace a broken washing machine:

Kate (not her real name) has been hand washing for eight months after her washing machine exploded. This has made relations difficult with her children. She didn't have time to help them with their homework, and often would fall behind in terms of the amount of clothes that needed to be washed – *'it annoyed them, their clothes building up in the basket, me saying to my daughter, can you help your brother with his homework?'*

She had tried to find a loan from other sources, including banks, stores, and rental schemes, but they did not believe she would be able to pay them back. This had a negative effect on Kate's self-esteem, as it made her feel untrustworthy and insignificant – *'They make you feel like you're a nobody.'*³⁹

Similar research conducted in relation to Australians who received help under a low interest loan scheme demonstrated the same pressures for people on low

36 See generally Chant Link & Associates, above n 20, 94.

37 Valerie Ayres-Wearne and Janet Palafox, 'NILS® Small Loans – Big Changes: The Impacts of No Interest Loans on Households' (Research Report, Good Shepherd Youth and Family Service, 2005).

38 Ibid 18.

39 Ibid 19.

incomes without access to credit: 'I lived out of an esky for a while. Heaps of people do that now. You'd be surprised, how many people run their life out of an esky'.⁴⁰ The difference that responsibly structured credit access could make to people's lives was also apparent in the interviews, for example:

I travel roughly eighty kilometres a day ... Thanks to you guys, I managed to get a car on gas and save myself heaps of money, and I'm able to pay off my loan ... I'm paying less than forty dollars on gas, and the money I've saved, I've put into the new ministry house I'm in, my kids are getting new clothes now – it's just making life so much easier. And the repayments, being so low, and being over one or two years, having that option, it's just made life so much easier.⁴¹

These case studies make the link between financial and social exclusion very clear, where financial exclusion 'within a contemporary capitalist society can become extremely problematic'.⁴² This link, and the way in which financial exclusion might entrench disadvantage, was articulated by Ramsay as follows:

Differing patterns of credit use and access to credit may act as a potential 'multiplier' of advantage and disadvantage in society potentially heightening social divisions ... Exclusion from access to credit may therefore mean both economic exclusion from markets ... and also exclusion from a central aspect of public expression in modern society.⁴³

In addition to exclusion from access to any credit, people should also be regarded as financially excluded where they can access only high cost, exploitative forms of credit, known as 'fringe credit'. It is estimated that the size of the fringe credit market in Australia stands at approximately \$10 billion in loans transactions annually.⁴⁴ There is evidence of substantial detriment being suffered by some low-income consumers who have accessed credit through the fringe market. There are a number of characteristics that can make fringe credit products potentially harmful, including loan 'rollovers' and failing to comply with responsible lending obligations under the *NCCPA*.

An example of a fringe credit product is a payday loan, being a short-term loan for a short period of time (until the borrower's next pay day) for a small amount. Interest rates charged on these loans range between approximately 100 and 3380 per cent per annum.⁴⁵ 'Rollovers' are a feature of many short-term fringe credit products such as payday loans, which are utilised because the borrower may struggle to repay the loan within the short time period allowed. A borrower 'rolls over' the loan by payment of an additional 'loan fee'. This is said to be "the beginning for many of an uncontrollable debt spiral," wherein borrowers pay, over a period of time, an amount well in excess of the original

40 Rosanna Scutella and Genevieve Sheehan, 'To Their Credit: Evaluating an Experiment with Personal Loans for People on Low Incomes' (Research Report, Brotherhood of St Laurence, May 2006) 1.

41 Ibid 12.

42 Leyshon and Thrift, above n 18, 313.

43 Iain Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 *Oxford Journal of Legal Studies* 177, 181.

44 Market Intelligence Strategy Centre, 'Consumer Credit Report' (Report prepared for the Department of Justice, Consumer Affairs Victoria, June 2006) 57.

