ASIC Consultation Paper 311: Update to RG165: Internal Dispute Resolution

Submissions by Consumer Credit Legal Service (WA) Inc.

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1. Introduction

The Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) takes the opportunity to provide submissions to the ASIC Consultation Paper 311: Update to RG 165: Internal Dispute resolution (**CP 311**)

About CCLSWA

CCLSWA is well placed to provide ASIC with submissions in response to the proposals made in CP 311 with regards to clarification of RG 165. Further, CCLSWA is well placed to provide feedback to ASIC on how proposed updates to RG 165 set out in CP 311 will impact consumers in the context of internal dispute resolution procedures.

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 most of these case studies, we have not named the financial firms. We have made these entities anonymous to protect our clients' confidentiality. We have also made some of the entities anonymous as some matters are ongoing and others are subject to confidentiality agreements. If ASIC would like to know the name of a financial firm 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.

2. Summary of Key issues and recommendations

B1 Definition of Complaint

B1Q1 Do you consider that complaints made through social media channels should be dealt with under IDR processes?

1. CCLSWA supports the extension to the definition of 'complaint' which expands the channels through which complaints may be made to include social media.

2. At a minimum, complaints made on the financial firm's own social media, and posts which 'tag' a financial firm such that it receives a 'notification' should be dealt with under IDR processes.

3. Further guidance is required on what is considered 'identifiable and contactable' in the context of social media.

B2 Definition of 'complaint' – additional guidance

B1Q1 Do you consider that the guidance in draft updated RG 165 on the definition of 'complaint' will assist financial firms to accurately identify complaints?

4. CCLSWA supports guidance which makes it clear that it is the expression of dissatisfaction that triggers the financial firm's obligation to deal with the matter under IDR process, not the referral of a complaint to a specialist complaints or IDR team.

B2Q2 Is any additional guidance required about the definition of 'complaint'? If yes, please provide:

(a) details of any issues that require clarification; and

(b) any other examples of 'what is' or 'what is not' a complaint that should be included in draft updated RG 165.

5. Guidance should consider retrospectively re-categorising notices / requests as 'complaints' for statistical purposes if they are not complied with within statutory prescribed time frames and escalate to EDR.

B3 Definition of 'small business'

B3Q1 Do you support the proposed modification to the small business definition in the Corporations Act, which applies for IDR purposes only?

6. CCLSWA supports the proposed change of the definition of Small Business for IDR and EDR purposes as it is more inclusive.

7. All small business lenders should be required to hold an Australian Credit Licence and be a member of AFCA.

B4 Recording of all complaints received

B4Q1 Do you agree that firms should record all complaints that they receive?

8. Financial firms should record all complaints they receive.

9. Removing a financial firm's discretion to record complaints resolved within 5 days is essential to accurate and reliable data collection.

B5 Recording a unique identifier and prescribed data set for all complaints received

B5Q1 Do you agree that financial firms should assign a unique identifier, which cannot be reused, to each complaint received?

10. CCLSWA agrees that there should be a unique identifier for each complaint which cannot be reused.

11. Further guidance regarding single complainants with multiple complaints is required. We consider that a unique identifier should be attributed to each discrete issue.

B5Q2 Do you consider that the data set proposed in the data dictionary is appropriate? In particular:

(a) Do the data elements for 'products and services line, category and type' cover all the products and services that your financial firm offers?

(b) Do the proposed codes for 'complaint issue' and 'financial compensation' provide adequate detail?

12. CCLSWA considers that it would be appropriate to further categorise the data set for the product and services lines Category 3 –Guarantees in order to capture the regulatory differences in providing a guarantee for consumer credit with guarantees for loans with a business purposes.

13. There should be an "other" category for each of the product and service categories to provide a "catch-all". It would also capture circumstances where there are unique customer products. Financial firms should then be required to specify the details of the "other" product type.

14. Codes for 'financial compensation' to be continued in increments up to $2,000,000 in line with AFCA compensation caps.

B6 IDR data reporting

B6Q1 Do you agree with our proposed requirements for IDR data reporting? In Particular:

(c) When the status of an open complaint has not changed over multiple reporting periods, should the complaint be reported to ASIC for the periods when there has been no change in status?

15. The status of complaints should continue to be recorded despite no change over multiple reporting periods.

16. Guidance should be provided requiring financial firms to make further inquiries regarding why a complaint has stagnated.

17. 'Complaint status' codes should be updated to distinguish between complaints that are actively withdrawn and those where contact with the complainant has been lost. "Lost contact" should be a separate code as it signifies a materially different complaint status.

18. Further guidance is required on what may be appropriately coded as "2=Reopened". Consideration needs to be given to when a further complaint should be assigned a new unique identifier rather than re-opened under existing identifier.

B8 IDR responses – Minimum content requirements

B8Q1 Do you agree with our minimum content requirements for IDR responses? If not, why not?

19. CCLSWA supports the minimum content requirements for IDR responses.

20. In addition, where a financial firm refers to information that supports its finding, it may be necessary to provide documentary evidence. It should not be sufficient to rely upon internal information that is not made available to the complainant.

21. Deeds of settlement must comply with the requirements for settlement deeds issued by financial firms at AFCA. Additionally, we believe the updated RG 165 may benefit from guidance around when a deed of settlement may not be appropriate.

B11 Reduced maximum IDR timeframes

B11Q1 Do you agree with our proposals to reduce the maximum IDR timeframes?

22. Reduce all IDR response timeframes to 21 days. Imposing a consistent time frame of 21 days, without distinction for hardship notices or postponement requests, will remove any confusion regarding the time allowed for responses to different issues.

B12 Role of customer advocates

B12Q1 Do you agree with our approach to the treatment of customer advocates under RG 165? If not, please provide reasons and any alternative proposals, including evidence of how customer advocates improve consumer outcomes at IDR.

B12Q2 Please consider the customer advocate model set out in paragraph 100. Is this model likely to improve consumer outcomes? Please provide evidence to support your position.

23. IDR responses should include a separate information leaflet on the role of a customer advocate – clearly juxtaposing the role of customer advocate and AFCA - allowing a consumer to make an informed decision regarding their next steps in the IDR process.

