

SUBMISSION

TO | The Treasury

TOPIC | _____
Review of the Australian Financial Complaints Authority

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Contact

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Executive Summary

The Consumer Credit Law Centre SA (CCLCSA) welcomes the opportunity to make a submission on The Treasury's Review of the Australian Financial Complaints Authority Limited (AFCA).

The CCLCSA endorses the Joint Consumer Submission to The Treasury for the 'Review of the Australian Financial Complaints Authority' ('joint submission') and would like to respond to some of the questions posed by the review's Terms of Reference in reference to the experience for South Australia to enhance AFCA's effectiveness of service to South Australians.

The CCLCSA supports external dispute resolution (EDR) and acknowledges that in the vast majority of cases that AFCA have provided a valuable service to South Australian consumers and supports the ongoing work of AFCA.

Consumer Credit Law Centre SA

The CCLCSA was established in 2014 to provide free legal advice, representation, legal education, advocacy and financial counselling to consumers in South Australia in the areas of credit, banking and finance. The CCLCSA is managed by Uniting Communities who also provide general community legal services, as well as a range of services to low income and disadvantaged people including mental health, drug and alcohol and disability services. The CCLCSA works alongside other legal services including generalist legal, social security, elder abuse, disability advocacy and mediation services.

Many clients seeking legal advice and financial counselling assistance from the CCLCSA are referred to our service by AFCA.

Uniting Communities

Uniting Communities works with South Australian citizens across metropolitan, regional and remote South Australia through more than 90 community service programs. Our vision is: a compassionate, respectful and just community in which all people participate and flourish. We are made up of a team of more than 1500 staff and volunteers who support and engage with more than 20,000 South Australians each year. Recognising that people of all ages and backgrounds will come across challenges in their life, we offer professional and non-judgemental support for individuals and families.

1. South Australia's experience

1.1 Stakeholder engagement with South Australia on broad systemic issues

The CCLCSA raises concern that AFCA has not comprehensively engaged with South Australian stakeholders and this may have disadvantaged South Australian consumers (see below at paragraph 1.2).

Whilst COVID-19 has understandably limited the ability of AFCA to visit South Australia as part of the AFCA Road Show, there has been very limited physical presence of AFCA in South Australia. In turn, the CCLCSA has not had the opportunity to meet with AFCA in South Australia to raise our concerns about what we see are system issues in AFCA decision making that are directly impacting on South Australians.

To date, South Australia does not have any specialist consumer credit legal representation on the AFCA's Consumer Advisory Panel.

There has been an issue for the dissemination of information, in particular in relation to rules and legal issues, shared by AFCA to consumer advocates. For example:

- The CCLCSA learned of the legacy complaint period through browsing the AFCA website and was not notified by AFCA.

Similarly, the CCLCSA has raised issues to AFCA but has not received a comprehensive response or further information from AFCA. For example:

- The CCLCSA has raised concerns specific to South Australia about how AFCA 'may' be misapplying the law of South Australia which ultimately results in South Australians being excluded from AFCA. To date, AFCA have not responded to our concerns and this continues to remain unresolved;
- The CCLCSA has not had any engagement or communication back from AFCA about concerns the CCLCSA raised about certain Debt Management Firms or the way AFCA are handling service complaints.

Recommendations:

1. AFCA disseminate and share information with all consumer advocates by way of regular email updates or news bulletins (e.g. sharing AFCA rule changes, new published AFCA Approaches etc.);
2. AFCA develop stakeholder relationships by responding and providing feedback to stakeholders when matters are raised (eg a liaison person from AFCA who looks after concerns raised by each state);
3. Sub-committees are formed so that legal representatives from each State and Territory can directly report to AFCA on legal issues. AFCA should be inclusive of people from all States and Territories (this may be one way to avert AFCA misapplying the law and unfairly excluding South Australians from accessing AFCA).

1.2 AFCA's understanding and application of South Australian in AFCA decisions

The CCLCSA expresses concern that AFCA's lack of presence in South Australia possibly leads to AFCA not having a comprehensive understanding of South Australian law.

The CCLCSA expresses concern that AFCA decision-makers are all located in Victoria and New South Wales and that these decision-makers may mistakenly apply the law from other jurisdictions to complaints where the law of South Australia applies.

The CCLCSA is concerned that AFCA may be incorrectly excluding complaints raised by South Australians, leaving South Australians without access to EDR and effective justice.

