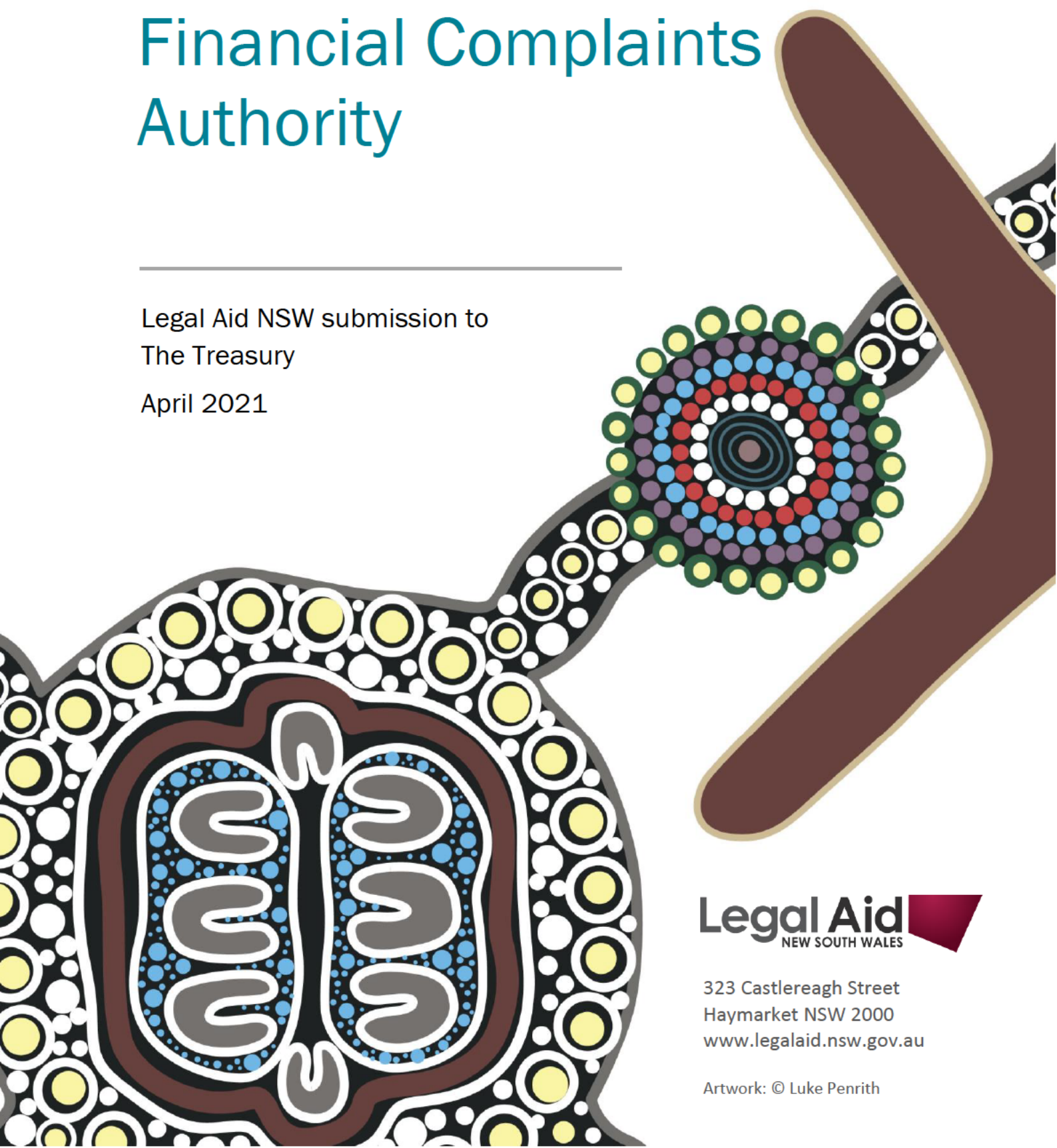


Treasury review of the Australian Financial Complaints Authority

Legal Aid NSW submission to
The Treasury

April 2021



Legal Aid
NEW SOUTH WALES

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, human rights, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

Should you require any further information, please contact

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2. Executive Summary

Legal Aid NSW welcomes the opportunity to provide a submission to the Treasury's review of the Australian Financial Complaints Authority (**AFCA**).