24. If customer advocates are not bound by IDR timeframes, a consumer's express consent to an extended timeframe for a 'customer advocate IDR response' should be required.

3. Definition of 'complaint'

B1Q1 Do you consider that complaints made through social media channels should be dealt with under IDR processes? If no, please provide reasons. Financial firms should explain: (a) how you currently deal with complaints made through social media channels; and (b) whether the treatment of social media complaints differs depending on whether the complainant uses your firm's own social media platform or an external platform.

3.1. CCLSWA assists many vulnerable consumers who would otherwise be denied access to justice. We believe that the findings of Report 603 *The consumer journey through the internal dispute resolution process of financial service providers* (**REP 603**) set out at para. 8 of Consultation Paper 311 (**CP311**) are telling. The research correlates with our experience that consumers who find it difficult to make a complaint are inclined to just 'give up' rather than pursue their rights and entitlements. Many stumble at the first hurdle, which is initiating a dispute with the appropriate internal dispute resolution department (**IDR**).

3.2. In our experience, the appropriate IDR contact is not always clear and accessible. As a result, the first response a consumer may receive to their complaint will be a referral to an alternative department or IDR contact, and so the 'run around' begins. This slows down the IDR process and frustrates consumers.

3.3. We often advise consumers on how to start the complaint process and provide them with the IDR contact information for the financial firm that is available through the search tool on the Australian Financial Complaints Authority (**AFCA**) website. We refer to AFCA throughout our submission, but we note that this also includes reference to AFCA's predecessor schemes.

3.4. However, on numerous occasions, when initiating a complaint on behalf of clients, CCLSWA has been redirected by various financial firms to a department other than the complaint contact registered with AFCA. For example, we contacted the complaint contact listed on the AFCA website only to be told we would need to send our complaint to an alternative e-mail address.

3.5. Our clients have also told us that they have been informed that they can only make complaints by email or they can only make complaints by calling a number which is different to the contact details registered with AFCA.

3.6. Natalie and Claire's stories below are illustrative.

Case Study – Natalie's Story – C996432

CCLSWA made a request to the financial firm on Natalie's behalf for documents in relation to her loans with the financial firm. CCLSWA directed this request to the e-mail address listed as the complaint contact for the financial firm on AFCA's website. The financial firm replied to the request informing CCLSWA that we would have to fill in a separate form and direct it to a different e-mail address in order to be provided with the documents.

CCLSWA brought this to the attention of our professional contact at the financial firm who investigated the matter. We were told that it was a "misunderstanding" of an individual employee.

Without the network contacts of CCLSWA, the consumer would certainly have been given the 'run around'.

Case study – Claire's story – C996406

CCLSWA made a hardship request on behalf of Claire to a financial firm using the e-mail address provided on AFCA's website.

CCLSWA received a response from the financial firm stating that the request could not be made through the e-mail address provided on AFCA's website but had to be directed to another team.
Further, the financial firm's representative who replied to CCLSWA was only able to provide a telephone number to contact this team.

CCLSWA responded and advised that the email contact address we had used was registered with AFCA as the appropriate contact address for complaints and hardship notices.

CCLSWA further asked that our request be forwarded to the relevant department to deal with the hardship notice.

The financial firm maintained that the appropriate team could only be reached by telephone. Given the statutory time frames applicable to hardship notices, and for evidentiary purposes, CCLSWA always recommends that all hardship variation notices are made in writing.

CCLSWA then submitted a complaint to the financial firm's customer advocate through an online form.

After liaising with a number of people within the financial firm, CCLSWA eventually received a response confirming that their procedures had been amended and our request was now with the appropriate team.

Again, without CCLSWA's legal knowledge and persistence, the consumer may have been dissuaded from pursuing their rights.

3.7. If our lawyers find it difficult to initiate a dispute with the appropriate IDR contact, we hypothesise that many unrepresented consumers may not even make it past this first hurdle in the IDR process.

3.8. Accordingly, CCLSWA supports any extension to the definition of 'complaint' that expands the channels through which consumers may make a complaint which requires an IDR response, and thereby increases access to justice.

3.9. We consider that social media is a useful medium through which consumers may easily access IDR processes. Requiring financial firms to accept a complaint via social media may remove existing barriers and reduce confusion among consumers regarding how and where to initiate a complaint.

3.10. Not only will acceptance of complaints made through social media channels improve accessibility, it may also be the preferred method of contact for many consumers.

3.11. It is widely acknowledged that social media has changed the way that we communicate. For some consumers, social media is even replacing email as a preferred method of contact. We believe that this cannot be dismissed as a millennial fad, as statistics show platforms such as Facebook are most actively used by 25 – 45 year olds. In the last financial year (2018/2019) 25 – 49 year olds comprised 55% of CCLSWA clients.

3.12. While CCLSWA supports the use of social media as a medium for making a complaint, we consider that distinction needs to be made between a complaint made on the financial firm's own platform and complaints made on external platforms. The proposed guidance would benefit from clarification around the type of social media communication that may be considered a 'complaint'.

3.13. Based on the proposed definition of 'complaint which includes expressions of dissatisfaction made 'to or about' an organisation, IDR processes could conceivably be activated by: a direct message; a post on a financial firm's own platform or external platform; or a simple 'comment' on another post; or perpetual 'comments' on 'comments' on the financial firms own social media platform or on external platforms.

3.14. To rein in the potential for the broadened definition of 'complaint' to overrun IDR departments, we concur with ASIC's rationale at para. 31 of CP 311 that at minimum, complaints made on a financial firm's own social media platforms will be dealt with through the firm's IDR process.

3.15. In addition, we submit that posts which 'tag' a financial firm such that it receives a 'notification', and accordingly are expressly aware of the 'complaint', should also be dealt with through the firm's IDR process.

3.16. We note the limitation in para. 31 of CP 311 that an IDR response may only be required when the consumer is both 'identifiable and contactable', and believe further guidance around the meaning of 'identifiable and contactable' in the context of social media would be useful to prevent this caveat from watering down financial firm's IDR obligations.