Complainants subject to judgment for an Order for Possession may still take action in a South Australian Court to claim damages for statutory contraventions (such as misleading and deceptive conduct) to off-set shortfall loan balances without disturbing the Order for Possession.

However, AFCA have been excluding complaints raised by South Australians about the conduct of a mortgagee once judgment for an Order for Possession is entered.

Case study example

Kelly was in mortgage stress as a result of many factors, including that she was experiencing family violence. During this time Kelly was aggressively approached by a debt management firm (otherwise known as a “debt vulture”) offering to assist her to keep her home from being repossessed by the mortgagee. The debt management firm ultimately lodged a complaint with AFCA on behalf of Kelly. Unfortunately the debt management firm did not act with due care and skill and failed to identify in the AFCA dispute that there had been maladministration in lending by the mortgagee as the home loan was unaffordable at the time it was advanced. However, despite the debt management firm’s failings, it was Kelly’s understanding that after her complaint was lodged AFCA would complete a comprehensive investigation into all aspects of the loan. This was not the case, and at no stage did AFCA raise with Kelly that she may have an additional ground of dispute (maladministration in lending) to raise against the mortgagee in her AFCA complaint.

Following the completion of the AFCA complaint process, Kelly and her husband ultimately defaulted on their home loan and the mortgagee sought possession of their home. Kelly did not resist the making of an Order for Possession in the South Australian Supreme Court sought by a mortgagee as she was experiencing family violence which extended to her husband refusing to cooperate to sign a sales agency agreement to sell their home. Kelly did not have the means to obtain a court order enabling her to sell the property.

Whilst Kelly did not object to the Order for Possession, as she did not seek to challenge that she was in default and the mortgagee was entitled to an Order for Possession, Kelly sought to make a claim to set-off the loan balance. Kelly essentially had a damages claim against the mortgagee for the mortgagee’s conduct at the time the loan was granted to set-off the loan balance.

Kelly filed a complaint with AFCA and the complaint was subsequently referred to the AFCA Rules Team. AFCA’s Rules Team first excluded Kelly’s complaint because AFCA said the Doctrine of Merger applied. At Determination, AFCA said the judgment for the Order for Possession was *res judicata*, or in the alternative, *Anshun* estoppel would apply.

Case authority from the Full Court of South Australia provides that judgment for an Order for Possession is not *res judicata* to finalise a claim for damages for statutory contraventions. The Court also said an unadjudicated cause of action, in the narrow sense, is not the subject of an estoppel.

AFCA excluded Kelly the right from making a claim against the mortgagee, despite AFCA not providing an accessible service to Kelly and ultimately denied Kelly justice.

The CCLCSA does not know how many South Australian complainants have been impacted by AFCA excluding disputes, but raises concern that this is a systemic issue for South Australians that may require a remediation program.

Recommendations:

1. AFCA consult with counsel based in South Australia on matters concerning South Australian law;
2. AFCA to have a specialised team to consider jurisdiction for South Australian complaints;
3. AFCA improve stakeholder relationship with stakeholders from South Australia;
4. AFCA consult with South Australian stakeholders about the way AFCA are interpreting and applying the law of South Australia;
5. AFCA liaise with South Australian stakeholders to utilise test case provisions if necessary;
6. AFCA enter into a remediation program to compensate consumers if AFCA have improperly excluded complaints.

1.3 Consumers accessing AFCA's services

The CCLCSA endorses the joint submission outlining that clarity is required with respect to AFCA's role in assisting consumers to formulate their complaint (ie identifying legal issues and relevant parties). The CCLCSA submits that a consumer should not be expected to lodge a complaint in the form of legal pleadings to AFCA after judgment for an Order for Possession has been entered (i.e. a consumer should not have to explain that their claim is one for damages based on statutory cause of action rather than rectification or variation of the contract, when pursuing a complaint relating to responsible lending contraventions or misleading conduct that a mortgagee made the loan offer in accordance with regulatory standards etc.).

The CCLCSA notes recent judicial commentary about whether it is fair for AFCA to assist complainants. The CCLCSA calls for urgent legislative clarification that 'fairness' means AFCA can assist consumers to:

- Identify legal issues and grounds of dispute;
- Identify relevant parties to include in a complaint; and
- Introduce new grounds of complaint where information suggests a new ground of complaint should be raised (e.g. maladministration during a hardship dispute).

This will ensure AFCA remain an effective service to South Australians (e.g. a South Australian with a complaint about the conduct of the mortgagee should not be expected to lodge a complaint in the form of pleadings alleging statutory contraventions in order for AFCA to recognise the complaint as separate and distinct from judgment for an Order for Possession). AFCA should be accessible to consumers who do not have the legal knowledge

to formulate and articulate legal pleadings in order for AFCA to be an effective, efficient and fair external dispute resolution scheme.

