



# Legal and Constitutional Affairs References Committee Inquiry into the resolution of disputes with financial service providers within the justice system

Submissions by Consumer Credit Legal  
Service (WA) Inc.

March 2019

# 1 Introduction

The Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) takes the opportunity to provide submissions to the Senate Legal and Constitutional Affairs Reference Committee's Inquiry into the resolution of disputes with financial service providers within the justice system (**Senate Inquiry**).

## About CCLSWA

CCLSWA is well placed to provide the Senate Inquiry with insight into, and information on, how Western Australian consumers are impacted by the inability to effectively exercise their legal rights and pursue a remedy against banks or financial service providers within the legal system; and whether there are fair, affordable and appropriate resolution processes available and accessible to consumers.

CCLSWA is a not-for-profit specialist community legal centre based in the Perth metropolitan area. CCLSWA advises and advocates for consumers on consumer credit issues.

CCLSWA operates a free telephone advice line service which allows consumers to obtain information and legal advice in the areas of banking and finance. CCLSWA provides ongoing legal assistance to consumers by opening case files when the legal issues are complex and CCLSWA has capacity to do so.

CCLSWA also provides:

- (1) assistance to financial counsellors and other consumer advocates who work closely with disadvantaged and low-income individuals for the resolution of their credit and debt related problems;
- (2) community legal education programmes relating to credit and debt issues, including financial literacy programmes to high school students and select groups within the community;
- (3) contributions to relevant policy and law reform initiatives; and
- (4) a training and supervision programme for law students and graduate volunteer paralegals.

In providing these services, CCLSWA aims to create awareness, knowledge and understanding of consumer issues relating to financial services.

CCLSWA's mission is to strengthen the consumer voice in WA by advocating for, and educating people about, consumer and financial, rights and responsibilities.

In these submissions CCLSWA provides its experience and views and makes recommendations as to how the issues may be resolved.

We have incorporated case studies as examples of our experience. In these case studies, we have not named the financial service providers. We have made these entities anonymous to protect our clients' confidentiality. We have also made these entities anonymous as some matters are ongoing and others are subject to confidentiality agreements. If the Senate Inquiry would like to know the name of a financial service provider or further detail on a particular case study, CCLSWA can approach the relevant client and seek his or her permission for those details to be provided.

## Summary of key issues and recommendations

Terms of Reference	Issue	Recommendation
(a) (iii) Whether banks generally have behaved in a way that meets community standards when dealing with consumers trying to exercise their legal rights.	<ol style="list-style-type: none"> <li>1. Failure to respond to documents requests.</li> <li>2. Rejecting and redirecting requests for documents.</li> </ol>	<ol style="list-style-type: none"> <li>1. Increase and enforce penalties for non-compliance with disclosure obligations.</li> <li>2. Banks and other financial service providers should provide easy to use document request systems.</li> </ol>
(b) The accessibility and appropriateness of the court system as a forum to resolve these disputes fairly.	Consumers have limited dispute resolution options against small business lenders who are not members of the Australian Financial Complaints Authority (AFCA).	All small business lenders should be required to be members of AFCA.
(c) The appropriateness of AFCA as an alternative forum for resolving disputes.	<ol style="list-style-type: none"> <li>1. AFCA needs greater powers to compensate victims of irresponsible lending.</li> <li>2. AFCA compensation thresholds warrant change.</li> </ol>	<ol style="list-style-type: none"> <li>1. In certain circumstances, AFCA should have the power to waive a debt, and vary and set aside a credit contract.</li> <li>2. Increase AFCA's monetary and compensation limits to a uniform \$2 million limit for claims and compensation without distinction between consumer and small business, or non-financial and financial loss.</li> </ol>
(d) The accessibility of community legal centres advice relating to financial matters.	<ol style="list-style-type: none"> <li>1. Community legal centres with limited funding and resources do not generally have capacity to represent clients in court proceedings.</li> <li>2. Under-funded and under-resourced community legal centres cannot meet demand and have to 'turnaway' vulnerable consumers.</li> </ol>	<ol style="list-style-type: none"> <li>1. A levy sourced from the financial services industry to fund specialist financial services lawyers in community legal centres.</li> <li>2. Increased funding commitment that would assist consumer credit legal services and financial counsellors to extend the reach of our services and reduce the instances of 'turnaways'.</li> </ol>