Our submission is based on Legal Aid NSW's extensive consumer law experience, and our experience assisting clients to make complaints to AFCA. The work of our civil law solicitors, including our specialist consumer law team, solicitors in regional offices and solicitors in the Civil Law Service for Aboriginal Communities, is focused on assisting the most vulnerable consumers in our community, including those with cognitive impairment, language or literacy issues, low levels of education, young people, Aboriginal and Torres Strait Islander people, and consumers experiencing domestic and family violence or elder abuse. We also acknowledge research, which is consistent with the experience of our solicitors, that indicates everyone is likely to experience vulnerable circumstances at some point in their lives, due to common, unavoidable and unpredictable life events such as illness, job loss, financial shocks, the death of a loved one and natural disaster.¹ These issues can further compound any barriers faced in dealing with consumer law problems.

From 1 November 2018 to 28 February 2021, Legal Aid NSW has lodged 204 complaints to AFCA on behalf of clients, including 80 complaints against related funeral insurance entities. In addition, we regularly advise clients on how to use AFCA as a dispute resolution forum to resolve their consumer law disputes without providing ongoing assistance.

We consider AFCA to be an accessible forum for dispute resolution that is easier for consumers to use than courts and tribunals. Features including AFCA's less formal procedures, plain language forms, ease of lodging documents and option to run matters online or over the phone so that consumers can participate without the inconvenience and expense of attending in person, contribute to AFCA's accessibility, particularly in contrast to traditional dispute resolution forums. We also value AFCA's focus on fairness whilst applying the law.

In addition to consumer law, Legal Aid NSW practices in many other areas of civil law including tenancy, employment, civil liberties, social security and immigration. We have experience participating in a wide range of dispute resolution forums on behalf of our clients. These forums include internal review and appeals processes within both government and non-government agencies, state and federal tribunals, courts and statutory dispute resolution bodies. Against that background, we consider that AFCA is one of the most accessible and efficient dispute resolution forums available. While we have noted some criticisms and areas for improvement below, we consider that alternative models would inevitably be more expensive and less efficient for consumers, small businesses, and financial firms.

Legal Aid NSW participates in two AFCA consumer representative forums, the AFCA Consumer Advisory Panel and Consumer Advocate Liaison Meeting. The AFCA Consumer Advisory Panel has been running since March 2019, and in our experience, it is productive and well organised. AFCA is also responsive to issues raised by consumers through the Consumer Advisory Panel. The Consumer Advocate Liaison Meeting is relatively new, having commenced in late 2020. While it is premature to comment on its operation, we welcome the opportunity to be part of this forum and consider it to be a further positive indication of AFCA's willingness to seek feedback and continue to improve the administration of a fair, efficient, timely and independent authority.

We provide more specific responses to the Terms of Reference and suggestions for improvements, which are summarised in our Recommendations and detailed further below.

Recommendations

Recommendation 1 – AFCA should improve accessibility of its services and processes to Aboriginal and Torres Strait Islander consumers, by increasing the proportion of Aboriginal and Torres Strait Islander people who work at AFCA, allocating dedicated resourcing to Aboriginal and Torres Strait Islander community engagement teams to conduct community-engagement, outreach and education activities, and developing targeted resources for Aboriginal and Torres Strait Islander people.

Recommendation 2 – AFCA should consider reviewing training for case managers to ensure quality of decision making and consider whether there is a role for more senior officer involvement in case management of files at an early stage.

Recommendation 3 – AFCA should consider adopting more flexibility within its dispute management timetables, and introducing guidelines to inform parties of AFCA's approach to balancing efficiency with fairness by noting factors it considers in setting timetables and granting extensions.

Recommendation 4 – As current review processes are adequate, an additional internal review mechanism is not required.

¹ O'Neill, Emma, 'Exploring regulatory approaches to consumer vulnerability: A report for the Australian Energy Regulator', *Consumer Policy Research Centre* (1 November 2019).

3. Delivering against statutory objectives: Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent (TOR 1)

In our experience, AFCA generally resolves complaints in a way that is fair, efficient, timely and independent. Our solicitors have also been impressed with the way that some case managers have dealt with vulnerable clients experiencing financial hardship and have taken steps to ensure a fair outcome. Although our solicitors have not yet had the opportunity to work with AFCA's vulnerable consumer team, we praise AFCA's initiative in creating this team and acknowledge its commitment to assisting vulnerable consumers.

