



**INQUIRY INTO THE RESOLUTION OF DISPUTES WITH FINANCIAL SERVICE PROVIDERS WITHIN THE JUSTICE SYSTEM**

**Financial Counselling Australia (FCA)**  
is the peak body for financial counsellors in Australia

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## About Financial Counselling

Financial counsellors provide advice to people with money and debt issues. Working in community organisations, their services are free, confidential and independent.

Financial counsellors need an in-depth knowledge of credit law, bankruptcy law, debt collection law and practices, industry hardship processes and government concession frameworks.

Financial counselling agencies are exempt from holding either a Credit Licence or an Australian Financial Services Licence as long as they meet certain criteria, including that their services are free and staff are adequately trained.

There are approximately 800 financial counsellors in Australia, and we estimate this translates into around 500 full time positions.

People can access financial counselling through either face-to-face services or by ringing the phone financial counselling service, the National Debt Helpline on 1800 007 007. We estimate that face to face financial counsellors assist around 125,000 people each year. In 2018, the National Debt Helpline received almost 180,000 calls, an increase of 4% on the previous year.

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# 1 Introduction

Financial counsellors welcome this inquiry. Access to justice is a key right for people in a dispute with a financial services provider (FSP).

Financial counsellors assist people who are in financial difficulty and their services are free, independent and confidential. Financial counsellors must hold a Diploma of Financial Counselling and are required to undertake continuing professional development each year. They are not financial planners, they do not charge fees, receive commissions or give investment advice.

As financial counsellors see so many people in financial difficulty, they often assist people who are in disputes with FSPs. Access to justice and access to free dispute resolution procedures is critical for people who find themselves in these situations. Financial counsellors do not represent people in court but they sometimes assist and support people and small businesses who are going through a court process. Financial counsellors do represent people with disputes through the Australian Financial Complaints Authority.

Financial counsellors also play a critical support role for owners of small business in financial difficulty. Financial counsellors regularly see people running a small business and provide assistance and support in dealing with both business and personal debts.

We also support the submission to this Inquiry by the Consumer Action Law Centre.

## 2 Summary of what needs to change

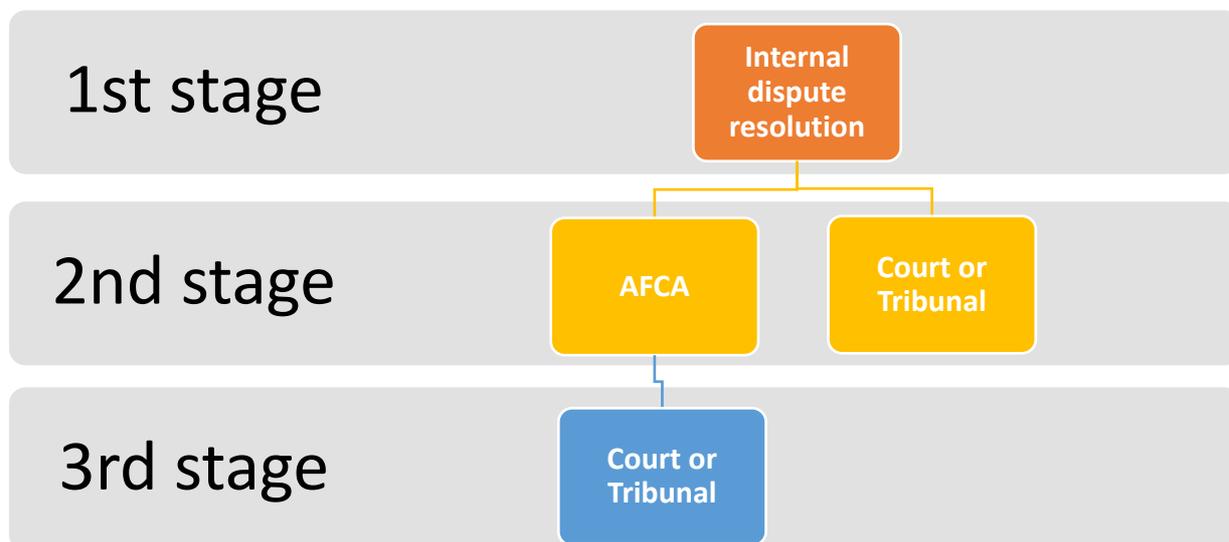
1. All small business lenders must be required by law to be members of AFCA.
2. State and Federal Courts should publish statistics that name the plaintiffs that are the highest users of the Court(s) for debt collection.
3. For court proceedings, people and small business need timely access to free legal advice and financial counselling to avoid unfair settlements. Increased funding for financial counselling and community lawyers and funding for free advice for small business is necessary.
4. FSPs (but particularly the big banks) should ensure that they have instructed their lawyers that financial counsellors and community lawyers can contact them directly about their client's case.
5. ASIC Regulatory Guide 209 should be a term of the Banking Code of Practice to provide adequate guidance on responsible lending requirements.
6. The Courts should have procedures in place to provide orders to cap costs or determine that each party should pay its own costs for people or small businesses in disputes with an FSP.
7. Increase funding (through an industry levy) is necessary to ensure that people and small business have access to free legal advice.
8. AFCA's jurisdiction is changed to enable it to consider disputes where the FSP has obtained a default judgment in court.
9. AFCA should delete the two-year time limit in relation to an IDR dispute so that people can uniformly have access to appropriate time limits.
10. People and small businesses using FSPs have a right to expect access to AFCA to resolve their dispute. Legislative change is required so all FSPs providing credit to individuals or small business are required to be members of AFCA.
11. "Lacking in substance" must be removed from C.2.2. (d) of the AFCA Rules to ensure everyone gets a fair go to make out their complaint.
12. AFCA compensation limits should be increased.
13. AFCA should be joining a mortgage broker to any dispute where the formation of the loan is subject to a dispute to ensure that liability is shared fairly and issues with misconduct are identified.
14. The AFCA Rules should be amended to require the FSP to fully cooperate to provide all necessary information and documents.
15. The AFCA Rules should be enhanced to acknowledge that a dispute can be on the basis that the FSP will not provide the relevant documents.
16. AFCA continues to expand their role in making sure that settlements are fair.