## 2. Disclosure – not acting in a way that meets community standards

- 2.1. Responding to (a)(iii) of the Terms of Reference (**TOR**), in CCLSWA’s experience, banks and other financial service providers do not behave in a way that meets community standards when dealing with consumers trying to exercise their legal rights to information and documents in relation to their credit contracts and loan accounts.
- 2.2. Consumers are legally entitled to documents and information prescribed under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the National Credit Code (**NCC**).
- 2.3. Consumers are entitled to copies of:
  - a) signed contract and mortgages, including terms and conditions, in accordance with section 185(1)(a) of the NCC;
  - b) statements of account for whole period under section 36 of the NCC;
  - c) any notices under section 73 in accordance with section 185(1)(c) of the NCC;
  - d) any notices issued under the NCC in accordance with section 185(1)(c) of the NCC;
  - e) the credit guide provided in accordance with section 126 of the NCCPA; and
  - f) assessment of unsuitability in accordance with section 132 of the NCCPA.
- 2.4. In CCLSWA’s experience, banks and other financial service providers often breach the NCCPA and NCC by:
  - a) ignoring requests for documents;
  - b) partially responding;
  - c) responding after the statutory timeframe has lapsed; and/ or
  - d) responding only after a complaint has been lodged with the bank or other financial service provider’s external dispute resolution scheme (**EDR**).
- 2.5. Failure to comply in full to document requests is also a breach of Part 2, section 11 of the Debt Collection Guidelines produced by the Australian Competition and Consumer Commission (**ACCC**) and the Australian Securities and Investment Commission (**ASIC**) and Part D section 13 of the Code of Banking Practice.
- 2.6. Requesting and reviewing documents is often the first step consumers or consumer representatives must take in order to determine a consumer’s legal position in relation to a credit contract and any potential breaches of the NCCPA.
- 2.7. Banks and other financial service providers failure to provide requested documents is a formidable barrier to justice as it prevents consumers from gaining the necessary information to formulate their claims and exercise their legal rights.
- 2.8. CCLSWA maintains that a full and timely response to all requests for loan documents and account information is crucial to a consumer’s ability to exercise their legal rights.
- 2.9. CCCLWA supports the findings in the Senate Economics References Committee report into Regulatory framework for the protection of consumers in the banking insurance and

financial services sector (**Senate Report**) that the lack of provision of documents negatively affects consumer's ability to fairly resolve their disputes and is a barrier to accessing justice.<sup>1</sup>

- 2.10 CCLSWA made 61 document requests on behalf of clients to banks and financial service providers from January 2017 to February 2019 and only 28 of those requests were complied with.
- 2.11 CCLSWA draws particular attention to the conduct of the big four banks (**Big Bank**) in relation to document requests under the NCCPA and NCC.
- 2.12 CCLSWA has encountered numerous difficulties when attempting to request and obtain documents from a Big Bank on behalf of clients. If our lawyers find it difficult to surmount the Big Bank's obstacles, we hypothesise that many unrepresented consumers may not even make it past this first hurdle in the dispute resolution process.
- 2.13 In our case studies we will highlight just some instances CCLSWA has dealt with since 2017 illustrating how the Big Banks did not respond to our document requests within the prescribed statutory period, did not provide all of the requested documents or made the process for requesting documents under the NCCPA and NCC highly inaccessible.
- 2.14 In some instances the Big Bank's total failure to engage with CCLSWA required us to lodge a dispute with the Big Bank's EDR scheme in order to simply obtain documents. Escalating matters to EDR is time and resource intensive for the consumer and consumer advocate.
- 2.15 Lodging an EDR dispute allows the Big Bank further time to respond to the complaint, usually an additional 45 days. This means that it may be at least 75 days before documents are provided in response to a request that statutorily requires a response within 30 days. For some consumers, access delayed is justice denied.

#### **Case study – Trish's Story**

Trish had a number of loans with Big Bank. This included a credit card, a home loan, and a personal loan. Trish was in arrears on each of these loans and approached CCLSWA in February 2017 for assistance.

CCLSWA sent a request for documents to Big Bank on 3 March 2017. While Big Bank responded to the request within the statutory prescribed period of 30 days, a review of the documents revealed some inconsistencies which could not be explained by Trish.

CCLSWA made a request for further information on 29 May 2017. Big Bank responded on 1 June 2017 requesting a letter of authority, despite the fact that CCLSWA had previously provided this.

CCLSWA was unable to provide a response to Big Bank within the next two weeks, and on 15 June 2017, CCLSWA received an email from Big Bank stating that they had closed the complaint pending

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<sup>1</sup> Senate Economics Committee report into regulatory framework for the protection of consumers in the banking, insurance and financial services sector, November 2018 available < [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Consumerprotection/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Consumerprotection/Report) > at pp 27-28.

further contact from us. CCLSWA contacted the designated representative, who was unable to locate our document request, or the relevant documents that CCLSWA had provided.