3.17. Bearing in mind that many consumers adopt avatars or use handles to maintain anonymity online, questions may be raised regarding the extent of identification required. We believe that a broad interpretation of 'identifiable' should be adopted so as not exclude consumers with genuine grievances, but high privacy settings.

3.18. Further questions arise about how contactable a consumer may be via social media given their ability to block or restrict other users from contacting them or commenting on their posts.

3.19. Guidance regarding a financial firm's obligation to make genuine attempts to identify and contact consumers before discarding a 'complaint', may prevent a consumer's desire to protect their privacy online from being a barrier to using social media as a legitimate channel for making complaints.

4. Definition of 'complaint' - Additional guidance

B2Q1 Do you consider that the guidance in draft updated RG 165 on the definition of 'complaint' will assist financial firms to accurately identify complaints?

4.1. We refer to Draft RG para 165.32 and note the practise of financial firms to categorise "expressions of dissatisfaction" as "comments" or "enquiries" which do not trigger IDR processes because the dissatisfaction was only expressed verbally; they do not believe the matter has merit; or, a goodwill payment is made in resolution of the matter without admission or error.

4.2. CCLSWA often settles disputes on the basis of "goodwill payments" made without admission of liability. We believe this is done precisely to prevent escalation of the matter and negate 'complaint' statistics.

4.3. Ryan's story below is illustrative of how financial firms make commercial decisions to dispose of a matter, rather than address the merits or incur the costs of an IDR dispute or AFCA complaint.

Case study – Ryan's story – C995252

Ryan was a 25 year old electrician who suffered from a serious gambling addiction.

Between May 2015 and September 2017 Ryan obtained at least:

- 43 Small Amount Credit Contracts (SACCS); and
- three credit cards

from 10 different financial firms in order to fund his addiction.

Many of the SACCs were approved concurrently with some financial firms aware that Ryan was already servicing up to 12 other SACCs, a credit card debt and a car loan at the time of approval.

CCLSWA expended considerable resources lodging disputes with the various financial firms' IDR departments. In some instances, the financial firms did not deal with our IDR complaints appropriately.

See Appendix A for a de-identified example of an unprofessional response from one of Ryan's financial firm's denying liability and settling for commercial reasons.

Notably this offer of settlement came within 3 days of CCLSWA lodging the dispute on behalf of Ryan and accordingly likely evaded becoming an IDR complaint statistic in line with the Rationale at para. 36 and 42 of CP 311.

4.4. We believe that matters such as Ryan's above, settled without admission of liability and without consideration of its merits, are not reflected in the firm's IDR statistics. In Ryan's instance, settlement was blatantly made to avoid attracting the attention of AFCA or ASIC.

4.5. Such settlements also usually include confidentiality clauses which prevent the consumer or CCSLWA from making regulatory complaints and accordingly may also distort the prevalence of systemic issues.

4.6. CCLSWA supports the guidance provided at para. 165.34 of the Draft Regulatory Guide 165 (**Draft RG 165**) which makes it clear that it is the expression of dissatisfaction that triggers the financial firm's obligation to deal with the matter under IDR processes, not the referral of a complaint to a specialist complaints or IDR team.

4.7. CCSLWA can also relate to the rationale provided at para. 35 and 41 of CP 311 and often experiences disparity in the application of IDR processes between financial firms and between divisions or franchisees of the same financial firm.

4.8. Christina's story is illustrative of two franchisees, with the same IDR contact, adopting disparate dispute resolution approaches with a single complainant.

Case study - Christina's story – C992240

Christina is a 74-year-old indigenous Australian whose income is derived from a Centrelink pension and a superannuation pension. Christina experiences crippling financial difficulty. Christina has extensive expenses due to her role as guardian to eight grandchildren and three children. She lives in government housing and struggles to manage her living expenses.

All of the above facts were known to Christina's financial firm. Between March 2012 and October 2014, the financial firm approved 19 SACCs and advanced a total of $9,800 to Christina.

Christina made repayments totalling $13,000 on these SACCs.

In CCLSWA's view, all 19 SACCs were unsuitable for Christina pursuant to the NCCPA.

Another franchisee of the same financial firm approved Christina for five personal loans (in addition to the 19 SACCs) between January 2011 and July 2013.

Both franchisees had the same registered IDR contact. CCLSWA accordingly directed a complaint on Christina's behalf to the financial firm's client liaison officer. The franchisee denied breaching its responsible lending obligations and disputes with both franchisees escalated to EDR.

At EDR, the personal loans obtained through one franchisee were settled early, while the 19 cash advances obtained through the other franchisee proceeded through a full investigation until eventually a recommendation was made in Christina's favour 15 months after the EDR complaint was lodged (18 months from the initial IDR complaint).

4.9. The legal distinction between the franchisees and the disparate approach to dispute resolution applied by their single IDR contact, was confusing to Christina and illogical in CCLSWA's opinion.

4.10. By providing clear examples of 'what is' and 'what is not' a 'complaint', RG 165 may reduce disparity and remove the ability of financial firms to distort IDR complaint statistics. It may also provide greater certainty for consumers who raise a 'complaint' as they may be assured that their matter will be dealt with under the financial firm's IDR process – and they may not be as discouraged, as REP 603 suggests consumers are, with the worthiness of the complaint process.

4.11. CCLSWA concurs with the examples provided at para. 165.32 and 165.35 of Draft RG 165, but we believe that the guidance would benefit from further examples of 'what is' and 'what is not' a complaint (see B2Q2 below).

4.12. Recognising that an expression of dissatisfaction is a 'complaint' means that a referral to a specialist complaints or IDR team will not be an appropriate first response.

4.13. CCLSWA acknowledges that a 'complaint' made via social media may have a greater tendency to be brief and may lend towards a referral. We maintain that a referral is not appropriate in these

circumstances. If further information is required to assess the merits of the case, a request for information may be made via social media in line with IDR processes and the dissatisfaction should nonetheless be recorded as a complaint.

4.14. Where a complainant is not identifiable or directly contactable via private message on social media, a referral or general invitation to contact a specialist complaints or IDR team in order to progress the matter may be appropriate.