In a limited number of disputes, our solicitors reported that AFCA case managers appeared somewhat inexperienced, which in turn lead to perceptions of bias from both consumers and their advocates, impacting the users' overall perception of fairness. Legal Aid NSW considers that this issue can be addressed through rigorous quality assurance programs, training for junior and new staff, and greater involvement of senior staff in case management at early stages.

Legal Aid NSW has found that when we raised these concerns, AFCA was both receptive and responsive, taking appropriate action to address individual problems and ensure the disputes were resolved in a way that is fair, efficient, timely and independent.

We therefore consider that many of the strategies suggested above are already being implemented and that AFCA is genuinely committed to improving and ensuring quality of decision making.

Further, Legal Aid NSW is of the view that the current case management process is appropriate, and that issues relating to poor decision making are best resolved by increased training and supervision, rather than changing the structure of AFCA dispute resolution process.

Case Study: Jessica

Legal Aid NSW assisted Jessica to lodge a dispute against a financial firm on the basis of responsible lending breaches, domestic violence and undue influence. The financial firm was not prepared to make any offers of settlement during conciliation and the dispute was referred to the preliminary assessment stage. Prior to the matter reaching this stage, our client sold the secured property and the complaint became largely irrelevant.

In the process of informing the AFCA case manager of our client's sale of the property, our solicitor questioned whether there was any possibility of the financial firm waiving interest and fees on the debt for the period of time when Jessica was in the relationship with her abusive partner who was not making repayments. Instead of simply closing the complaint upon finding out that the property was sold, the case manager liaised with the financial firm and secured their agreement to waive \$11,500 in interest and fees for the period as a goodwill gesture.

In the words of our solicitor "I think the case manager had a significant impact on this and I don't think we would have got the outcome if not for him...I feel he went 'above and beyond' what he had to do in the circumstances".

Case Study: Mia

Mia contacted Legal Aid NSW from interstate after receiving a writ of possession of land which she owned relating to a default judgment in NSW. The judgment related to a car loan taken out many years ago in Mia's name by her then husband. Mia suffered extreme domestic violence whilst in the relationship which ended with Mia fleeing, taking out an Apprehended Domestic Violence Order and relocating interstate for her safety.

Mia worked hard to rebuild her life and purchased a new property which was the subject of the writ. She was unaware of the debt or the default judgment until the writ was served on her at her new property. The debt had been purchased by a debt management firm who was enforcing the writ.

Mia attempted to take steps to set aside the default judgment, however, was vulnerable and unable to do so unassisted. Mia requested that the debt management firm take no enforcement measures whilst she was receiving advice but received no response.

Mia lodged a dispute with AFCA explaining her situation and seeking a stay on enforcement, while also seeking advice from Legal Aid NSW. Mia incorrectly lodged the dispute against the original lender, not the debt management firm who took over the debt. When Legal Aid NSW spoke with AFCA, the AFCA case manager had already recognised Mia's vulnerability and urgency of the matter, correctly identified the appropriate respondent and assisted Mia to lodge a complaint against the debt management firm. As a result, Mia received a stay of enforcement while she sought representation to seek to set aside the original judgment. The AFCA case manager also assisted Mia to obtain important documents relevant to the debt.

AFCA case manager's assistance in helping Mia identify the correct party and noting the urgency of the matter was essential. Without the appropriate expertise of the AFCA case manager, it is likely that the debt management firm would have proceeded to take possession of Mia's home without affording her the opportunity to obtain legal advice and representation in the matter. Without this assistance, it is unlikely

that Mia would have been able to navigate the external dispute resolution forum.

3.1 Fairness and accessibility

In our view, a key element of fairness is accessibility. We submit that AFCA would benefit from adopting a targeted strategy to increase awareness of its role and function, and the accessibility of its processes to Aboriginal and Torres Strait Islander people. We note that while Aboriginal and Torres Strait Islander people account for only 2% of complainants to AFCA,² our experience shows that because of barriers to financial inclusion, predatory conduct and lower levels of financial literacy, there is a much higher prevalence of consumer disputes in Aboriginal and Torres Strait Islander communities than is represented by their engagement with AFCA. Increasing the proportion of Aboriginal and Torres Strait Islander people who work at AFCA beyond 0.4%,³ resourcing dedicated Aboriginal and Torres Strait Islander community engagement teams to conduct community engagement, outreach and education activities, reviewing the accessibility of AFCA processes through a cultural lens, and developing targeted resources, would go some way to addressing those barriers. We acknowledge that in 2019 AFCA had organised AFCA “Financial Fairness” Roadshows with locations across the country, including in regional and remote areas, but that the Roadshow had to be postponed in light of the COVID-19 pandemic. Legal Aid NSW welcomes and supports proactive activities of this kind which help raise awareness of AFCA’s role, particularly in financially vulnerable communities, and increase consumer engagement.