CCLSWA emailed the relevant documents for a second time on 15 June 2017, and sent follow up emails to Big Bank of 3 July and 11 July 2017. CCLSWA also left a voicemail with the designated representative on 24 July 2017. CCLSWA received no response to any of our correspondence.

CCLSWA lodged a complaint with Big Bank's Internal Dispute Resolution Department on 2 October 2017.

Big Bank responded on 3 October 2017 with additional documents regarding the home loan (214 days after our initial request).

Big Bank declined to provide further information on Trish's credit card suitability assessments on the basis that the information was "commercially sensitive".

Big Bank failed to reply in full to our request for documents and our further requests for clarifying information in relation to the personal loan.

CCLSWA then lodged a complaint with the Financial Ombudsman Service (**FOS**).

Copies of the credit card "assessments" were eventually provided to CCLSWA via FOS on 30 November 2017 (272 days after our initial request). In our opinion, the assessments were entirely inadequate to comply with responsible lending obligations.

- 2.16. Trish's story is also illustrative of CCLSWA's experience that often a Big Bank's failure to provide information or documents upon request is symptomatic of the Big Bank's failure to have carried out and collated the necessary inquiries and verifications at the relevant time, that is, prior to providing the credit.

#### **Case study – Jill's story**

Jill had a joint home loan with her ex-spouse, and approached CCLSWA for advice on whether Big Bank had breached their obligations by providing top ups to the loan without her permission.

CCLSWA made a request for documents to Big Bank on 26 May 2017, allowing Big Bank the statutory 30 days to provide the requested documents. Big Bank did not acknowledge or respond to the request within this period. CCLSWA made a follow up request on 3 July 2017, which allowed 10 days to supply the documents. Big Bank did not provide the documents.

CCLSWA called Big Bank's customer relations team on 17 July 2017, explaining the requests CCLSWA had made concerning the home loans. Big Bank transferred us to the home loans team, who advised us that they were not authorised to release documents. CCLSWA were then directed to the "productions department", who could only be contacted by email. Big Bank also informed us that all requests for documents must be made using the form on their website, titled "request for access to personal information under the Australian Privacy Principles".

Following this conversation, CCLSWA sent a further email to Big Bank requesting that the documents

be provided no later than 18 July 2017. CCLSWA advised Big Bank that if they did not provide the documents, CCLSWA would lodge a dispute with FOS. Big Bank did not provide the requested documents.

CCLSWA raised a FOS dispute on 25 July 2017. Big Bank provided documents on 8 August 2017 (74 days after our initial request) and 16 August 2017 (82 days after our initial request).

- 2.17. Jill's story is another example of a situation where EDR intervention was required to obtain information and documents. It is also illustrative of how difficult the Big Banks make their internal processes.
- 2.18. Unfortunately, Trish and Jill's stories are not isolated incidents. Delays are also experienced as a result of our document requests being rejected or redirected.
- 2.19. CCLSWA has experienced a number of issues with a Big Bank not accepting the general authority of our community legal centre (**CLC**) to act.
- 2.20. As it is often the case that our clients have multiple debts with multiple lenders, it is our practice to obtain a general authority to liaise with their lenders as it is administratively more efficient. However on numerous occasions we have been asked to fill in additional paperwork to provide our client's specific authority to act on specific issues with specific lenders.
- 2.21. While we often successfully argued that this is an unnecessary step, it puts additional administrative pressure on limited CLC resources and further delays the dispute resolution process. Ryan's story is illustrative of this recurring issue.

#### **Case study – Ryan's story**

On 14 December 2017, CCLSWA enclosed a signed copy of Ryan's general authority to act to Big Bank. In the letter, CCLSWA requested a number of documents relevant to Ryan's financial history with Big Bank. CCLSWA requested the documents be sent by 15 January 2018.

On 11 January 2018, Big Bank rejected the authority to act form, stating that it was generic and not addressed to Big Bank. As such, Big Bank stated that it was under no compulsion to provide the requested documents. Further, Big Bank stated that to release the requested documents, Big Bank would require \$47.50. An invoice was attached outlining an hour of labour costing \$37.50 and document retrieval costing \$10.00.

Despite purportedly not accepting the authority provided, Big Bank subsequently forwarded documents to CCLSWA via registered express post, without an invoice.