45 Nicola Howell, Therese Wilson and James Davidson, 'Interest Rate Caps: Protection or Paternalism?' (Research Paper, Centre for Credit and Consumer Law, Griffith University, December 2008) ch 7.

loan amount, often without reducing the principal amount owed'.⁴⁶ This may be 'financially devastating' for a low-income borrower,⁴⁷ and has been described as 'one of the most controversial features of payday loans because it carries great financial risk for consumers and is perhaps the key to the lucrative nature of the business for lenders'.⁴⁸

A study undertaken in Queensland in 2008 confirmed that the 'rollover' is a common feature of many fringe products, with 15 out of 21 payday loan products and 76 out of 102 longer-term fringe credit products examined having this feature.⁴⁹

Closely related to the question of 'rollovers' is the failure on the part of fringe lenders to assess borrowers' capacities to repay to ensure that the borrower can repay the loan without substantial hardship. The targeting of borrowers who will be unable to repay within the loan repayment period and who will therefore need to 'rollover' a loan in the manner outlined above, has been described in a US study as 'the foundation of the payday lending business model'.⁵⁰

The *NCCPA* has introduced a licensing regime for all credit providers.⁵¹ Licensees are required to lend 'responsibly' in the sense that they are prohibited from providing credit that will be 'unsuitable' for a consumer.⁵² A credit contract will be unsuitable for a consumer where, at the time of a preliminary assessment by the credit provider, it is likely that the consumer will be unable to comply with the consumer's financial obligations under the contract or could only comply with substantial hardship; or the contract will not meet the consumer's requirements or objectives.⁵³ In 2011 the Australian Securities and Investments Commission ('ASIC') published a report into fringe lenders' compliance with responsible lending and disclosure obligations under the *NCCPA*.⁵⁴ In relation to responsible lending obligations, the report found instances where lenders: had not made reasonable inquiries about consumers' requirements and objectives; held

46 Nicola Howell and Therese Wilson 'The Limits of Competition: Reasserting a Role for Consumer Protection and Fair Trading Regulation in Competitive Markets' in Deborah Parry et al (eds), *The Yearbook of Consumer Law 2009* (Ashgate, 2008) 147, 165, quoting Paul Syvret, 'The Quick and the Debt', *The Bulletin with Newsweek* (Sydney), 6 February 2001, 30. See also Therese Wilson, 'The Inadequacy of the Current Regulatory Response to Payday Lending' (2004) 32 *Australian Business Law Review* 193, 194.

47 Sue Lott and Michael Grant, 'Fringe Lending and "Alternative" Banking: The Consumer Experience' (Research Report, Public Interest Advocacy Centre, November 2002) 13.

48 Ibid 22.

49 Howell, Wilson and Davidson, above n 45, ch 7.

50 Uriah King, Leslie Parrish and Ozlem Tanik, 'Financial Quicksand: Payday Lending Sinks Borrowers in Debt with \$4.2 Billion in Predatory Fees Every Year' (Research Report, Center for Responsible Lending, 30 November 2006) 3.

51 *National Consumer Credit Protection Act 2009* (Cth) pt 2-2.

52 *National Consumer Credit Protection Act 2009* (Cth) pt 3-1.

53 *National Consumer Credit Protection Act 2009* (Cth) s 118.

54 Fringe lenders are referred to in the report as 'micro lenders', defined as those who provide loans not involving real property, such as short-term loans of small amounts and payday loans: Australian Securities and Investments Commission, 'Review of Micro Lenders' Responsible Lending Conduct and Disclosure Obligations' (Report No 264, Australian Securities and Investments Commission, 22 November 2011) 9-10.

limited documentation verifying the consumer's financial situation; had not recorded verification of a consumer's expenses; and did not record how they had calculated a consumer's ability to meet repayments on the proposed credit contract without suffering substantial hardship.⁵⁵ Some lenders had sought to satisfy the responsible lending obligations simply by including in the credit contract a declaration by the consumer that he or she was able to afford the loan repayments.⁵⁶ Clearly, a failure to assess capacity to repay within the loan term can contribute to financial distress and exacerbate problems of over-indebtedness and poverty in the community.⁵⁷ It is essential that loans to people on low incomes are made responsibly, in the sense of being structured so as to enable repayment without substantial hardship.

Financial exclusion should be characterised as a social justice issue, as it is linked to social exclusion for those who cannot access credit, and entrenches poverty and over-indebtedness for those who access high cost, exploitative forms of credit. There is a clear inequality of opportunity with respect to credit access and this should be addressed by state regulation that seeks to facilitate access to safe and affordable small amount credit for low-income Australians.