Recommendation 1 – AFCA should improve accessibility of its services and processes to Aboriginal and Torres Strait Islander consumers, by increasing the proportion of Aboriginal and Torres Strait Islander people who work at AFCA, allocating dedicated resourcing to Aboriginal and Torres Strait Islander community engagement teams to conduct community engagement, outreach and education activities, reviewing the accessibility of its processes through a

² Australian Financial Complaints Authority (AFCA), *Annual Review 2019-2020*, 22.

³ Australian Financial Complaints Authority (AFCA), *Annual Review 2019-2020*, 101.

cultural lens, and developing targeted resources for Aboriginal and Torres Strait Islander people.

3.2 Fairness and quality of decision making

While our overall experience of AFCA's decision-making processes is positive, in a few instances, our solicitors have reported that AFCA case managers expressed views about the merits of the complaint prior to considering material and arguments in the matter. As a result, both our solicitors and their clients were concerned about the quality of the decisions made by individual case managers and overall fairness of the decision-making process those case managers adopted.

For example, a case manager told one of our solicitors that our client did not have a strong case prior to reading any information on the matter. In another matter, a case manager told a Legal Aid NSW solicitor that our client should offer to pay a reduced debt amount before considering submissions that the contract was an unjust transaction under the *National Consumer Credit Protection Act 2009* (NSW). In a further matter, an AFCA case manager informed the Legal Aid NSW solicitor that they did not consider that there were problems with the financial product that was the subject of our client's complaint, as the case manager had personally used that particular financial product and found it satisfactory.

In each of these cases, we raised our concerns through the AFCA Consumer Advisory Panel in response to which AFCA took steps to ensure that the matters were managed in a fair and balanced way. However, we are concerned that a self-represented consumer might accept such comments from a case manager and rely on this information when deciding to either withdraw or settle their matter for less than what they are entitled to.

The case study below illustrates our experience of a poor decision-making process adopted by an AFCA case manager, and the difficulties a self-represented consumer might face if in a similar situation.⁴

Legal Aid NSW notes that these views relate to a handful of cases and that we do not have a sufficient information basis to say that this is a systemic issue. As outlined in the case studies above, we have also had positive experiences where we consider case managers' approaches have been well informed and have achieved a fair outcome for both the financial firm and our client, in an efficient manner. We are acutely aware that many of the matters we file at AFCA are litigable, and the time, expense and stress for both the financial firm and consumer would be considerably higher if the matters were

⁴ All names in case studies have been de-identified.

run in court. Legal Aid NSW also recognises that AFCA is a relatively new organisation and recruited many new staff in a relatively short timeframe. While these are clearly serious issues, we consider they can be addressed through better training and senior oversight of the case management process and are not reflective of broader systemic deficiencies in the design of the AFCA dispute resolution system.

Case Study: Amy's story

Legal Aid NSW assisted Amy to lodge a complaint with AFCA about a loan guarantee.

Amy was a guarantor of a loan which although small, placed her at risk of losing her home, and exposed her to the risk of financial hardship given her dependence on social security benefits to support herself and her children. Legal Aid NSW raised concerns about the circumstances of the client entering the loan, and that it was 'unjust'.

Our solicitor was concerned about the tone of the first case manager's letter, which appeared to be biased in favour of the financial firm and accepting of their position, while unfairly dismissive of Amy's version of events and complaint. For example, the case manager stressed the inclusion of certain text in the guarantee document, despite our client's position that she had never seen or signed this document.

During phone calls between our solicitor and the AFCA case manager, the case manager continued to use this tone, and expressed strong views about the merits of the case even before properly considering the substantive arguments raised in the complaint. The case manager then informed our solicitor that all that was left to do was for Amy to make an offer to reduce the debt. The subsequent recommendation was wholly against our client and in favour of the financial firm.

Our solicitor raised concerns about the handling of this matter through AFCA Consumer Advisory Panel. The matter was reassigned and one of AFCA's legal counsel took over. The AFCA legal counsel asked further questions of Amy and the financial firm and the matter was dealt with in a more balanced, and less emotive manner. The dispute ultimately settled prior to a determination.