For clarity, CCLSWA still disputed Big Bank's objection to our general authority. In response we were advised that Big Bank had re-assessed our request and determined that the general authority was acceptable.

2.22 Despite Ryan’s story, CCLSWA continued to have issues with the same Big Bank rejecting and redirecting our document requests.

2.23 Lila’s story reflects that sadly this trend and delaying tactic continued into 2019.

**Case Study – Lila’s story**

Lila, suffering from financial hardship as a result of intermittent unemployment and a history of domestic violence, came to CCLSWA for advice regarding her home loan and multiple credit card debts. In January 2019 CCLSWA requested documents on behalf on Lila. In response, Big Bank provided CCLSWA with a “personal information request for access” which required CCLSWA to obtain Lila’s signature on the authority again, even though we had already provided a signed general authority.

We were also asked to re-direct our document request to a different e-mail address than the contact provided on AFCA’s website.

2.24 This conduct is not limited to the Big Banks.

2.25 The following case studies are examples of non-compliance with obligations from a range of different financial service providers, in addition to the Big Banks.

**Case study – Martin’s story**

Martin had a number of credit cards with various lenders. Martin was referred to us from a financial counsellor. In order to advise Martin about the various credit contracts, CCLSWA made requests for documents from each of the lenders. The following table records the progress of each document request, noting that no lender replied in full within the statutory prescribed period; and each matter has now been escalated to AFCA:

Lender	Date of document request	Date of response	Document request complied with?	Date of 2 <sup>nd</sup> (follow – up) document request	2 <sup>nd</sup> (follow-up) Document Request complied with?	AFCA dispute lodged
A	22/11/2018	No response	No	24/01/2019	Partial	Yes
B	22/11/2018	21/12/2018	Partially	24/1/2019	Partial	Yes
C	22/11/2018	No response	No	24/01/2019	No	Yes
D	22/11/2018	21/12/2018	Partially	24/01/2019	No	Yes
E	22/11/2018	13/12/2018	Partially	24/01/2019	Partial	Yes
F	22/11/2018	No response	No	24/01/2019	Partial	Yes

CCLSWA is awaiting the outcome of the AFCA disputes lodged in relation to the various lenders' failures to provide documents.

The failure of the lenders to respond perpetuates Martin's financial hardship as interest, fees and charges continue to accrue. Further, without reference to the documents, CCLSWA is unable to provide Martin with informed legal advice.

### Case study- Matthew's story

Matthew and his partner relocated to Perth from Sydney. Matthew and his partner took out loans to purchase land and build a house. Matthew's partner became ill and was unable to work. As a result Matthew and his partner began to rely on credit cards.

Matthew is struggling to pay the principal and interest on the multiple credit cards and came to CCLSWA to seek advice on his legal options.

In order to provide Matthew with legal advice, CCLSWA made a number of requests to the various lenders for documents relating to the credit cards.

The following table sets out the steps taken by CCLSWA in order to get only some of the requested documents required to be provided under the NCC.

Lender	Date of document request	Date of response	Document request complied with ?	Date of 2 <sup>nd</sup> (follow – up) document request	2 <sup>nd</sup> (follow-up) document request complied with?	AFCA dispute lodged	Document request complied with after AFCA dispute lodged
A	21/10/2018	22/11/2018	No	6/12/2018	No	Yes	Partially
B	21/10/2018	15/11/2018	No	20/12/2018	No	Yes	Partially
C	21/10/2018	15/11/2018	Partially	11/01/2019	No	Yes	Partially

2.26 Despite clear statutory obligations, these case studies show how laborious the process of obtaining documents and information can be.

2.27 The case studies also show how banks and other financial service providers disregard their legal obligations and consumers' rights. They are immediately defensive to any request and culturally unhelpful in providing documents to consumers and consumer advocates.

- 2.28 CCLSWA maintain the banks' and other financial service providers' failures to comply with document requests pursuant to the NCC and NCCPA exemplifies banks' and other financial service providers' behaviours that do not meet community standards.
- 2.29 This behaviour also reflects a lack of fairness and proportionality. Limiting access to documents that consumers have a legal right to obtain significantly affects a consumer's ability to understand their legal rights and fairly resolve disputes with banks and financial service providers.