IV FACILITATING ACCESS TO CREDIT AS A SOCIAL JUSTICE ISSUE

A Theoretical Grounds

Credit is widely used in a modern consumerist society such as Australia, and equality of opportunity to access such credit is an important goal in that context. This article draws on Jacobs' theory of equality of opportunity to argue that credit is a 'stake' which is distributed through competitive processes, and that those processes should be constructed in a manner that is fair and just.

Jacobs' concept of 'stakes fairness' is an important one for the purposes of this article, in that he maintains that the distribution of stakes in one competition should not affect the distribution of stakes in another.⁵⁸ This means that the fact that a person has done badly in relation to the distribution of the income and employment stakes, should not of itself make that person unworthy of consideration in the 'credit stakes'. The same rule that applies to higher income consumers – namely that someone with capacity to repay a loan without hardship should be eligible for it – should apply to those on low incomes, rather than those on low incomes being excluded from access to safe and affordable loans on the ground of income level alone. As will be discussed below, the evidence shows

⁵⁵ Ibid 7–8.

⁵⁶ Ibid 19.

⁵⁷ See generally King, Parrish and Tanik, above n 50, 8. The Australian Government is currently considering regulation to reduce the potential harms of fringe credit: Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011* (2011) 49–118.

⁵⁸ Jacobs, above n 10, 43.

that people on low incomes can repay loans and are not more likely than more affluent borrowers to default in doing so, provided the loans are structured appropriately. There is currently a lack of stakes fairness in Australians' access to credit in that those on low incomes do not receive a fair distribution of available credit, which is directed towards more 'profitable' consumers. They are therefore being disadvantaged in the competition for credit, because of the manner in which the 'stake' of income and employment opportunities has been distributed. This is a form of economic discrimination.

Background and procedural fairness also require economic discrimination to be overcome. The current allocation of access to credit in Australia exhibits a lack of background fairness, where the market is constructed to exclude those living on lower incomes. There is a lack of procedural fairness in terms of the rules governing the competition, which allow judgments about eligibility for credit to be based on profitability concerns and misguided concerns as to the risk of lending in the low-income market.

Wilhelmsson notes the injustice of discriminating against individuals on the basis of a perception that they are a higher risk borrower and therefore should pay higher costs, such as those demanded by fringe lenders. This only serves to cement the 'poor pay more' problem.⁵⁹

Ramsay also makes this point, noting the inequity inherent in low-income consumers paying more due to perceived risk. Referring to Grameen Bank in Bangladesh and Shorebank in the US, Ramsay notes that:

The success of many of these institutions has contradicted the assumption that the poor are high risk debtors prone to default and has demonstrated that, given the proper market framework and institutional structure, lower-income groups may be both a reliable and profitable market.⁶⁰

There is a two-fold argument here. First, it is argued that it is inappropriate and unfair to price credit according to a risk calculation based upon a person's income level alone. Second, it is argued that in any event, the risk as calculated on loans to low-income consumers is inaccurate. As argued above, evidence suggests that the risk of lending to people on low incomes has been overestimated. Where loans are priced and structured so as to be affordable and repayable without hardship, the risk of default is significantly reduced and credit can have a positive impact on the lives of low-income borrowers. Low-income people can indeed repay loans, provided they are given a chance to do so through an appropriate, individualistic credit assessment process, and provided the loan term and repayments are structured so that borrowers can repay without substantial hardship.

Ramsay argues that consumer protection law has a redistributive role, and that achieving equality of access to credit markets is part of that role.⁶¹ Where the market denies a person access to safe and affordable credit, social disadvantage is

59 Wilhelmsson, above n 7, 163, referring to the well-known 'poor pay more' phrase derived from David Caplovitz, *The Poor Pay More: Consumer Practices of Low-Income Families* (Free Press, 1963).