Recommendation 2 – AFCA should consider reviewing training for case managers to ensure quality of decision making and consider whether there is a role for more senior officer involvement in case management of files at an early stage.

3.2.1 Efficient and timely

Legal Aid NSW acknowledges AFCA's commitment to determining disputes in an efficient and timely manner. We also note that the wide variety of disputes and differences in individual complainants' circumstances inevitably mean that a "one size fits all" approach to managing disputes is not always conducive to producing fair outcomes. We recognise that this places AFCA in a difficult position where it needs to balance progressing disputes flexibly in order to accommodate vulnerable clients, whilst also producing timely decisions and meeting both consumers' and financial firms' expectations.

Legal Aid NSW notes that AFCA Rules⁵ ensure that matters are completed in an efficient and timely manner. However, in some cases Legal Aid NSW practitioners have found that the strict application of timelines has the potential to result in unfair outcomes. Many of our clients are very vulnerable, have low levels of literacy and live in remote parts of NSW. In some cases, they have limited internet access. For example, they may only have a reliable phone line when they drive into a nearby town. We recognise the need for efficiency and timeliness, however this ought to be balanced against the needs of disadvantaged consumers so the barriers they experience can be appropriately considered.

On the other hand, Legal Aid NSW considers that timeliness is essential for some consumers. We have represented clients, particularly in insurance matters, where the prospect of delay in obtaining an Ombudsman decision has influenced them to accept a preliminary decision. For example, people may not be able to start rebuilding their home until an insurance dispute is resolved. If consumers are faced with a waiting period of 2-3 months, they may not be able to wait for a decision.

We acknowledge there are delays in all dispute resolution forums and note that comparatively, AFCA's processes are likely to be more efficient for consumers and industry than other available dispute resolution forums. We also consider that better quality decision making at an earlier stage is likely to reduce the number of matters proceeding to determination which in turn would improve wait times. While we do not have firsthand experience in dealing with AFCA's vulnerable consumer teams, we

⁵ Australian Financial Complaints Authority (AFCA), *Complaint Resolution Scheme Rules* (13 January 2021).

appreciate that our solicitors' concerns around vulnerable clients may be addressed through the team's involvement.

Case Study: Colin

Colin is an Aboriginal man from a small town in remote NSW. He has five children, a low paying job, no assets of note and limited education. Colin was experiencing financial hardship.

Colin could not afford to purchase essential household products outright, so he signed up to two separate consumer lease contracts within a short period of time. The contract further exacerbated Colin's financial difficulties and he sought assistance from Legal Aid NSW. We assisted Colin to lodge a dispute in AFCA arguing breaches of responsible lending.

The case manager who was initially assigned to Colin's matter did not seem to appreciate the particular challenges faced by vulnerable clients living in remote areas. The case manager set down short time frames for Colin to complete two statements of financial position despite his very limited access to services, including a financial counsellor.

The case manager also described an early offer from the financial firm whereby Colin would have to pay a relatively large amount of money as a "good one", again, apparently ignoring his existing financial distress.

Our solicitor raised concerns about the timeframes set by the case manager with AFCA management and the matter was re-assigned. The new case manager had a much better appreciation of Colin's difficulties and was able to not only progress the dispute in a manner that was sensitive to Colin's challenging circumstances, but achieved a much fairer settlement between Colin and the financial firm.

Recommendation 3 – AFCA should consider adopting more flexibility within its dispute management timetables, and introducing guidelines to inform parties

of AFCA's approach to balancing efficiency with fairness by noting factors it considers in setting timetables and granting extensions.

3.3 Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes? (ToR 1.1)

Legal Aid NSW has made a wide variety of complaints to AFCA on behalf of its clients, so it is difficult to comment on the consistency of AFCA's decision-making. While we have not comparatively analysed the outcomes we have achieved in AFCA, our solicitors have not reported concerns that decisions are inconsistent or unpredictable. In our experience, where decisions differ usually turns on the facts and circumstances of the particular dispute.

3.4 Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective? (ToR 1.2)

Legal Aid NSW considers that identification and resolution of systemic issues is an important function of AFCA and supports AFCA maintaining this function. We welcome AFCA's recent engagement of an independent consultant to review its current processes and note that Legal Aid NSW has contributed to that review.