17. There should be a specialist financial services community legal centre available in every State or Territory in Australia.

## 3 Overview of the current dispute resolution system

### 3.1 Individuals

The current dispute resolution system for people dealing with FSPs is:



The first step in dispute resolution is to raise a dispute with the FSP. If the dispute is not resolved, the vast majority of people will choose to use free external dispute resolution which is AFCA. FSPs that are required to have a licence must be a member of AFCA. If the person goes to AFCA and does not want to accept a determination of AFCA, the person still has the option of going to a Court or Tribunal. The vast majority of people do not go to a Court or Tribunal due to the cost and stress.

### 3.2 Small business

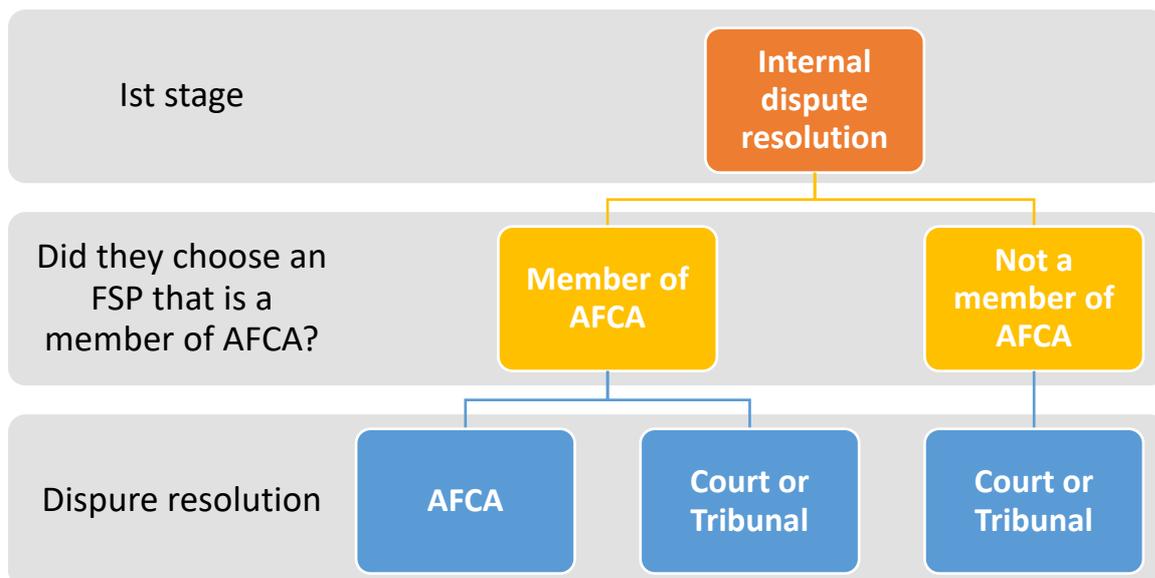
For small business with business loans the options are more limited. The dispute resolution options and access to justice depends a great deal on whether the FSP is a member of AFCA.

- FSPs providing finance only to small businesses are not required to have a credit licence or to join AFCA.
- FSPs however that provide both personal and business finance are required to be members of AFCA and to be licenced under the National Credit Act.<sup>1</sup> This means that small businesses that deal with a FSP that is a member of AFCA, can access AFCA if they have a dispute.