60 Ramsay, above n 43, 187.

61 Ibid 178.

multiplied, in that that person falls prey to high cost, exploitative credit products and consequential over-indebtedness and entrenched poverty.⁶²

Lack of access to credit cannot be addressed through increased welfare or charitable handouts. Neither of those avenues offers the dignity or social benefits offered by financial inclusion, and they deny equality of opportunity. Jacobs has made some interesting observations concerning ‘welfare to work’ programs as opposed to simply ‘welfare’, which can also provide some insights into the benefits of access to credit. He endorses welfare to work programs which require some sort of work or job training to be undertaken by those in receipt of unemployment benefits, as this requires ‘stakes fairness’ – in terms of a fair distribution of opportunities for work – to be taken seriously. This endorsement is based on the role of such programs to fulfil the right to employment, rather than the imposition of duties on welfare recipients to work.⁶³ An analogy can be drawn with programs to facilitate access to credit as opposed to simply increasing welfare payments. Programs which facilitate access to credit actually address a right to access safe and affordable small amount credit, in the same way that a well constructed welfare to work program might address a right to work.

The World Bank has referred to ‘the lack of access to finance as a critical mechanism for generating persistent income inequality’.⁶⁴ This inequality can only be overcome by addressing that lack of access. In this regard, the UK’s Social Investment Task Force has recognised the importance of looking ‘beyond welfare’ to improved access to financial services in order to assist disadvantaged individuals and communities.⁶⁵ This is reflective of Pierson’s prediction of, ‘a future in which welfare states focus on social investment rather than social costs. Welfare states should be enabling rather than providing, customized rather than generic, smaller but smarter’.⁶⁶

There must be a focus on achieving a fair marketplace through regulation, where small amount credit can be accessed by low-income Australians on the same fair and reasonable terms offered to other Australians. Access to such credit can have a positive impact on the extent to which low-income Australians experience financial and social inclusion.

B Practical Implementation

The provision of safe and affordable credit to low-income Australians could be undertaken by mainstream banks, community sector organisations, community development finance institutions and community development credit unions.

62 Ibid 180.

63 Jacobs, above n 10, 165–6.

64 Asli Demirgüç-Kunt, Thorsten Beck and Patrick Honohan, ‘Finance for All? Policies and Pitfalls in Expanding Access’ (Policy Research Report, World Bank, 13 November 2007) ix.

65 Social Investment Task Force, ‘Enterprising Communities: Wealth beyond Welfare’ (Paper presented at Community Development Finance Association Conference, Melton Mowbray (UK), 6–8 July 2005).

66 Christopher Pierson, *Beyond The Welfare State: The New Political Economy of Welfare* (Polity Press, 3rd ed, 2006) 184.

Turning first to the role that banks might play, it is worth noting that the current engagement of Australian banks with the issue of financial exclusion is minimal. One exception is National Australia Bank ('NAB') which has made a significant commitment to no interest and low interest loan schemes in partnership with community sector organisations,⁶⁷ as well as more recently working with a community development finance institution to address financial exclusion for low-income individuals not eligible for more charity-based programs.⁶⁸ Such activities are undertaken as part of NAB's corporate social responsibility programs ('CSR'), not its core business.

Voluntary CSR initiatives by banks will, for the most part, be limited to achieving strategic outcomes for banks, such as improving their public reputations, and may therefore not go far enough to effectively address financial exclusion. These initiatives are also potentially ephemeral, in the sense that a major change within a banking corporation, such as a change to the Chief Executive Officer, could well spell the end for some of these initiatives, particularly in difficult financial times.

Ideally, banks should provide access to small amount personal credit on safe and affordable terms for all members of the community, including low-income consumers who can satisfy a realistic 'capacity to repay on the terms offered' test. The 'terms offered' should be structured so as to maximise the prospects of a borrower having capacity to repay; that is, the loan period and repayment schedule should be structured so that, as far as possible, a low-income consumer can repay on those terms without substantial hardship, notwithstanding that this may reduce the profitability of the product for the bank.