### 3. Accessibility and appropriateness of the court system

- 3.1. In response to TOR (b), in CCLSWA's experience, court proceedings are not the most appropriate, accessible and cost effective way for consumers to resolve their disputes with banks and financial service providers fairly and reasonably.
- 3.2. As a CLC with limited funding and resources, CCLSWA does not generally have capacity to represent clients in court proceedings. We are generally able to resolve our client's disputes more efficiently through AFCA (and formerly, FOS and the Credit and Investment Ombudsman (CIO)). However, where the relevant lender is not a member of an EDR scheme, we have acted for clients in court, with the assistance of pro bono counsel.
- 3.3. A common example of this is where banks and other financial service providers enforce guarantees given by consumers for loans to small businesses.
- 3.4. Often third party consumer guarantees for small business loans are secured by mortgages over the third party's own homes. These consumers, who often receive no benefit from the business loan, risk losing their homes in the event the principal borrower defaults. As the loans fall outside the NCCPA and the lender is not required to be a member of an EDR scheme, the consumers have limited ability to dispute these often unconscionable guarantees. They find themselves in the conundrum of risking a judgment in default being made against them if they do not defend the lenders' claims on the one hand, on the other hand, they risk an adverse judgment by the court and prohibitively high associated costs if they do challenge the guarantee.
- 3.5. The Langdons' story is illustrative of the risks and costs involved for a consumer attempting to defend Supreme Court proceedings and challenge a guarantee, where the guarantee is not covered by the NCC and the lender is not a member of an EDR scheme.

#### Case study – The Langdons story

Mr and Mrs Langdon owned their own home, Asset A. Their son, Adam, asked them to guarantee a loan. The loan was taken out by Adam's company as trustee for Adam's family trust and was used for the purposes of renovating Asset B. Adam intended to sell Asset B after renovations were completed

to make a profit for Adam's family trust. The initial loan was for \$600,000 and a 6 month term. Mr and Mrs Langdon agreed to be unlimited guarantors and provided a mortgage over Asset A as security.

After 6 months, Adam was unable to repay the loan and agreed with the Lender to extend the loan period and increase the loan amount by \$500,000. Lender did not communicate this to Mr and Mrs Langdon. At the end of the extended loan period, Adam was unable to repay the loan and Lender commenced proceedings to enforce the loan including the guarantee provided by Mr and Mrs Langdon.

Mr and Mrs Langdon are currently challenging the guarantee in the courts.

As the loan was for business purposes, the NCC did not apply, and there was no requirement for Lender to be a member of an EDR scheme. Lender commenced proceedings in the Supreme Court of Western Australia for repossession of Asset A.

Mr and Mrs Langdon have very limited English and cannot afford private legal advice.

CCLSWA began acting for the Langdons in 2015 and remained as solicitors on the record for the Langdons for over three years and provided as much assistance as possible with the assistance of translation services and pro bono counsel. However the demands of a Supreme Court case could no longer be met by the resources of our centre. Fortunately CCLSWA were able to arrange for the file to be transferred to a law firm who had agreed to act for the Langdons on a pro bono basis.

Unable to afford legal representation, we have no doubt that without the assistance of CCLSWA and other pro-bono lawyers and barristers, the Langdons as unrepresented litigants could not have hoped to protect their home from repossession.

- 3.6. Stella's story is also illustrative of the difficulties consumers face in trying to challenge credit contracts, and in particular guarantees for small business loans, where the lender is not a member of AFCA.

#### **Case study - Stella's story**

Stella was married to Alan for many years and they had a son together. After 30 years of marriage, the couple separated.

Shortly after Stella separated from Alan, Alan contacted Stella requesting that she guarantee a \$30,000 loan. Alan assured Stella that the purpose of the loan was to pay off some of his debt, get up to date with his mortgage repayments and to cover travel expenses for a job he had lined up overseas. Stella felt guilty and was pressured into agreeing to sign the guarantee.

There was a meeting at Stella's home, attended by Alan and Mr Bamboo, Alan's solicitor. At this meeting Stella found out that the loan was actually for \$100,000 and she did not want to guarantee the loan. However, once again Stella felt pressured and she signed the deed of guarantee. Stella provided a mortgage over her own property as security for the guarantee.

Stella did not receive:

- (1) independent legal advice before signing the documents;
- (2) any benefit from the loan; or
- (3) signed copies of the documents executed at the meeting.

Stella later found out that the loan was actually advanced to 'Upbeats Pty Ltd', Alan's company. Furthermore, the loan was actually a business kick-starter loan rather than a personal loan.

Alan defaulted on his repayments and has since disappeared leaving Stella to deal with the Lender.

As the loan was for business purposes, the NCC did not apply to the loan or guarantee and the Lender was not required to be a member of an EDR scheme. The Lender commenced proceedings in the Supreme Court of Western Australia. CCLSWA was able to provide direction and limited assistance to help Stella file a conditional appearance before the matter was necessarily transferred to a private law firm, who agreed to act for Stella on a pro bono basis.