The dispute resolution process for small business is therefore more complex as shown in the diagram on the next page.

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<sup>1</sup> National Consumer Credit Protection Act 2009 (Cth).



Many small business owners do not know about the importance of getting access to AFCA. Worse, small businesses in financial difficulty are often forced to deal with non-mainstream FSPs that are not members of AFCA. As AFCA becomes more widely known, small business owners may assume that they can access this service, when this will not be the case if their lender is not a member.

Financial counsellors regularly find themselves in the difficult situation of having to tell a client that their lender is not a member of a free external dispute resolution scheme (now AFCA). This often means they cannot afford to engage lawyers and run a dispute in Court. In effect, the dispute is never resolved.

**Recommendation:**

All small business lenders must be required by law to be members of AFCA.

### 3.3 Debt collection

The debt collection process is very relevant to how FSPs use the court system. If there is a default for a loan the usual process for debt collection is:



Many FSPs sell the debt to debt collectors (usually between 90 and 180 days after default). This means for many loans the litigation is conducted by a debt collector and not the original FSP. In our experience, some debt collectors are more litigious than others. Unfortunately, there is no comprehensive publicly available data on the highest users of Local or Magistrates Courts and the Supreme Court in each State or Territory of Australia. It is not possible to obtain hard data about whether some FSPs sue more people/businesses than others. This data would be invaluable in tracking the effectiveness of reform and to expose highly litigious FSPs.

**Recommendation:**

State and Federal Courts should publish statistics that name the plaintiffs that are the highest users of the Court(s) for debt collection.

We also strongly support the comments by the Consumer Action Law Centre in its submission on debt collection and bankruptcy. Financial counsellors have reported repeated problems with some debt collectors who seem intent on people making bankrupt (so they lose their home) over a small credit card debt.

**Statement of Claim or Summons**

Once a person or small business receives a Statement of Claim or Summons, they have a limited amount of time (14 – 28 days) to lodge a defence. People and small business also have the right to lodge a dispute in AFCA (if the FSP is a member) in this period of time. By lodging a dispute, the court proceedings are put on hold while the dispute is considered in AFCA. This gives the person or small business a chance to have their dispute determined for free.

The problem is that if this last window of opportunity is missed, then the chances of access to justice, even with a highly meritorious dispute, diminish enormously.

**Court judgment**

Once the FSP has obtained a court judgment the individual or small business has very limited rights. The vast majority of court judgments for debt are default judgments. This means that the person or business never lodged a defence. If the person had a defence then they could apply to set aside the judgment. However, this usually requires legal advice and fees. The other option is to make a repayment arrangement on the basis of financial difficulty in AFCA.<sup>2</sup> While this limited access right to AFCA is a welcome improvement, it does not address the following issues:

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<sup>2</sup> See AFCA Rule C.1.2 (d).

1. There is no personal service for a Statement of Claim/Summons and the originating process can go missing.
2. People and small businesses may not know their rights to lodge in AFCA after receiving a Statement of Claim or Summons. There is usually no information on the Statement of Claim or Summons telling people and small businesses about their rights to access AFCA instead of filing a defence.
3. People and small businesses may believe that there is no point defending the proceedings due to time and cost.
4. Many people genuinely do not know they have a defence or dispute as it can be hard to access free legal advice or for small businesses to be able to afford legal advice.

In effect, if the FSP is fast enough and gets a court judgment, a person with a prima facie defence, for example the loan breached the responsible lending laws, can miss the opportunity to seek access to justice.

### 3.4 Banks compared to other financial services providers

Throughout this submission we have generally referred to FSPs as a class, rather than specific categories such as the banks or other lenders. As the market share of the banks is so large, any misconduct involving them is amplified by the enormous number of loans they write compared to other FSPs. However, the misconduct of other FSPs, such as payday lenders, should not be overlooked in the consideration of issues in dispute resolution.

There are also a number of positive points to make about the banks and dispute resolution, including:

- improving access to financial hardship. There has been a steady improvement over the last 20 years in being compassionate and working with people in financial difficulty in offering sensible hardship arrangements. There is always room for improvement (particularly with small business), however, this strong commitment to ongoing improvement is welcome;
- strongly supporting free external dispute resolution (previously the Financial Ombudsman Service and now AFCA). This has also included supporting consumer advocate initiated changes to include hardship, post statement of claim/summons and increasing thresholds;
- improving the Banking Code of Practice and getting it registered with ASIC; and
- recognising that some people are in long term financial hardship, often due to a serious change in circumstances and will never be able to reasonably repay their credit commitments.