A difficulty that might arise in compelling banks to lend directly to low-income Australians is an inability to access and engage appropriately with the low-income market. This has led to banks such as NAB partnering with community sector organisations to offer these loan products. Some of these partnerships are open to criticism for shifting transaction costs associated with the loan – including time consuming initial interviews and financial counselling sessions with the borrower – onto the community sector organisation, thus negatively affecting the sustainability of those organisations. Further, these arrangements can silence community sector organisations in their advocacy roles, as they may have a keen sense of obligation to the bank that is funding their lending program.⁶⁹ An alternative to cross-sector partnership arrangements would be for banks to simply provide funding for both operational costs and on-lending

67 See National Australia Bank, *Microfinance* (16 May 2011) National Australia Bank <http://www.nab.com.au/wps/wcm/connect/nab/nab/home/About_Us/7/4/3/10/>.

68 See Foresters Community Finance Limited, *Fair Finance Australia* (20 September 2011) Fair Finance Australia, Foresters Community Finance Limited <<http://www.fairfinance.com.au/news/78-fair-finance-australia.html>>; Connolly et al, above n 1, 36–7.

69 Ingrid Burkett and Belinda Drew, 'Financial Inclusion, Market Failures and New Markets: Possibilities for Community Development Finance Institutions in Australia' (Occasional Paper, Foresters Community Finance, October 2008) <<http://www.foresters.org.au/knowledge-exchange/publications.html>> 27–8.

to community sector organisations or community development finance institutions ('CDFIs') engaged in safe lending to low-income Australians.

Such a requirement on banks can arguably be justified on the basis of CSR and implemented through both tax incentives for investment in financial inclusion programs, and a positive obligation to contribute to meeting the needs of the financially excluded under a model based on the US *CRA*.⁷⁰

In terms of the CSR of banks, whilst voluntary CSR initiatives may be too tenuous to address the problem of financial exclusion adequately and effectively, recognition of CSR obligations can provide justification for state regulation to achieve this. Banking corporations, because of their central role in the Australian financial system, wield a certain amount of power and influence in Australian society. Further, the privilege of being able to receive consumer deposits as authorised deposit-taking institution ('ADI') licence holders undoubtedly places banks in a favourable position in terms of fundraising to sustain profitable lending activities. They are also in a position of significant economic power due to the resources which they hold and, unlike most other corporations, have the benefit of a government guarantee that, at least in the case of the larger banks, they should not be allowed to fail.⁷¹

Given the central role of banks in our financial system, the argument for mandated CSR for banking corporations is strong. In undertaking research into financial exclusion in Australia, Connolly and Hajaj supported the view in 2001 that:

It is not sufficient to argue that banks are now like any other competitive business whose primary business is to maximise the return to the shareholder. The major banks, because of their key role in the financial system have a utility function that confers responsibilities beyond that of ordinary business.⁷²

This view is supported by Cartwright, who asks 'whether the special nature and importance of banking justifies the imposition of an obligation to provide certain suitable banking services and products to consumers?'⁷³

Cartwright then considers arguments surrounding CSR and the 'services of general interest' argument espoused by Wilhelmsson and considered above, before concluding that 'it is possible to argue that it is legitimate to put social obligations on banks although the precise justification for such an imposition is a matter for debate'.⁷⁴

70 William C Apgar and Mark Duda, 'The Twenty-Fifth Anniversary of the *Community Reinvestment Act*: Past Accomplishments and Future Regulatory Challenges' (2003) 9 *Economic Policy Review* 169.

71 This became very apparent in the 2008 global financial crisis: see, eg, Prime Minister Kevin Rudd, 'Global Financial Crisis' (Media Release, 12 October 2008); Australian Prudential Regulation Authority, *Financial Claims Scheme for Authorised Deposit-taking Institutions* (1 February 2012) APRA: Financial Claims Scheme <<http://www.apra.gov.au/CrossIndustry/Documents/ADI%20Financial%20Claims%20Scheme%20FAQ%2001%2002%2012.pdf>>.

72 Local Government and Shires Association of NSW, Submission No 48 to House of Representatives Standing Committee on Economics, Finance and Public Administration, *Inquiry into Alternative Means of Providing Banking and Like Services in Regional Australia*, 1998, 381, quoted in Connolly and Hajaj, above n 30, 40.

73 Cartwright, above n 27, 212.

74 Ibid 218.

I argue that the power, resources and privileged positions of banking corporations as ADI licence holders give rise to an obligation to contribute to a solution to financial exclusion in Australia.