4.15. CCLSWA recommends that further guidance be provided by ASIC regarding a financial firm's obligations to follow up a 'complaint' where the complainant is not readily identifiable, but the grievance is.

4.16. The consumer may not have intentionally de-identified themselves and their complaint should not be immediately discounted without providing them an opportunity to identify themselves and progress the matter.

B2Q2 Is any additional guidance required about the definition of 'complaint'? If yes, please provide:

(a) details of any issues that require clarification; and

(b) any other examples of 'what is' or 'what is not' a complaint that should be included in draft updated RG 165.

4.17. While the examples of 'what is not a complaint' at para. 165.35 of Draft RG 165, and the matters that do not disqualify a 'complaint' set out at para 165.32 are useful, we believe there is room for further clarification and scope to include examples of 'what is a complaint'.

4.18. In particular, it should be acknowledged that while some of the matters identified at Draft RG para. 165.35 may not constitute a complaint at first instance, they may escalate to EDR without further reference to a financial firm and accordingly we submit they may be considered an IDR complaint in retrospect.

4.19. For example, while we consider a consumer's exercise of a statutory entitlement is not a complaint, we also consider that the failure of a financial firm to comply with their statutory obligation within a prescribed timeframe may trigger a complaint to AFCA, without requiring a further IDR complaint. We say there is no question regarding the merit of such disputes and we would consider the initial request was the financial firm's opportunity to engage with the consumer.

4.20. We refer to simple requests for information or documents (**Document Request**). In CCLSWA's experience, financial firms often breach the NCCPA by ignoring our Document Requests; only partially responding; and/or responding only after a complaint has been lodged with AFCA.

4.21. 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.

4.22. CCLSWA acknowledges that AFCA encourages consumers to first raise a complaint directly with the financial firm, but we consider that the failure of a financial firm to respond to a statutory request, that is an offence of strict liability, is referrable to AFCA without further delay caused by the IDR process.

4.23. For instance, a financial firm has 30 days to respond to a simple Document Request, if they fail to respond with the statutorily prescribed time, and a consumer is still required to raise an IDR complaint before referring the matter to AFCA, then the financial firm could conceivably have up to a further 45 days to deal with that IDR complaint. In reality then, a financial firm has 75 days to comply with a Document Request that statutorily requires a response within 30 days.

4.24. Furthermore, if the matter is not resolved through IDR processes, lodging an EDR dispute allows a financial firm further time to respond to AFCA, usually an additional 45 days. This means that it may be up to 120 days before documents are provided in response to a request that statutorily requires a response within 30 days.

4.25. Trish's & Jill's stories below are illustrative of extreme delays experienced by CCLSWA when engaging in the IDR process due to a financial firm's failure to comply with a simple Document Request. They are also examples of situations where EDR intervention was required to obtain information and documents, and how difficult the big banks make their internal processes.

Case study – Trish's Story – C993805

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.

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 and Big Bank had previously provided part of the requested information in reliance on that said authority.

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 further contact from us*. CCLSWA contacted the designated representative, who was unable to

locate our document request, or the relevant authority and 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 on 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, being 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, being 272 days after our initial request.

*Big Bank's haste to close the complaint is not an isolated incident. Despite poor response times to our Document Requests and IDR complaints, CCLSWA notices eagerness amongst financial firms to classify matters as "resolved" or "closed" without delay once a response has been provided without allowing sufficient time for the response to be reviewed and further action considered. Presumably the practice also distorts IDR statistics. Draft RG 165 may also benefit from further guidance regarding acceptable processes and timeframes before a complaint may be "closed" for inactivity (see further discussion under B4Q1 below).

Case study – Jill's story – C994025

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).

4.26. CCLSWA maintains that a full and timely response to all Document Requests is crucial to a consumer's ability to exercise their legal rights. For some consumers, access delayed is justice denied.

4.27. In CCLSWA's view, a Document Request should be re-categorised retrospectively as a 'complaint' for statistical purposes if it is not complied with and escalates to EDR.

4.28. Similarly, we consider that while a hardship notice is not of itself a 'complaint', a financial firms' failure to provide a satisfactory response to a hardship notice within the statutorily prescribed period, may escalate to AFCA without further recourse to the financial firm and, accordingly, may retrospectively be considered a 'complaint'.

4.29. Further, where it is established that the hardship notice is resultant from a financial firm's breach of its responsible lending obligations, the request for change on the grounds of hardship may appropriately be considered a complaint.

5. Definition of 'small business'

B3Q1 Do you support the proposed modification to the small business definition in the Corporations Act, which applies for IDR purposes only? If not, you should provide evidence to show that this modification would have a materially negative impact.

5.1. CCLSWA notes that the current definition of 'small proprietary company' or small business in the Corporations Act 2001 (CTH) under s 45A(2) is:

> *A proprietary company is a small proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:*

(a) the consolidated revenue for the financial year of the company and the entities it controls (if any) is less than $25 million, or any other amount prescribed by the regulations for the purposes of this paragraph;

(b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than $12.5 million, or any other amount prescribed by the regulations for the purposes of this paragraph;

(c) the company and the entities it controls (if any) have fewer than 50, or any other number prescribed by the regulations for the purposes of this paragraph, employees at the end of the financial year.

5.2. We further note the proposal to modify the above definition to align with the small business definition in the AFCA Rules:

> *A Primary Producer or other business that had less than 100 employees at the time of the act or omission by the Financial Firm that gave rise to the complaint.*

5.3. CCLSWA has long advocated for small businesses to have more access to AFCA and, accordingly, supports the proposed change of the definition for IDR and EDR purposes as it is more inclusive.

5.4. CCLSWA agrees with the rationale at para 45 of CP 311 that harmonising the definitions will ensure clear and consistent dispute resolution access for small business complaints through both IDR and EDR.

5.5. It is the long held view of CCLSWA that all small business lenders should, at a minimum, be required to be members of AFCA and hold an Australian Credit Licence.[1] We repeat that recommendation here.