This list is not to excuse any misconduct but it is to recognise the work that the banks, particularly the larger ones have done to improve dispute resolution over a long period of time.

These positive changes are evidenced also in FCA’s bi-annual Rank the Banks survey. This survey asks financial counsellors to rate the performance of the banks in relation to financial hardship assistance. The data from the surveys for the four major banks is shown in the graph below and shows a steady improvement.



*Rank the Banks survey results for the four major banks – 2013, 2015, 2017*

## 4 TOR (a) – Legal system and fairness and proportionality

*(a) Whether the way in which banks and other financial service providers have used the legal system to resolve disputes with consumers and small business has reflected fairness and proportionality*

### 4.1 Use of the legal system to pressure customers into accepting settlements

Some FSPs use the legal system to pressure customers into accepting settlements that do not reflect their legal rights. FSPs are often represented by large law firms who are experts in understanding how the legal system works. People and small business owners are often unrepresented, struggle to afford a lawyer, struggle to find free help and do not know about their legal rights. There is a well-recognised power imbalance and information asymmetry.

As outlined above, the legal system is difficult and stressful for people. Quite rightly they will worry about the consequences of court action which includes the sheriff repossessing goods/their home, garnisheeing of their wages or savings and being made bankrupt. In this context the FSP knows they are in a very powerful position and can make unfair offers. The best way to protect people and small business is to ensure that they are not in the court system in the first place if they have a genuine dispute. This is why AFCA is so important. People must have an option available for dispute resolution that goes some way to address the power imbalance.

Access to advice when making a decision about a settlement in court is critical. People and small businesses are often befuddled when trying to decide whether to accept a settlement. Getting access to specialist advice can make an enormous difference. It can empower people to reject the settlement or renegotiate based on their legal rights.

#### **Recommendation:**

For court proceedings, people and small business need timely access to free legal advice and financial counselling to avoid unfair settlements. Increased funding for financial counselling and community lawyers and funding for free advice for small business is necessary.

Financial counsellors sometimes deal with people and small business that are in court proceedings or court proceedings are threatened. Financial counsellors are not lawyers and cannot represent people in court. However, financial counsellors can and do negotiate with FSPs while also referring the person for legal advice. Financial counsellors in these cases may be able to negotiate settlements (particularly financial hardship arrangements) directly with the FSP and sometimes the FSP lawyer, with a very good outcome for their client.

In our experience, sometimes a FSP may be far more reasonable than their lawyers. It is noted that lawyers do not have this option. If the FSP is represented a community or legal aid lawyer must deal with the FSP lawyer.

There should not be a difference between negotiating with the FSP or their lawyers. In many instances, the lawyers can make it much harder to get a fair settlement.

#### **Recommendation:**

FSPs (but particularly the big banks) should ensure that they have instructed their lawyers that financial counsellors and community lawyers can contact them directly about their client's case.

## Personal credit

FSPs must comply with the law, but as the Financial Services Royal Commission (FSRC) established, there has been serious and systemic misconduct in a number of areas - the law has not been followed.

The best and most common example of making a legal claim when the FSP is aware of misconduct, is irresponsible lending. FSPs (and particularly big banks because of the volume), have been providing credit to people who cannot afford to reasonably repay their loans. It has been established in the FSRC, and in actions by ASIC, that lenders were failing to properly check expenses and relying on benchmarks, like the Household Expenditure Measure, in breach of the responsible lending provisions of the National Credit Act. This is a systemic failure.

FSPs were aware of these problems given the following:

- ASIC had issued Regulatory Guide 209 which contained specific guidance on how to comply with the responsible lending provisions. Although RG209 is not law it is considered good industry practice in AFCA and breaches of RG209 can lead to an adverse determination against an FSP. FSPs must have been aware that their policies failed to comply with RG209;
- The Financial Ombudsman Service (now AFCA) issued guidance and made numerous decisions about responsible lending;
- Financial counsellors raised many disputes on the basis of breaches of the responsible lending provisions; and
- Consumer advocates repeatedly raised concerns with FSPs about compliance with responsible lending requirements.

It follows that:

- many debts, including those with court judgments and settlements, were recovered or paid when the person did not know they had a meritorious dispute on the basis of irresponsible lending. It is heartbreaking to consider that some people lost their home, car, credit rating, and money because of loans that should not have been granted.
- FSPs collected debts, employed lawyers and enforced debts when they knew or reasonably suspected the person may have a defence. If justice was to be done for all those people then it would be necessary to give affected people an opportunity to go back and have the matter reconsidered.