With regard to models for tax incentive schemes, in the UK there is a Community Investment Tax Relief scheme available to those who invest in CDFIs for micro-enterprise lending. There has also been support for extending this scheme to investment in CDFIs for personal lending to low-income earners.⁷⁵ The tax relief is five per cent of the amount invested every year for five years, so that the total tax relief amounts to 25 per cent of the amount invested.⁷⁶

In the US there is a similar scheme known as the New Markets Tax Credit, administered by the CDFI Fund. The scheme encourages investment in 'community development entities' that in turn invest in 'qualified low-income community investments'. The CDFI Fund allocates tax credits to the community development entities, which, in turn, offer those credits to investors who invest in them. Those investors receive a tax credit representing 39 per cent of the cost of the investment, claimed over a seven-year period. To qualify as a community development entity, an organisation needs to 'demonstrate a primary mission of serving, or providing investment capital for, low-income communities or low-income persons'.⁷⁷

The *CRA* rates banks on the extent of their lending to borrowers at different income levels, and their provision of community development loans.⁷⁸ A poor *CRA* rating can affect a bank's application for deposit-taking facilities, including applications for mergers with and acquisitions of deposit-taking institutions. *CRA* ratings can also be taken into account in the approval process for opening or closing bank branches and banks must have a satisfactory *CRA* rating to be allowed to engage in extended financial activities such as insurance and securities.⁷⁹ Further, a bank's *CRA* rating can affect its reputation and is regarded as 'an important part of a bank's public image'.⁸⁰

In Australia, the *CRA*-like model would involve a ratings system whereby banks and other ADIs would be rated by either the Australian Prudential Regulatory Authority ('APRA'), ASIC or an agency specifically established for the purpose of undertaking ratings. The ADIs would be rated on the extent of their contribution to addressing financial exclusion. If an existing regulator is to

75 Treasury Committee, *Financial Inclusion: Credit, Savings, Advice and Insurance*, House of Commons Report No 12, Session 2005–06 (2006).

76 Community Development Finance Association, *Community Investment Tax Relief: A Guide for CDFIs* (May 2003) <<http://www.cdfa.org.uk/wp-content/uploads/2011/02/CITR-CDFI-guide-final.pdf>>.

77 Community Development Financial Institutions Fund, *New Markets Tax Credit Program* (14 June 2012) United States Department of Treasury <http://www.cdfifund.gov/what_we_do/programs_id.asp?programid=5>.

78 Richard D Marsico, 'The 2004–2005 Amendments to the *Community Reinvestment Act* Regulations: For Communities One Step Forward and Three Steps Back' (2006) 39 *Clearinghouse Review* 534, 535–6.

79 Michael S Barr, 'Credit Where It Counts: The *Community Reinvestment Act* and Its Critics' (2005) 80 *New York University Law Review* 513, 519.

80 John Taylor and Josh Silver, 'The Essential Role of Activism in Community Reinvestment' in Gregory D Squires (ed), *Organizing Access to Capital: Advocacy and the Democratization of Financial Institutions* (Temple University Press, 2003) 169, 181.

undertake the ratings, it is likely that ASIC, with its consumer protection focus under the NCCPA, would be thought more appropriate than APRA, with its focus on prudential regulation under the *Banking Act 1959* (Cth). However, the need for positive ratings would need to be linked to the right to maintain an ADI licence.

Under the proposed regime, a poor *CRA*-like rating would affect an ADI's public reputation and could lead to conditions requiring an improvement in the rating being imposed upon the ADI's licence, in the same manner that APRA can now impose conditions on an ADI licence pursuant to section 9(4) of the *Banking Act 1959* (Cth). A 'conversation' between the regulator and the ADI regulatees during the ratings process, as to the factors and criteria being considered and which should be considered in arriving at a rating, would be an important aspect of the regime.⁸¹

The *CRA* is not without its critics in the US⁸² and has been blamed in some circles for the 2008 sub-prime mortgage crisis and subsequent global financial crisis.⁸³ In response, the point has been made that it was predatory lending, which is not supported nor condoned by the *CRA*, which caused the sub-prime mortgage crisis.⁸⁴ The evidence is that the *CRA* has helped to overcome market failure in credit markets in the US by enhancing access to credit for low-income borrowers.⁸⁵ One commentator has described the positive impacts as follows:

Banks have channelled significantly more credit into low income and minority neighbourhoods than they ever did before the passage of the *CRA* ... many banks are now much more proactive in forming partnerships with community-based organisations and in making credit available in previously neglected neighbourhoods.⁸⁶

There is a clear role for CDFIs and community sector organisations in addressing financial exclusion. CDFIs are a category of social enterprise that exist for the social purpose of addressing financial exclusion, and seek to operate under a sustainable business model. They are well recognised in the US and UK, and have recently come to be recognised in Australia as having a role to play in addressing financial exclusion.⁸⁷ I argue that it is the social enterprise based CDFI model which offers the greatest opportunity for sustainability and scale in offering safe, affordable small amount credit because of its decreased reliance on

81 See generally Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 181.

82 See generally Barr, above n 79.

83 See generally Ellen Seidman, 'No, Larry, CRA Didn't Cause the Sub-Prime Mess' on New America Foundation, *The Ladder* (15 April 2008) <<http://www.newamerica.net/blog/asset-building/2008/no-larry-cra-didn-t-cause-sub-prime-mess-3210>>.

84 Ibid.

85 Barr, above n 79, 101.

86 Peter Dreier, 'Protest, Progress, and the Politics of Reinvestment' in Gregory D Squires (ed), *Organizing Access to Capital: Advocacy and the Democratization of Financial Institutions* (Temple University Press, 2003) 188, 193.

87 Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Minister for Disability Reform, 'Extending Financial Services to Disadvantaged Australians' (Media Release, 28 January 2010) <<http://www.jennymacklin.fahcsia.gov.au/node/666>>.

external sources. Notwithstanding their potential for sustainability, CDFIs should be the beneficiaries of government and industry (including banking industry) investment, at least in their early establishment phases pending long-term sustainability. This will be necessary because of the current dearth of such institutions in Australia.

There are contradictory views as to the ability of CDFIs to make microfinance activities in developed countries fully self-sustaining without external support, at least without compromising their social mission. There are risks in requiring CDFIs to achieve full financial sustainability without the benefit of any subsidisation, as noted by Rubin: 'Adopting a "business mindset" can be very difficult for a nonprofit ... it can move a nonprofit organization's activities away from its social mission and potentially even harm the individuals the organization was created to serve'.⁸⁸

There is a view that financially sustainable microfinance models in the developed world will not be possible, although CDFIs should continue to strive for financial sustainability and may be able to do this through cross subsidisation of activities, that is, engaging in more profitable activity to support microfinance work. Certainly, the recent demise of Shorebank Corporation in the US,⁸⁹ which had been a highly successful CDFI, does suggest a need for ongoing government and industry investment to ensure that CDFIs can continue to meet their social purpose of addressing financial exclusion.

Current small loans programs offered by community sector organisations – badged as low interest and no interest loans – are not adequate to meet the need for small amount credit, and this has led to a significant increase in the level of fringe credit provided in the Australian market.⁹⁰ As stated above, to the extent that banks are contributing to low interest loan schemes and no interest loan schemes, they are doing so on the basis of voluntary CSR initiatives which might limit their capacity to grow sufficiently to meet demand and need.

CDFIs would be well placed to have a significant impact on financial exclusion with the appropriate support and funding. The potential good work of these organisations will be hampered without adequate support. There is currently no regulatory incentive to encourage industry investment in CDFIs, such as through tax incentives and a *CRA*-like regime, to enable them to continue and grow their small amount lending programs designed to assist low-income Australians.⁹¹ Government funding of these programs will also be required, either initially until they become self-sustaining, or possibly on an ongoing basis where a focus on financial sustainability might interfere with the CDFI's social

88 Julia Rubin, 'Adaptation or Extinction? Community Development Loan Funds at a Crossroads' (2008) 30 *Journal of Urban Affairs* 191, 192.