[1] CCLSWA Submission to the Legal and Constitutional Affairs Reference Committee Inquiry into the resolutions of disputes with financial service providers within the justice system - https://cclswa.org.au/wp-content/uploads/2019/04/20190301-DOC-Submission-to-Legal-and-Constitutional-Affairs-References-C....pdf
Joint submission to the Senate Economics References Committee's Inquiry into Credit and Financial Services targeted at Australians at risk of financial hardship - https://cclswa.org.au/wp-content/uploads/2018/11/20181109-FNL-SUB-Submissions-to-Senate-Inquiry-into-Credit-and-Financial-Services-Industry-and-Attachments.pdf
Joint Submission in Response to the Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry - https://cclswa.org.au/wp-content/uploads/2018/10/20181025-FNL-SUB-Response-to-Royal-Commission-Interim-Report.pdf

6. Recording all complaints received

B4Q1 Do you agree that firms should record all complaints that they receive? If not, please provide reasons.

6.1. CCLSWA agrees that financial firms should record all complaints they receive.

6.2. REP 603 notes only 17% of Australians even considered making a complaint; with only 8% going on to actually lodge a formal complaint. These remarkably low percentages suggest consumers are jaded with the complaint processes. It is more likely that those who actually take the time to lodge a complaint do so with conviction in their cause.

6.3. It is important that those complaints made with such conviction are not trivialised but are treated with the appropriate gravity, which includes accurately recording them as ‘complaints’ to trigger IDR processes and affording them the benefits of controls embedded in the financial firm’s IDR process.

6.4. The quick resolution of a complaint is not necessarily indicative that a matter is without merit. On the contrary it may indicate that the matter warranted urgent attention and accordingly it is not appropriate that it should go unrecorded as a “complaint”.

6.5. We refer again to Ryan’s story at para 4.3 above and the ability of financial firms to manipulate the complaint data under the current version of RG 165.

6.6. In Ryan’s instance, CCLSWA lodged ten IDR complaints with ten different financial firms. We note that five of the financial firms responded and settled with either debt waivers or refunds within five days of our IDR complaint.

6.7. It is CCLSWA’s experience that smaller lenders and smaller loans, such as SACCs, are more susceptible to early resolution. These credit providers and credit products, which are widely acknowledged as predatory and targeted at disadvantaged consumers of low socio-economic background, may accordingly be mispresented by the data of complaints captured and recorded.

6.8. We concur with the rationale at para. 49 and 50 of CP 311 and believe that removing a financial firm’s discretion to record complaints resolved within 5 days is essential to accurate and reliable data collection.

6.9. We concur also with the rationale expressed at para 53 of CP 311 and believe that the Guidance will benefit from consistency in terminology and approach by ASIC and AFCA.

6.10. We refer to para 4.25 above and CCLSWA's experience with financial firms prematurely closing complaints. We note para. 165.87 and 165.88 of Draft RG 165 go some way to addressing this issue, but consider that Draft RG 165.88 still provides financial firms with too much discretion. In particular RG 165.88 (b) would benefit from further clarification regarding what 'circumstances' may be considered reasonable. For example, as referenced at para 4.25 above, acceptable processes and timeframes before a complaint may be "closed" for inactivity.

6.11. CCLSWA recommends that further guidance be provided by ASIC on how requests that are 'not a complaint' at first instance, such as Document Request and Hardship Notices, may be captured and recorded as complaints retrospectively if the financial firm fails to respond or the matter escalates to EDR (see discussion at para 4.27-4.29 above).

6.12. In our submissions to the Legal and Constitutional Affairs References Committee Inquiry into the resolution of disputes with financial service providers within the justice system, CCLSWA identified the failure to respond to Document Requests, and financial firms rejecting and redirecting requests for documents as a formidable barrier to justice as it prevent consumers from gaining the necessary information to formulate their complaints.[2] Accordingly we believe that data around how many simple requests escalate into 'complaints' (or may be reclassified or retrospectively recorded as a 'complaint') also warrant recording and may usefully inform IDR processes.

7. Recording a unique identifier and prescribed data set for all complaints received

B5Q1 Do you agree that financial firms should assign a unique identifier, which cannot be reused, to each complaint received? If no, please provide reasons.

7.1. CCLSWA agrees that there should be a unique identifier assigned to each complaint which cannot be reused. Each complaint is unique and records should reflect that.

7.2. CCLSWA would like to see further guidance regarding circumstances where a single complainant lodges multiple complaints. We believe that a unique identifier should be attributed to each issue to prevent the manipulation of IDR complaint data in these circumstances.

7.3. As previously discussed, CCLSWA often makes Document Requests on behalf of clients in order to determine whether there is any merit to their claims. A financial firm's failure to respond often becomes the subject of an AFCA complaint. As discussed above and as per

[2] CCLSWA Submission to the Legal and Constitutional Affairs Reference Committee Inquiry into the resolutions of disputes with financial service providers within the justice system - https://cclswa.org.au/wp-content/uploads/2019/04/20190301-DOC-Submission-to-Legal-and-Constitutional-Affairs-References-C....pdf

Recommendation 5, we maintain that the financial firm's initial failure to respond should be retrospectively categorised as a 'complaint' and assigned a unique identifier..

7.4. If we subsequently obtain documents as a result of our AFCA complaint and upon review of the documents determine that our client's claims do have merit, we would proceed to lodge an IDR complaint regarding any issues identified. We would consider that a separate IDR complaint and expect it to be allocated a separate unique identifier.

7.5. We have experienced instances where the failure to provide documents has become the subject of an AFCA complaint and the financial firm and/or AFCA presume to resolve all the issues that may be identifiable on the documents when dealing with the Document Request complaint.

7.6. It is CCLSWA's preference to separate the issues and firstly resolve the Document Request complaint in isolation. We may only proceed to give considered advice regarding any other issues apparent on the documents following resolution of the initial Document Request complaint and careful review of any documents subsequently furnished. For example, we may not be able to advise our client regarding any debt waiver or refund offered in settlement of a claim of irresponsible lending without reviewing the documents and assessing the offer relative to our client's legally entitled remedy.

7.7. Designating the initial Document Request complaint and any subsequent substantive complaint separate unique identifiers would assist to distinguish the discrete issues.

B5Q2 Do you consider that the data set proposed in the data dictionary is appropriate? In particular:

(a) Do the data elements for 'products and services line, category and type' cover all the products and services that your financial firm offers?