Had the Lender been required to hold an Australian Credit Licence, the Lender would have had to have been a member of an EDR scheme. Stella would have had the option of taking her dispute to the EDR scheme.

- 3.7. Overall, the court system does not provide an accessible, cost effective, fair or timely forum for consumers to resolve disputes with banks and other financial service providers. In CCLSWA's experience, consumers are often the defendants to court actions and rarely the initiator of court proceedings against banks and other financial service providers. Clearly, courts are not the consumers' preferred forum for dispute resolution.
- 3.8. Consumers in dispute with banks or other financial service providers are often suffering financial hardship due to the subject of the dispute and are unable to afford to initiate or defend court proceedings.
- 3.9. Court proceedings are time consuming, costly and the outcomes are uncertain. For this reason, generally, in the event that a client's matter proceeds to court, CCLSWA will necessarily refer those clients or assist them to secure pro bono representation.
- 3.10. However, even with a supportive network including the Law Society of WA – Law Access and the Western Australian Bar Association, CCLSWA experiences difficulty sourcing pro-bono or low cost representation for vulnerable consumers within short timeframes dictated by the courts. In particular, when CCLSWA attempts to source advice on a matter related to a bank or other financial services entity, many top tier law firms are unable to assist due to actual or perceived conflicts of interest in acting or advising against a bank or other financial services entity. No doubt, consumers attempting to secure these services without any CLC assistance face even more difficulty.

- 3.11. That is why CCLSWA runs most of our matters through the EDR schemes – now AFCA. In our experience, AFCA’s less formal approach reduces the risk of consumer matters failing for procedural reasons and also represents a lower risk option for consumers in terms of associated costs.

## 4. Accessibility and appropriateness of AFCA

- 4.1. CCLSWA made joint submissions to the Ramsay EDR Review strongly supporting the establishment of a one-stop-shop for EDR and the expansion of a merged EDR scheme’s jurisdiction. Accordingly, CCLSWA supports AFCA, born from the recommendations of the Ramsay Report, as a more accessible and appropriate alternative forum for resolving disputes.
- 4.2. CCLSWA does not have the capacity to provide resource intensive court representation. We find that we can often achieve positive outcomes for our clients through AFCA without incurring costly court and legal fees.
- 4.3. Underpinned by design principles which include fairness, natural justice and accessibility, AFCA apply a test of: ‘what is fair and reasonable?’ Unlike the legal system, AFCA determinations are not necessarily constrained by black letter law. Speaking on AFCA’s principles at Legal Aid WA’s 2019 Summer Series - Civil Law Day in Perth, CEO and Chief Ombudsman, David Locke stated “*any black letter law that does not deliver fair outcomes to consumers will not stand*”.
- 4.4. However, in response to TOR (c), we believe that AFCA is nevertheless operating within limitations not optimum to consumer outcomes, and advocate for an expansion of AFCA’s role and resources.

### *Expanded jurisdiction*

- 4.5. In our view, AFCA’s jurisdiction should be extended to capture small business lenders and provide alternative redress to consumers like the Langdons and Stella.
- 4.6. In our submission in response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Banking Royal Commission**)’s interim report, CCLSWA advocated for bringing all small business lending, and guarantors for small business loans under the same guidelines or legislation as those that govern the provision of consumer credit. However, no such recommendations were made in the final report. Even so, we maintain that, as a minimum, all small business lenders should be required to be a member of AFCA before being able to provide credit to small business borrowers.

- 4.7. It is also our experience that many small business lenders hide behind the guise of “business loans” to avoid obligations under the NCCPA in circumstances where they would have known or had reason to believe that the loan was not wholly or predominantly for business purposes.
- 4.8. Colin’s story is illustrative of how small business lenders use business purpose declarations to provide unsuitable credit to consumers for non business purposes. The avenues for consumer redress are severely limited if these lenders are not AFCA members.

#### **Case study – Colin’s story**

Colin was a recovering drug addict and was unemployed.

Colin got a loan from a small business lender to buy illegal drugs. At the time Colin applied for the loan he was servicing many SACCs with seven lenders.

The application with the small business lender revealed a number of inconsistencies and issues such as an incomplete ABN provided by Colin, the ABN did not match the business name, the small business lender only looked at Colin’s personal bank statements and did not obtain a business bank statement.

Colin signed a business purpose declaration when he signed the loan contract with the small business lender.