A final matter is ASIC Regulatory Guide 209 which contains detailed guidance on how the responsible lending provisions apply. It is not law and should be. Consumer advocates asked for compliance with RG209 to become a term of the Banking Code of Practice.<sup>3</sup> This was never recommended or implemented. However, the FSRC has since exposed the necessity of detailed guidance that is mandatory. It is incongruous that AFCA applies RG209 but it is not law.

### Recommendation:

<sup>3</sup> See Recommendation 24 b of the Joint Consumer Submission to the Independent Review of the Code of Banking Practice 2016. Available at <http://cobpreview.crkhoury.com.au/wp-content/uploads/sites/2/2017/01/24-Joint-Consumer-Submission-Review-of-Code-of-Banking-Practice-CCMC.pdf>.

ASIC Regulatory Guide 209 should be a term of the Banking Code of Practice to provide adequate guidance on responsible lending requirements.

### **Business loans**

The protections in place for small business are much less than for individuals. Small business has none of the following protections:

- a default notice that gives an opportunity to catch up arrears in a set period. Many FSPs may do this anyway but there is no legal protection;
- access to justice through AFCA as a legal requirement for the FSP;
- rights to get loan account statements (although most FSPs do this);
- a right to financial hardship that is enforceable in AFCA;
- irresponsible lending protections;
- a requirement that repossessed goods as security are sold for the best price reasonably obtainable.

As there are a lack of protections for small business it is harder to show misconduct. The FSRC heard evidence of small businesses being treated in a way that did not meet community standards and this is discussed further below.

The FSRC did not make a recommendation for further protections for small business. We were disappointed with that position as many small businesses are very vulnerable when dealing with FSPs and some basic consumer protections would assist. As we have already recommended above, small business owners should have a right to access AFCA for disputes with a FSP.

### **4.2 Banks and community standards with consumers exercising their legal rights**

As a whole, the banking industry, has not behaved in a way that meets community standards. The experience of financial counsellors is that banks continued to lend irresponsibly. Countless hours have been spent on disputes where the bank did not have a reasonable argument to resist the dispute raised.

## 5 TOR (b) Court system as a forum

(b) The accessibility and appropriateness of the court system as a forum to resolve these disputes fairly

There are broadly two ways a person can access legal advice and representation:

1. Approach a private lawyer for advice and representation; or
2. Ring a community legal centre or Legal Aid for advice and representation

### Private lawyers

Generally speaking, people in financial difficulty cannot afford a private lawyer. Private lawyers often charge by the hour and are costly and there will also be court fees. If you lose the case, the person is usually liable for the costs of the other side. There is no doubt that the risk of costs drives many people to give up on legal action. Paying your own costs and the other sides costs can add up to many thousands of dollars. For some people the loss of a case means bankruptcy. Courts would be more accessible if each party paid their own costs in a dispute with an FSP or the costs were fixed at a capped amount from the start.

Another problem is finding a private lawyer who has specialist knowledge about financial services. Financial services is a complex area and specialist knowledge can make an enormous difference.

### Recommendation:

The Courts should have procedures in place to provide orders to cap costs or determine that each party should pay its own costs for people or small businesses in disputes with an FSP.

### Community lawyers and Legal Aid

Community lawyers are free and Legal Aid is generally provided at a lower cost or no cost (depending on the matter). The main issue is that these services are funded to prioritise lower income people for detailed legal advice and representation. Those services have high demand and cannot meet that demand. Victoria, New South Wales, South Australia, the Australian Capital Territory and Western Australia all have community legal services that specialise in credit and financial services.

### AFCA

AFCA also has an important role to play for people who cannot afford legal advice. Although AFCA cannot give legal advice, it should be making sure that people are referred to free legal advice and financial counselling when it is needed.

### The experience of participants in a court process who appear unrepresented

Financial counsellors sometimes see people who are going through a court process. People going through court may end up in financial difficulty (if they were not already) because of the costs. Financial counsellors provide advice about paying costs orders and may negotiate with the FSP demanding payment.

Financial counsellors report that people going through court are usually very stressed. They are scared about the costs and very worried about financial stability going forward.

### **What needs to change**

The best solution is to increase funding for specialist community legal services and Legal Aid. Lower income and/or vulnerable people should be getting better access to advice and representation. Middle income people should be able to get free ongoing legal advice.

The Government should also consider funding a National Business Debt Helpline so small business can get free financial counselling advice. This funding should be paid for with an industry levy. We have written in detail about how the funding is needed and how a levy would work in our submission to the *Senate Inquiry into Credit and financial services targeted at people in financial hardship*. The submission (submission 2) is available at <https://www.financialcounselingaustralia.org.au/Corporate/Publications/Submissions>.

### **Recommendations:**

Increase funding (through an industry levy) to ensure that people and small business have access to free legal advice.