(b) Do the proposed codes for 'complaint issue' and 'financial compensation' provide adequate detail?

7.8. CCLSWA does not provide any financial products or services, but as experienced consumer credit advocates, we consider that the data elements proposed are largely appropriate.

7.9. However, CCLSWA considers that it would be appropriate to further categorise the data set for the product and services lines Category 3 –Guarantees in order to capture other types of guarantees we frequently advise upon, including secured personal guarantees for consumer credit and guarantees for business loans.

7.10. CCLSWA often provides advice to guarantors who have guaranteed loans that fall under the NCC and NCCPA. Additionally, we also receive a significant number of calls from individuals who have provided personal guarantees for a business loan, using their home as security for the

guarantee. These individuals are often unconnected with the business, and receive no protection under the NCC or NCCPA.

7.11. For individuals who have provided guarantees for small business loans, there are limited alternative dispute resolution avenues, particularly when dealing with a business lender that is not a member of AFCA, yet the risks are significant. These consumers, who often receive no benefit, from the business loan, risk losing their homes in the event the principal borrower defaults.

7.12. We consider that it would be useful to separately itemise guarantees for consumer credit, and guarantees for business loans at category 3, to reflect the differences in providing a guarantee for consumer credit with guarantees for loans with a business purpose.

7.13. The data captured may drive advocacy and reform for many consumers who are vulnerable to abuse by principal borrowers and business lenders. We suggest that the data may support our argument for extending the membership of AFCA to cover small business lenders, in order to protect individual consumers who provide guarantees for small business loans, and who are not involved in the business and receive no benefit.[3]

7.14. We note that some categories include "other" as an option under the product and service number and type. We suggest that there should be an "other" category for each of the product and service categories. This would reflect the vast majority of other guidance which is provided as non-exhaustive lists. It would also capture circumstances where there are unique customer products. Financial firms should then be required to specify the details of the "other" product type.

7.15. CCLSWA considers the codes for 'complaint issue' are adequate and we are satisfied that code "11=Others" provides a catchall.

7.16. However, CCLSWA believes that 'financial compensation' code "11 = More than 500,000" is too broad. We believe there may be some benefit to extending the codes for 'financial

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[3] CCLSWA Submission to the Legal and Constitutional Affairs Reference Committee Inquiry into the resolutions of disputes with financial service providers within the justice system - https://cclswa.org.au/wp-content/uploads/2019/04/20190301-DOC-Submission-to-Legal-and-Constitutional-Affairs-References-C....pdf
Joint Submission in Response to the Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry - https://cclswa.org.au/wp-content/uploads/2018/10/20181025-FNL-SUB-Response-to-Royal-Commission-Interim-Report.pdf
Joint submission to the Senate Economics References Committee's Inquiry into Credit and Financial Services targeted at Australians at risk of financial hardship - https://cclswa.org.au/wp-content/uploads/2018/11/20181109-FNL-SUB-Submissions-to-Senate-Inquiry-into-Credit-and-Financial-Services-Industry-and-Attachments.pdf

compensation' to meet AFCA's compensation caps (ie., 1 million, 2 million, unlimited). We would suggest additional codes:

12 = 500 000 – 1 000 000
13 = 1 000 001 – 2 000 000
14 = more than 2 000 001

7.17. Bringing the 'financial compensation' codes into line with the financial compensation limits of AFCA would also provide consistency for consumers and financial firms.

7.18. CCLSWA considers that it may also be useful to have data on financial compensation within and outside the parameters of AFCA's cap, as this may inform the reform and revision of AFCA's compensation limits going forward.

8. IDR data reporting

B6Q1 Do you agree with our proposed requirements for IDR data reporting? In Particular:

(a) Are the proposed data variables set out in the draft IDR data dictionary appropriate?

(b) Is the maximum size of 25 MB for the CSV files adequate?

(c) When the status of an open complaint has not changed over multiple reporting periods, should the complaint be reported to ASIC for the periods when there has been no change in status?

8.1. CCLSWA advocates that the status of a complaint should continue to be recorded, despite there being no change over multiple reporting periods.

8.2. We believe that it is important to continue to record the status of complaints as this can provide important data regarding complaints that may have stagnated. We suggest that this data should prompt financial firms to make further inquiries regarding why a complaint has not resolved, progressed or escalated.

8.3. In our experience, vulnerable clients in financial hardship are unlikely to be pursuing an IDR complaint in isolation. They are usually dealing with numerous other legal and non- legal issues concurrently. Accordingly, their complaint may not progress as a result of their inability to cope with multiple issues outside their 'window of tolerance', rather than due to a lack of merit.

8.4. Mrs Ebe's story at paragraph 11.1 below is indicative of a scenario where a consumer was not well placed to pursue an IDR complaint in the first instance, but CCLWA's persistence over 5 years later resulted in a positive outcome for Mrs Ebe.

8.5. Boris' story at 9.8 below also shows a complaint failing due to a complainant's inability to cope compounded by an inappropriate IDR response.

8.6. If data regarding complaints with no change in status was reportable, this may highlight inactive matters and encourage financial firms to proactively inquire into the reasons for the dormancy. Proactive steps by financial firms in the first instance may save consumers years of financially debilitating stress. Unchanged complaint status may be indicative of changes to the complainant's personal circumstances including illness, unemployment, financial abuse or even death. Accordingly, the unchanged status of a complaint should be recorded as a source of important data and act as a notice to financial firms to investigate why the complaint is still ongoing without change.

8.7. Applying the same logic to the 'complaint status' codes at page 7 of the Internal data resolution data dictionary, where complaint status is recorded as either 1=Open; 2 = Re-opened; 3 = Withdrawn or 4 = Closed, we suggest that "Use 3" is too broad.

8.8. The guide for use explains that Use 3 (Withdrawn) applies if the complaint was withdrawn by the complainant or contact with the complainant has been lost.