As the small business lender was not a member of an EDR scheme, Colin’s remedies were limited. CCLSWA lodged an ASIC complaint on behalf of Colin in relation to potential breaches by the small business lender of the NCCPA and NCC on the basis the loan was not for business purposes but was for personal use.

The small business lender sold its debt to another entity which settled the debt with Colin.

- 4.9. Initiating or defending matters in court is prohibitively expensive for many consumers and unrepresented litigants face a huge power imbalance when met with the might of a bank’s or other financial service provider’s senior lawyers.
- 4.10. Ensuring that all small business lenders are required to be a member of AFCA would provide small businesses and guarantors for small business loans an alternative avenue for redress that is not currently available to consumers.

### *Expanded compensation*

- 4.11. CCLSWA appreciates that AFCA was established with greater jurisdictional limits than its predecessors, however, we believe there is still scope to expand AFCA's powers to award compensation.
- 4.12. In particular, CCLSWA would like to see a change to the way that AFCA awards compensation for breach of responsible lending obligations.
- 4.13. Currently, the AFCA approach for breach of responsible lending is for the consumer to be put back in a position they would have been in if the unsuitable loan had not been granted.
- 4.14. Generally, this means that the consumer will remain liable for the principal amount that they are deemed to have benefitted from. However, the consumer may be relieved of liability for the costs (being interest, fees and charges) associated with the credit contract that the consumer would not have paid if the lender had complied with their responsible lending obligations and not entered into the credit contract.
- 4.15. CCLSWA believes that this does not amount to compensation and does not adequately reflect the loss and detriment suffered by a consumer provided with an unsuitable loan. Nor does it act as a serious enough deterrent to banks and other financial service providers to provide loans that are unsuitable.
- 4.16. The current approach results in no real penalty for banks or other financial service providers. Regardless of whether the loans were responsible or irresponsible the bank will still profit or at least maintain the status quo if the consumer remains liable for the principal.
- 4.17. CCLSWA supports the Consumer Action Law Centre's (**CALC**) submission to the Banking Royal Commission on this point<sup>2</sup>. CALC submitted that "[t]he current approach to consumer lending remedies adopted by the banks and FOS did not fully compensate consumers where a bank advances an irresponsible loan"<sup>3</sup>.
- 4.18. CCLSWA also supports CALC's position that "creating a default position where consumers need to 'account for the benefit' undermines the objections of the National Credit Act and the Code and castrates consumer redress".
- 4.19. CCLSWA also recommended as a part of the response to the interim report that even though there is the option for AFCA to award a remedy of forgiveness or variation of a debt under

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<sup>2</sup> Consumer Action Law Centre submission to Banking Royal Commission Round 1 Consumer Lending available <<https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/04/180403-Submission-on-Consumer-Lending-FINAL-1.pdf>>

<sup>3</sup>ibid p 22.

the rules<sup>4</sup> it does not have the same effect of putting the borrower back in the position that they would have been had the loan not been made.

- 4.20. We also advocate for AFCA to have the power to vary or set aside a contract. The ability to vary a contract is very different from the ability to forgive or waive a debt, or the power to rectify a contract. We believe it is an essential remedy to ensure fair outcomes for consumers.
- 4.21. We also believe that there are certain circumstances in which AFCA should be able to waive a consumer's debt such as:
  - a. compassionate grounds – including circumstances of family violence;
  - b. unconscionability; and/or
  - c. where an initial unsuitable loan sets off a series of unsuitable credit contracts, causing the consumer substantial financial hardship.
- 4.22. CCLSWA also supports the ALP's response to the Banking Royal Commission in relation to increasing AFCA's monetary and compensation cap to \$2 million.<sup>5</sup>
- 4.23. Not only do we support the proposed larger monetary limit, we also welcome the clarity that a uniform \$2 million limit for claims and compensation without distinction between consumer and small business, or non- financial and financial loss, may provide. This can only result in greater access to justice and fairer outcomes for consumers.

## 5. The accessibility of community legal centre advice relating to financial matters

- 5.1. In response to TOR (d), while CLC's are theoretically more accessible to consumers than other lawyers as arms of the justice system, realistically they are under-funded and under-resourced resulting in our centre having to 'turnaway' vulnerable consumers.
- 5.2. Demand for our service continues to outstrip our capacity. This is reflected in our most recent "turnaway" statistics.
- 5.3. We record as a "turnaway" consumers who contact our centre but are unable to speak with us; or who leave a voicemail but we are unable to reach them.
- 5.4. In the 2017/2018 financial year, CCLSWA turned away approximately 1517 people seeking legal advice. When you compare that to the number of cases opened as 121, telephone advices given as 907, and referrals given as 1183, this means that approximately 40% of the people that contact us for advice are turned-away.