## 6 TOR (c) AFCA

(b) The accessibility and appropriateness of AFCA as an alternative forum for resolving disputes

We strongly support AFCA. AFCA is the way people and small business get access to justice in a dispute with their FSP. It is the best chance of getting a fair result. Financial counsellors regularly run disputes in AFCA on behalf of clients.

### 6.1 Eligibility criteria and compensation thresholds for AFCA

#### Post court default judgment access to AFCA

At 3.3 above we discussed the effect of a court judgment on access to AFCA. Access to AFCA is severely limited once a court judgment has been obtained by an FSP. It is limited to making repayment arrangements. Based on the systemic issues uncovered by the FSRC, we consider that AFCA's ability to consider post-court judgment disputes should be expanded. We are not proposing that AFCA has any jurisdiction to consider disputes where there has been a full hearing in Court. We assume that there has been a fair hearing and decision by the Court.

However, we do believe that AFCA should be able to consider post court judgment matters where a default judgment was obtained. A default judgment is a judgment obtained with no hearing when the defendant does not file a defence. As already outlined above (at 3.3) people do not file defences for a range of reasons but a common reason is they did not know they had one. For responsible lending breaches this is a very common problem.

Expanding the jurisdiction of AFCA to consider post default judgments would mean that those people who did not get a court notice, were scared or could not get advice would get a chance to access justice. If their complaint was upheld the FSP could set aside the judgment by consent. This widening of access to AFCA would be a profound change and would provide many people who had been denied justice a chance to get justice.

#### Recommendation:

AFCA's jurisdiction is changed to enable it to consider disputes where the FSP has obtained a default judgment in court.

#### Time limits

In response to the FSRC, the Government announced a change to the time limits that apply to AFCA for a period of 12 months, allowing disputes as far back as 1 January 2008 to be considered. This is welcome because many people did not realise they had been a victim of misconduct.

We remain concerned however about the effect of the AFCA time limit that states<sup>4</sup>:

*“where, prior to lodging the complaint with AFCA, the Complainant was given an IDR Response in relation to the Complaint from the Financial Firm - within two years of the date of that IDR Response.”*

<sup>4</sup> The relevant time limits appear at AFCA Rules B.4.2.1 (b) and B.4.3.1 (b). AFCA Rule B.4.2.1. is less of a concern as it is the later time limit to be applied. However, for B.4.3.1 (b) the 2 year time limit could be the earlier time limit.

As detailed above, we believe that many people have been misled or pressured into not proceeding with a complaint by FSPs. This means that when a person gets the IDR response from the FSP completely rejecting their claim they give up. The two-year time limit above means that many of those people's time limits expired well before the usual six-year time limit. Time limits in the AFCA Rules should favour the consumer and not the FSP.

**Recommendation:**

That AFCA delete the two-year time limit in relation to an IDR dispute so that people can uniformly have access to the most generous time limits.

**Not being a member of AFCA**

As previously noted, there are FSPs that do not have to be a member of AFCA. Some will voluntarily be a member of AFCA but may choose to leave at any time possibly leaving people with their dispute unresolved.

The FSPs that do not have to be a member of AFCA are:

- those that only offer small business loans or business leases;
- buy now, pay later providers;
- mortgage brokers who only arrange business loans;
- other debt management firms;
- pawnbrokers;
- payday lenders avoiding the National Credit Act.

This means that some people and small businesses get turned away from AFCA because the FSP they chose to use is not a member (and is not required to be a member). The person or small business therefore may not get access to justice which is an unfair outcome.

**Recommendation:**

People and small businesses using FSPs have a right to expect access to AFCA to resolve their dispute. Legislative change is required so all FSPs providing credit to individuals or small business are required to be members of AFCA.

**“lacking in substance”**

In AFCA Rule C.2.2. (d) a complaint can be excluded if it is “lacking in substance”. We recommend that these words are removed. It is a matter for AFCA to determine when a complaint lacks substance by investigating the complaint fully and making a decision. It is unclear how AFCA can determine a complaint is lacking in substance when it has not investigated the complaint. People often find it difficult to explain their dispute. AFCA should be referring those people for advice so they can make their complaint. We remain very concerned that vulnerable people may simply have their dispute excluded without assistance or advice.

**Recommendation:**

“Lacking in substance” must be removed from C.2.2. (d) of the AFCA Rules to ensure everyone gets a fair go to make out their complaint.

## Compensation limits

We believe the following compensation limits should be increased to facilitate greater access to AFCA:

1. Compensation for non-superannuation disputes should be increased from \$500,000 to \$2 million (this should be the general claim limit);
2. Compensation for non-financial loss should be the same limit as financial loss; and
3. Double the compensation limit for small business disputes from \$1 Million to \$2 Million

### **Recommendation:**

AFCA compensation limits should be increased as above.