The CCLCSA notes that AFCA have not assisted consumers to identify maladministration of lending issues in matters where consumers are represented by debt vultures who have only lodged disputes seeking financial difficulty assistance, in some cases with no merit. The CCLCSA notes that consumers often do not understand that the dispute opened by the debt vulture is not a comprehensive assessment of their loan which results in further detriment to the consumer who:

1. Have exorbitant fees payable to the debt vulture for a service that consumers can otherwise access for free;
2. Potentially missing out on other potential claims against the mortgagee before any judgment is entered (and then excluded by AFCA)

Recommendations:

1. AFCA ban known debt vultures from lodging disputes on behalf of consumers;
2. AFCA contact consumers represented by debt vultures and recommend they obtain independent legal advice;
3. AFCA assist consumers to properly identify grounds of dispute, particularly where information may suggest maladministration/responsible lending complaint grounds.

1.4 Service complaints

The CCLCSA raises concerns about the service complaint handling process within AFCA.

The CCLCSA has assisted a client to lodge a service complaint about AFCA's service. The CCLCSA notes that it has been more than 13 months since the service complaint was first lodged and apart from acknowledgments, the CCLCSA has yet to receive a response. AFCA overlooked the service complaint in the first instance and has failed to identify a further complaint about the service complaint handling process.

The CCLCSA is able to provide further details upon request.

The CCLCSA notes that information on the AFCA website has been updated to include that AFCA will not reply to service complaints unless the complainant requests feedback. The CCLCSA is of the view that ordinarily in a complaints process, the reverse would apply.

The CCLCSA raises concern about AFCA's internal processes involved with managing service complaints and lack of feedback regarding concerns raised about accessibility for consumers.

1.5 Accessibility

The CCLCSA has raised concerns to AFCA about access issues for people living with disability and/or who are Deaf and use Auslan (Australian Sign Language). The CCLCSA works alongside a Disability Advocacy Service.

We note that there are no videos in Auslan on the AFCA website:

- Explaining the role and function of AFCA;
- Providing information to a person who is Deaf and uses Auslan, about their right to request an Auslan interpreter and materials to be translated into Auslan;
- Translating material provided such as AFCA Guides and AFCA Approaches into Auslan.

People who identify as Deaf might have been impacted by language deprivation and access requirements are not necessarily resolved by using the National Relay Service. Some impacts of language deprivation may include lack of fluency in a native language, difficulties with understanding the world around them due to lack of incidental information shared in the hearing population, different thinking and behaviours (e.g. gratuitous concurrence) and literacy barriers.

AFCA should be aware and culturally sensitive when working with a person who uses Auslan and identifies themselves as Deaf. The CCLCSA acknowledges that barriers may be invisible and complainants are in the best position to advise AFCA about accessibility issues.

For example, the CCLCSA is aware of a Deaf complainant who was excluded from participating in an AFCA telephone conciliation conference. The consumer pleaded to a paid representative to be involved in the conciliation conference and for an Auslan interpreter to be provided. The consumer was excluded from their own AFCA matter and ultimately ended up homeless pursued by the paid representative for an AFCA complaint that if the consumer was involved, could have alerted AFCA about issues with maladministration of lending.

Recommendations:

1. AFCA set up a disability action plan to review access requirements for people living with disability and/or who are Deaf;
2. AFCA create a sub-committee or include a member on the Consumer Advisory Panel for people to report to AFCA about issues presenting for people living with disability/who are Deaf;
3. AFCA provide information about AFCA's role and service in Auslan on the AFCA website. In particular, information about accessibility, including the right to request information be translated and use an Auslan interpreter, to be provided in Auslan as well as English;
4. AFCA employ people living with disability and/or who are Deaf;
5. AFCA consult with peak advocacy groups and people with lived experience about accessibility requirements and systemic issues for people living with disability and/or who are Deaf;
6. AFCA employ liaison officers who have lived experience and good understanding of issues and barriers for people living with disability and/or who are Deaf to assist AFCA caseworkers to provide a culturally accessible service.

If Treasury would like to discuss any of the matters raised, please contact the Uniting Communities Law Consumer Credit Law Centre SA on 8342 1800 or at consumercredit@unitingcommunities.org.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'D. Ferraro', with a long horizontal line extending to the right.

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