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<sup>4</sup> Australian Financial Complaints Authority Operational Guidelines available < <https://www.afca.org.au/about-afca/rules-and-guidelines/afcas-operational-guidelines/>> p 181.

<sup>5</sup> 'FAIRER BOLDER STRONGER' Labor's response to the Royal Commission into misconduct in the banking, superannuation and financial services industry, available <<https://www.alp.org.au/media/1565/labor-royal-commission-response.pdf>> p 61

- 5.5. CCLSWA welcomes Commissioner’s Haynes observation in the Banking Royal Commission Final Report that the legal assistance sector and financial counselling services frequently struggle to meet demand, and that demand continues to increase.
- 5.6. Commissioner Hayne highlighted that “desirability of predictable and stable funding for the legal assistance sector and financial counselling services is clear and how this may best be delivered is worthy of careful consideration”<sup>6</sup>.
- 5.7. We support the National Association of Community Legal Centres (**NACLC**) and Financial Counsellors Association’s joint submission to the Banking Royal Commission. This called for a levy sourced from the financial services industry to fund the National Debt Helpline, financial counsellors and community legal centres, similar to the model which already operates effectively in the United Kingdom. This model and submission was referred to by Commissioner Hayne.<sup>7</sup>
- 5.8. Further the Senate Report found evidence presented to the inquiry “emphasised the importance of properly resourcing financial counselling and community legal services dealing directly with consumers experiencing failures in the consumer protection system”<sup>8</sup>.
- 5.9. CCLSWA notes the recent ALP announcement that \$120 million of a proposed \$640 million “Banking Fairness Fund” would go towards funding financial rights lawyers who can take cases to AFCA.
- 5.10. In its media release in response to the announcement, NACLC set out as background:

*Community legal centres across Australia provide legal help about credit and debt matters, and see every day how the misconduct of banks and other financial bodies hurt people experiencing discrimination and disadvantage.*

*Community legal centres helped over 30,000 people with credit and debt, consumer law and consumer credit issues in 2018 and this work represented over 23% of total civil services provided by community legal centres across Australia.*

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<sup>6</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report (Volume 1) February 2019, p 493.

<sup>7</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report (Volume 1), February 2019, p 493. See footnote 34: National Association of Community Legal Centres and FCA, Interim Report Submission, 2 [3]–[5]. See submission here: [http://www.naclc.org.au/resources/20181026%20NACLC%20and%20FCA%20Banking%20RC%20Submission\\_2.pdf](http://www.naclc.org.au/resources/20181026%20NACLC%20and%20FCA%20Banking%20RC%20Submission_2.pdf)

See footnote 35 National Association of Community Legal Centres and FCA, Interim Report Submission, 2 [5]. The UK has adopted an industry levy model to fund financial counselling and financial literacy services: Free and Impartial Money Advice, Set Up by Government (Undated) The Money Advice Service

<sup>8</sup> Senate Economics Committee report into regulatory framework for the protection of consumers in the banking, insurance and financial services sector, November 2018 available < [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Consumerprotection/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Consumerprotection/Report) > p 26.

*In addition to the work of generalist legal centres in urban, regional and rural Australia, there are five specialist consumer legal centres that focus on the rights of consumers and provide legal support and training to financial counsellors in their states:*

- *Financial Rights Legal Centre (NSW but also operates the National Insurance Law Service)*
- *Consumer Action Law Centre (Vic)*
- *Consumer Credit Law Centre (SA)*
- *Consumer Credit Legal Service (WA)*
- *Consumer Law Centre (ACT)*<sup>9</sup>

- 5.11. CCLSWA welcomes any increased funding commitment that may assist consumer credit legal services and financial counsellors gain and secure funding to be able to extend the reach of our services and reduce the instances of ‘turnaways’.

## 6. Conclusion

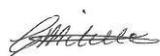
CCLSWA is grateful for the opportunity to provide input to the Senate Inquiry.

CCLSWA would be happy to be of assistance in providing further information or detail on CCLSWA’s position or in relation to a case study.

If you have any questions or would like to discuss these submissions further, please contact Gemma Mitchell on (08) 6336 7020.

Yours faithfully

**Consumer Credit Legal Service (WA) Inc.**



Gemma Mitchell  
Managing Solicitor

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<sup>9</sup> <http://www.naclc.org.au/resources/190226%20NACLCMediaReleaseALPFinancialServicesLawyersFinal.pdf>