## 6.2 Whether AFCA has the powers and resources it needs

AFCA should have the resources it needs in terms of funding and this should be provided by industry. We understand that the demand for assistance from AFCA has increased dramatically following the FSRC. In these circumstances, AFCA may be placed under pressure and it is important to ask people to be patient so that procedural fairness is applied in every case. In our view, AFCA has the powers it needs.

### **Joining mortgage brokers**

AFCA has the power to join other parties as set out in Rule A.6.2. Before AFCA was set up most lenders were members of the Financial Ombudsman Service and most mortgage brokers were members of the Credit and Investments Ombudsman. This meant that if a consumer or small business had to raise a dispute, they were most likely to raise it with the lender who held the home as security.

This meant that mortgage brokers remained under much less scrutiny for their conduct in relation to a dispute. Instead, the FSP lender was faced with the whole dispute, even if there was serious mortgage broker misconduct. The FSRC exposed a great deal of broker misconduct and this is consistent with the experience of financial counsellors. It is therefore critical that AFCA join the mortgage broker to disputes to ensure that any compensation orders cover their misconduct and not just the lender. It is also important that AFCA carefully track all FSP misconduct, including mortgage brokers.

### **Recommendation:**

AFCA should be joining a mortgage broker to any dispute where the formation of the loan is subject to a dispute to ensure that liability is shared fairly and issues with misconduct are identified.

### **Providing documents and requesting documents**

AFCA should be able to get all the documents needed to resolve the dispute. FSPs should be handing over their entire file to AFCA so it has all relevant information. We support recommendation 4.11 of the FSRC, which requires reasonable cooperation of FSPs in providing documents.

### **Recommendation:**

The AFCA Rules should be amended to require the FSP to fully cooperate to provide all necessary information and documents.

Conversely, when a person or small business needs access to documents to prepare their case, the FSP should provide those documents. For some cases, it is impossible to work out what the dispute should be until the person or small business gets the relevant documents. AFCA should be able to consider a dispute that is solely on the basis that the FSP will not provide the requested documents.

**Recommendation:**

The AFCA Rules should be enhanced to acknowledge that a dispute can be on the basis that the FSP will not provide the relevant documents.

### 6.3 AFCA and accountability measures

We believe that AFCA does face proper accountability measures as it is bound by ASIC Regulatory Guide 267 with oversight by ASIC.

### 6.4 Test case procedures, or other expansions to AFCA's role

The test case procedures are rarely used because the FSP must bear the costs of both parties. It is desirable that these procedures are used. We support the suggestion in the Consumer Action Law Centre submission to establish a Justice Fund to consumer legal costs and costs risks in AFCA test cases.

AFCA should be able to suggest law reform based on particular problems they are seeing in their experience as decision makers.

#### **Other matters**

AFCA has a very important role to play in reviewing settlements between FSPs and complainants. People can be pressured into unfair settlements even in the AFCA process. We are aware that AFCA does review settlements for cases, but as there is still a power imbalance a very active approach is warranted.

We recommend that AFCA undertake a review to put a process in place to meet the following requirements:

- Settlements for all registered disputes are reviewed. Some FSPs contact the complainant when they first register the complaint and pressure a settlement. The settlement may seem reasonable but it does not cover all the issues or is otherwise unfair. AFCA may not be involved in the settlement at all.
- Making sure the settlement resolves the entire complaint. FSPs can offer settlements that miss important issues. One example is the impact on the complainant's credit report.
- Not permitting settlements that set the complainant up to fail. For example, repayment arrangements need to be affordable.
- Banning unfair terms like "confidentiality" so the person cannot tell ASIC about the problem.

**Recommendation:**

AFCA continues to expand their role in making sure that settlements are fair as detailed above.

## 7 TOR (d) Community legal centre advice

### (d) The accessibility of community legal centre advice relating to financial matters

#### Background

In 2017-18, community legal centres helped over 200,000 people. Credit and debt issues are among the top five legal problems dealt with by community legal centres, alongside family/domestic violence, family law and housing/tenancy. In 2017 – 18, it is estimated that:

- At least 30,000 individual people were assisted with information services, legal advices, legal tasks, or representation services;
- Around 20,000 discrete legal services were provided (i.e. legal advices or related tasks);
- At least 2,500 legal representation services were provided, that is, lawyers acting for a client, e.g. in a dispute with a bank;
- Thousands of additional non-legal support services—primarily financial counselling - were also provided by CLCs.

Community legal centres are either generalist legal centres, providing legal assistance to people living in a specific geographic community on a wide range of legal issues, or specialist legal centres, that service a specific group of people or people who are affected by a particular area of law.