8.9. We consider that 'lost contact' should be a separate code as it signifies a materially different complaint status.

8.10. We also suggest further clear guidance regarding what may appropriately be coded as "2=Reopened". We consider there may be circumstances where it may be more appropriate for a matter to be identified as a further unique complaint. For example, if a complaint is itself regarding a matter being prematurely closed, then that complaint should be allocated a new unique identifier rather than simply reopening the complaint under the same identifier and thereby discounting the further complaint statistic.

9. IDR responses – Minimum content requirements

B8Q1 Do you agree with our minimum content requirements for IDR responses? If not, why not?

9.1. It is important for consumers to be assured their complaint has been adequately dealt with.

9.2. In particular, unrepresented consumers may not be able to clearly articulate the root of their complaint and identify their legal remedy. Accordingly, it is important that financial firms clearly set out their understanding of the complaint, identifying and addressing the issues raised in the

complaint. This will prompt consumers to provide further information or clarification if they don't feel their issue has been identified and addressed.

9.3. Accordingly, we concur with proposal B8(a).

9.4. With regard to proposal B8(b), we concur that it is pivotal that material questions of fact are set out in IDR responses in order that they may be appropriately disputed, if necessary.

9.5. In addition, where a financial firm refers to information that supports its finding, it may be necessary to provide documentary evidence. It should not be sufficient to rely upon internal information that is not made available to the complainant.

9.6. CCLSWA is often refused information on the basis that it is 'internal data' or 'commercially sensitive'. We maintain that it is not acceptable to base a decision on evidence unavailable to the complainant and accordingly indisputable. We believe that this also marries with proposal B8(c) which requires an IDR response to provide enough detail for the complainant to understand the basis of the decision and to be fully informed when deciding whether to escalate the matter to AFCA or another forum.

9.7. In CCLSWA's experience the consequence of financial firms failing to engage in the IDR process appropriately and providing an inadequate IDR response is that consumers become disgruntled and lose faith in the process. As a result they do not proceed with the complaint and therefore receive no outcome.

9.8. The case studies below are evidence of this occurring.

Case study - Boris's story – C984713

Boris had a car loan with ABC Finance and was insured by ABC Insurance, part of the same group.

Boris's ex-wife had bi-polar disorder and he was forced to stop working in order to look after their children. Boris lost all of his savings as his ex-wife took money from their joint bank accounts. Boris then went to ABC Insurance to claim on his policy. ABC Insurance made it very difficult, but eventually released one payment.

ABC Insurance asked Boris to complete the application process again to receive further payments. Boris said that he could not cope given the recent events in his life and failed to complete the re-application process.

Boris asked ABC Finance to contact ABC Insurance directly to seek payments on the loan. ABC refused and repossessed the vehicle. Boris was left with $12,000 shortfall debt.

Case study - Tristan's story – C993092

Tristan purchased a car from ABC Car Sales for $60,000 financed by ABC Credit (part of the same group) with fortnightly repayments of $500.

Tristan had PTSD and depression as a result of workplace bullying.

At the time of signing his purchase and finance contracts, Tristan was not aware that insurance had been included in his loan. He later found out that insurance was included in his loan repayments and that ABC Insurance (also part of the same group) would continue to make repayments on his behalf in the case of disability.

Tristan made a claim on his insurance to pay the loan when he was on sick leave in 2012 and 2015. Tristan was under the impression that ABC Insurance would continue to pay his loan until the expiry of his medical certificate.

Debt collectors acting on behalf of ABC Credit came to Tristan's house while he was on sick leave and he was told that he was $8,000 in arrears, even though Tristan had not even received a default notice.

Tristan contacted ABC Credit to ask why the insurance payments had been stopped. ABC Credit said they were unable to help but could offer a $4000 per month repayment plan for the next 2 months; otherwise they would repossess the car.

9.9. The above case studies show that when consumers find it so difficult to make a claim or complaint to a financial firm's IDR department they are inclined to just 'give up' on their claims rather than pursue their rights and entitlements. Boris and Tristan were both operating outside their 'windows of tolerance' and enquiries into why their complaints were 'withdrawn' may have prompted more appropriate IDR responses.

9.10. In CCLSWA's experience not all IDR responses are created equal. Financial firms often fail to engage with the content of the complaint and provide standard template responses, denying all liability.

9.11. This is not appropriate and CCLSWA believes that the guidance should reflect that the minimum requirements should not take the form of a 'template' response that does not take into account the individual circumstances of each claim.

9.12. Below are examples of template IDR responses received by CCLSWA.

Case study – Beverly's story – C993977

Beverly was 68 years old and self employed when she obtained a $650,000 home loan from Lender. The home loan was interest only for a term of 10 years, with a final lump sum payment of just over $650,000 due at the end of the term.

Beverly utilised approximately $400,000 of the home loan. The interest only repayments were made from the remaining "available funds" until insufficient funds remained whereupon she received a default notice.

Beverly did not understand why she received the default notice. She did not understand the concept of "interest only" and was not aware that she would be required to pay back the loan in one large lump sum.

The Lender knew or ought to have known that Beverley could not repay the home loan without selling her home and accordingly the presumption of substantial hardship arises.

CCLSWA assisted Beverly in making an IDR complaint to the Lender.

The IDR response denied all allegations and relied on information that was not relevant.

We considered that the response constituted a standard IDR response and did not take into account the claims that had been made nor considered Beverly's actual circumstances.

9.13. Where matters are resolved at IDR stage, financial firms often request our clients to sign deeds of settlement. In our experience, these deeds are often standard form precedents and not entirely appropriate for the matter in hand. Often they are devoid of detail and over-reach in terms of the releases sought. For example, in resolution of a dispute with one entity, release is often sought from all further claims against that entity and all its subsidiaries. We may not be able to advise our clients to sign such releases unaware of whether they may have further loans or claims against subsidiaries.

9.14. It is also our experience that standard template deeds furnished by smaller lenders are often provided by IDR departments without legal counsel. This is obvious due to the inappropriate content and, in some instances, the failure to even correctly execute the deed – limiting its enforceability.

9.15. Consumers without legal representation may unwittingly release their rights or rely on unenforceable deeds to their detriment.

9.16. Further, some deeds of settlement require explanation from a lawyer or a certificate of independent advice. This requirement may be unduly onerous on consumers. Not all

consumers, particularly those vulnerable and going through the IDR process without assistance, have access to legal advice; or the cost of obtaining such advice may be prohibitive.