89 Bill Zielinski, 'Politically Connected Shorebank of Chicago Fails and Reincarnated at Taxpayer Expense' on *Problem Bank List* (21 August 2010) <<http://problembanklist.com/politically-connected-shorebank-of-chicago-fails-and-reincarnated-at-taxpayer-expense-0172>>.

90 See generally Howell, Wilson and Davidson, above n 45.

91 See, eg, Foresters Community Finance Ltd, *Fair Finance Australia* <<http://www.fairfinance.com.au/>>.

objectives.⁹² A pool of \$7.5 million has been made available by the Australian Government to ‘pilot’ the development of a CDFI industry in Australia.⁹³ This is a small amount compared with the £74 million Growth Fund previously made available in the UK to foster the development of a CDFI industry.⁹⁴ More significant and ongoing government funding for CDFIs in Australia should be a focus of any regulatory response to financial exclusion.

In essence, a regulatory framework to address financial exclusion as a matter of social justice should incorporate:

1. government funding to support CDFIs as well as community sector organisations engaged in addressing financial exclusion through loans programs for low-income Australians;
2. tax incentives to encourage investment in CDFIs and community sector organisations engaged in this work, to enable them to lend to people on low incomes;
3. a *CRA*-like ratings system to encourage investment by banks in the CDFI and community sectors; and
4. effective monitoring and enforcement of the responsible lending obligations under the *NCCPA* so as to minimise the harms of fringe credit products. It must, however, be made clear that the assessment of a low-income borrower’s capacity to repay a loan needs to be undertaken on an individual basis and not subject to an arbitrary formula which automatically excludes that borrower on the grounds of income alone; and further that repayment schedules and interest rates should be tailored so that loans can be repaid by low-income borrowers without substantial hardship.⁹⁵

V CONCLUSION

Social justice can be characterised as a human rights issue, compelling states to regulate to protect economic and social rights, such as the right to access safe and affordable small amount credit in order to acquire necessary items and pay emergency bills, and lead a ‘normal’ life in a modern consumerist society. A recognition and facilitation of this right supports a sense of human dignity in a

92 See Therese Wilson, ‘Supporting Social Enterprises to Support Vulnerable Consumers: The Example of Community Development Finance Institutions and Financial Exclusion’ (2011) 35 *Journal of Consumer Policy* 197.

93 Macklin, above n 87.

94 Sharon Collard, Chris Hale and Laurie Day, ‘Evaluation of the DWP Growth Fund: Revised Final Report’ (Report prepared for HM Treasury, December 2010) 48 <http://www.hm-treasury.gov.uk/d/evaluation_growth_fund_report.pdf>.

95 See also Therese Wilson, ‘Responsible Lending or Restrictive Lending Practices? Balancing Concerns Regarding Over-Indebtedness with Addressing Financial Exclusion’ in Michelle Kelly-Louw, James Nehf and Peter Rott (eds), *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (Ashgate, 2008) 91.

way that charitable and welfare models do not. Competition and the constructed 'free market' are not delivering equality of opportunity to low-income Australians when it comes to accessing credit. Economic discrimination exists where consumers are excluded from access to products on the basis of their income alone. Low-income Australians are not necessarily a bad credit risk, and it has been the failure on the part of mainstream credit providers to lend to low-income Australians that has, to some extent, caused problems of over-indebtedness experienced by this group, as they turn to high cost, exploitative forms of credit. The provision of safe, affordable credit to low-income Australians should be encouraged and supported, while irresponsible, predatory lending should be discouraged.

I have proposed a regulatory regime that supports small loans programs offered by community sector organisations and CDFIs, through a *CRA*-like rating system and tax incentives to encourage investment in these programs. A well-enforced responsible lending requirement, but one which is appropriately designed so as not to automatically exclude borrowers on grounds of income, will also be a necessary part of this regime.

Lack of access to safe and affordable small amount credit by low-income Australians is a form of financial exclusion leading to broader social exclusion. Where low-income Australians have been able to access safe and affordable small amount credit, improvements to quality of life and a sense of social inclusion have been shown to follow. It is a matter of rights-based social justice that the time has come to create a fair market free of economic discrimination, where it is not simply accepted that 'the poor pay more' and have to endure exploitative conditions in order to access credit.