#### Specialist community legal centres – financial services

There are five specialist community legal centres with a focus on the rights of consumers, and that also provide legal support and training to financial counsellors: Financial Rights Legal Centre (based in NSW); Consumer Action Law Centre (based in Victoria); Consumer Credit Law Centre South Australia; Consumer Credit Legal Service (WA); and Consumer Law Centre of the ACT. Financial Rights and Consumer Action also provide the National Debt Helpline in their respective states (although federal funding to these two organisations for Helpline work has been withdrawn from January 2020). CARE Financial Counselling Service in the ACT provides the National Debt Helpline service for the Territory, and the Consumer Law Centre (ACT).

This means there are two States and one Territory are without a specialist community legal centre focusing on financial services: Queensland, Tasmania and the Northern Territory. For the people in those two States and Territory their access to specialist advice is very limited.

#### Recommendation:

There should be a specialist financial services community legal centre available in every State or Territory in Australia.

#### Demand

Demand for legal advice from community legal centres and Legal Aid far outstrips supply. It is estimated that in 2018, at least 6.4% of the population (aged 15 or over) or around 1.2 million people, will have experienced a credit or debt related legal issue in a 12-month period.<sup>5</sup> A

<sup>5</sup> As modelled on the 6.4% of respondents (aged 15+) to the Legal Australia Wide (LAW) survey who had a legal credit/debt problem they had experienced in the last 12 months. "credit and debt" covered credit - problems or disputes relating to loans, hire purchase, investment income, superannuation companies, shares, credit rating, bankruptcy - but also, debts that might be owed to the respondent (i.e. private debts). Christine Coumarelos et al. *Legal Australia-Wide Survey: Legal Need in Australia* Access to Justice and Legal Needs vol 7. 2012, Law and Justice Foundation,

conservative estimate would suggest at least 20% of the group that experienced a credit or debt-related legal issue - 240,000 people a year - would be financially disadvantaged and therefore benefit from access to free legal information and/or advice.<sup>6</sup>

## Funding

Community legal centres do not have enough funding to meet demand.

### **Recommendation:**

That there be a substantial increase in funding for financial counselling and community legal centres so that demand can be met. This should be paid for through an industry levy.

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<sup>6</sup> Of the 1.2 million individuals with credit debt legal problems, 20%, or 240,000 are likely to be in the lowest income quintile, and all these people are likely to need at least some legal information to help them resolve the issue. Christine Coumarelos et al. *Legal Australia-Wide Survey: Legal Need in Australia* Access to Justice and Legal Needs vol 7. 2012, Law and Justice Foundation, 60. Also see Renouf, G & Porteous, P. *Consumer Credit Legal Services in Australia*, unpublished report to ASIC, 2011, Document 18 on ASIC FOI Disclosure Log 2011-2017: <https://asic.gov.au/about-asic/freedom-of-information-foi/foi-disclosure-log/freedom-of-information-asic-disclosure-log-archive-2011-2017/>

## 8 Any other related matters - Vulnerable people

Vulnerable people find it difficult to access dispute resolution. Depending on the person, vulnerability can be temporary or can last for months and years. Financial counsellors see many people who are experiencing some form of vulnerability. We specifically discuss three groups:

1. People on a low income;
2. Aboriginal and Torres Strait Islander people;
3. Women

People who are vulnerable are likely to struggle with dispute resolution.

### 8.1 People on a low income

Financial counsellors see many low-income people as clients. These people are often on Centrelink as their sole source of income. For those clients receiving Newstart they are living below the poverty line. Low income people cannot even afford the filing fees for court. AFCA is free but getting access to the internet, reliable mail, having credit to make phone calls can all be very difficult.

In addition, people on low incomes can often be in financial difficulty and just surviving day to day can take up all of their attention. It is very important that AFCA identify low income people, offer extra help with making the complaint and sending responses and refer those people for assistance from financial counsellors and community lawyers.

### 8.2 Aboriginal and Torres Strait Islander people

Aboriginal and Torres Strait Islander people are particularly vulnerable when trying to access dispute resolution. AFCA is already providing assistance to Aboriginal and Torres Strait Islander people by:

- asking people if they identify as Aboriginal and Torres Strait Islander;
- focusing on providing culturally appropriate services;
- offering interpreters where needed; and
- making sure Aboriginal and Torres Strait Islander people are referred for advice and support from financial counsellors and community lawyers.

We recommend that AFCA continue to work on access for Aboriginal and Torres Strait Islander people.

### 8.3 Women

Although women are the majority of the population, there are many women who can end up being vulnerable at particular times. We recommend that AFCA conduct a gender impact analysis to ascertain whether there is more help they can provide to women to ensure they have access.