Legal Aid NSW does not have sufficient insight into AFCA's processes for the identification and appropriate responses to systemic issues to comment more broadly. We note that AFCA defines a systemic issue as "an issue that is likely to have an effect on consumers or Small Businesses in addition to any Complainant."⁶ The AFCA Annual Review 2019-2020 indicates that systemic issues are commonly identified by financial firms through the complaints process, and AFCA works with those financial firms to identify the number of consumers affected and the appropriate remedy.⁷ This approach works when the financial firms conduct themselves with probity and transparency. However, AFCA is likely to need to take a more proactive approach to identify and respond to systemic issues involving its more reticent members.

3.5 Do AFCA's funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by

⁶ Australian Financial Complaints Authority (AFCA), *Complaint Resolution Scheme Rules* (13 January 2021) Rule A.17

⁷ Australian Financial Complaints Authority (AFCA), *Annual Review 2019-2020*, 68.

AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model? (ToR 1.3)

We do not have any comment on how AFCA's funding and fee structures impact competition. Our experience is that, at least for some AFCA members, a complaint lodged in AFCA may expedite the resolution of the complaint due to the financial impact of the fee imposed. Retention of the fee structure is vital to ensure that matters are resolved quickly and cost effectively.

4. Internal review mechanism: Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? How should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA? (ToR 4)

Legal Aid NSW notes that as case managers' decisions are reviewable by the Ombudsman, there is already scope for internal review. Further, as suggested above, greater involvement of senior officers in the early stages of the proceedings could enhance the quality of decision making and may reduce the perceived need for additional internal reviews.

Legal Aid NSW has concerns about any proposal that would establish an additional internal review mechanism for financial firms. Legal Aid NSW considers there are sufficient safeguards in place for member firms to remove the need for such a mechanism:

- In cases where an AFCA decision has major implications for a member's overall operations, the AFCA Rules provide a test case process, which members can use if they wish to obtain a decision by a Court.⁸
- Financial firms have an opportunity to provide further information to AFCA to challenge (or effectively have reviewed) a Recommendation before a Final Determination is issued.⁹
- AFCA has an Independent assessor who can respond to complaints about AFCA's complaints handling operations and performance.¹⁰
- AFCA is required to report to ASIC quarterly about all service complaints.

⁸ Australian Financial Complaints Authority (AFCA), *Complaint Resolution Scheme Rules* (13 January 2021) Rule A.7.2.

⁹ Australian Financial Complaints Authority (AFCA), *Complaint Resolution Scheme Rules* (13 January 2021) Rule A.12

¹⁰ Australian Financial Complaints Authority (AFCA), *Complaint Resolution Scheme Rules* (13 January 2021) Rule A.16.4.

Legal Aid NSW is concerned that an additional review process would not ensure consumers and small businesses have access to timely decisions. The certainty of the outcome provided by the process is essential for consumers and would be diminished, should review of decisions become available to financial firms. In addition, we are concerned about the impact this additional layer of review could have on consumers' rights. More specifically we note that as AFCA is not a court, time limits for consumer claims are not put on hold whilst disputes are going through AFCA. By introducing extra steps, consumers and financial firms may lose the option to litigate if a time limit expires while AFCA makes a decision. To avoid this possibility, consumers may feel compelled to prematurely discontinue the AFCA proceedings. Finally, at present, consumers can withdraw from AFCA proceedings at any time they choose. We would be concerned if consumers were no longer able to do so because of a request for review option by a financial firm.

Alternatively, consumers may become exhausted by the process if there is a third level of review process. In some cases, consumers cannot start rebuilding their lives until the AFCA decision is final. For example, if a dispute is about a cash settlement or insurer managed rebuild, the consumer's life is on hold. Extra delays may mean the consumer pulls out just to get on with their life and accepts an inferior decision because they do not have the time to continue with extra review processes.

In our experience, many consumers have significant aspects of their life on hold while they are waiting for a determination. The subject of the dispute may relate to significant debt, or an insurance claim that that may mean the difference between where a consumer can live, or whether significant assets such as a car can be replaced. Accordingly, if this proposal was pursued, we would welcome an opportunity to be consulted further on the details.

Finally, as discussed above, Legal Aid NSW is of the view that if senior officers oversaw case managers' decisions in the early stages of the proceedings, this would lead to better quality decision-making at the earlier stages of the matter, and may reduce the perceived need for additional internal review mechanisms.

Recommendation 4 – As current review processes are adequate, an additional internal review mechanism is not required.



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