9.17. Where a deed of settlement is required to close an IDR complaint, the balance of power is tipped in favour of financial firms. It is more onerous on the consumer to enter into a deed of settlement than it is for the financial firm who has greater relevant resources, knowledge and experience. It is very easy for the financial firm to draft a deed of settlement that is vastly in their favour, to the detriment of the consumer.

9.18. Accordingly, we support the rationale at para 79 of CP 311 that says deeds of settlement must comply with the requirements for settlement deeds issued by financial firms at AFCA (see Regulatory Guide 267 Oversight of the Australian Finance Complaints Authority (**RG 267**)). We believe that this requirement should be included in Draft RG 165.

9.19. Additionally, we believe the updated RG 165 may benefit from guidance around when a deed of settlement may not be appropriate.

9.20. As noted above, the requirement for a deed of settlement is often unduly onerous on consumers and in our opinion is often unnecessary where correspondence records the agreement and recourse to EDR is available.

9.21. In particular, we say that a deed of settlement is unnecessary where a binding determination is issued by AFCA.

10. Reduced maximum IDR timeframes

B11Q1 Do you agree with our proposals to reduce the maximum IDR timeframes? If not, please provide:

(a) reasons and any proposed for alternative IDR timeframes; and

(b) if you are a financial firm, data about your firm's current complaint resolution timeframes by product line

10.1. We concur that timeliness is central to effective complaint management.

10.2. We note proposal B11 (b) to reduce the maximum IDR timeframe for all other complaints (excluding credit complaints involving hardship notices and/or requests to postpone enforcement proceedings and default notices where the maximum timeframe is generally 21 days) from 45 days to 30days. While we agree with the premise of reduced maximum IDR timeframes, we believe there is merit in reducing all IDR timeframes to 21 days.

10.3. Imposing a consistent time frame of 21days, without distinction for hardship notices or postponement requests, will remove any confusion regarding the time allowed for responses to different issues.

10.4. In CCLSWA's experience delayed responses from financial firms can compound consumer detriment. In cases where the IDR request/complaint is a Document Request, the delay in furnishing documents in effect delays the initiation of a formal IDR complaint regarding the substantive issues revealed by the documents. For consumers in substantial financial hardship, any delay compounds their situation exponentially and, as noted at para 87 (b) of CP311, causes increased stress.

10.5. Thus while the reduced timeframes may be exponentially beneficial to vulnerable consumers, the rationale at para 88 of CP311 indicates that reduced maximum timeframe would have minimal operational impact on financial firms.

10.6. Further, CCLSWA notes that financial firms have a unilateral ability to extend IDR timeframes by sending an 'IDR delay notification'. This is not a luxury that is afforded to consumers. In cases of financial hardship, consumers can not simply delay their ongoing financial stresses and demands.

10.7. While the guidance provides that 'IDR delay notifications' should occur only in exceptional circumstances, we believe the guidance would benefit from further clarification regarding what may qualify as an 'exceptional circumstance'.

10.8. It is CCLSWA's experience that, even in disputes with a 45 day IDR timeframe, financial firms delay their responses with various excuses; or with no excuses beyond "we need more time". In some instances CCLSWA is required to lodge a dispute with AFCA once a financial firm is 'out of time' to respond, in order to progress a complaint.

10.9. Given that a failure to provide an appropriate IDR response within the maximum timeframe may be referred to AFCA where the financial firm will likely be provided a further 21 days under AFCA's 'refer back' arrangements, we question the need for 'IDR delay notifications' at all. In this scenario the 'IDR delay notification' is an unnecessary step in the process that only serves to further delay consumer redress.

10.10. Paula's case is illustrative of the use of 'IDR delay notifications'

Case study – Paula's story – C995848

Paula signed a guarantee for her son's loan to purchase a property. Paula's son worked as a loans officer

in the financial firm and he presented her with documents that she did not really understand whilst sitting in a cafe.

Paula signed the documents, which mortgaged her home. Paula was under pressure and was not given the correct information about what she was signing up for.

After reviewing the documents from the financial firm, CCLSWA discovered that Paula was not given copies of the documents before or after she signed them, and she did not understand what she was signing.

CCLSWA made a formal complaint to the financial firm in May 2019. CCLSWA received four separate emails from the financial firm saying “we need more time” without adequate explanation.

It was not until after CCLSWA lodged a complaint with AFCA in July 2019 that the financial firm responded to our IDR complaint and agreed to remove the mortgage and release Paula from the guarantee.

10.11. The requests we receive for additional time to respond to IDR complaints are often made without reason or, alternatively on the basis of a generic list of multiple possible reasons.

10.12. Below is a de-identified extract from an email we received from a credit reporting body after we had sent a corrections request:

We refer to your correspondence dated [redacted] regarding the credit file of [redacted]. Unfortunately, we will be unable to resolve your correction request within 30 days. This has occurred because of either a:

- *Redirection of your correction request to the correct credit provider;*
- *Delay in receiving all the necessary information pertaining to your request from the relevant credit provider;*
  or
- *A high volume of current correction requests.*

We expect to have this matter resolved within the next 21 days.
Consequently, we seek your agreement to this extension request via reply email. If you do not respond, [redacted] will still endeavor to advise you of the outcome of your request within the time frame sought for the extension, or sooner.

10.13. CCLSWA recommends that the ability of financial firms to provide ‘IDR delay notifications’ is removed or, at a minimum, ‘IDR delay notifications’ must specify the precise reason for the delay. Generic requests as set out above are not acceptable. They depersonalise the complainant’s issues and only add to consumer’s dissatisfaction throughout the process.

11. Role of customer advocates

B12Q1 Do you agree with our approach to the treatment of customer advocates under RG 165? If not, please provide reasons and any alternative proposals, including evidence of how customer advocates improve consumer outcomes at IDR.

B12Q2 Please consider the customer advocate model set out in paragraph 100. Is this model likely to improve consumer outcomes? Please provide evidence to support your position.

11.1. We refer to the Ebe's story below and recount CCLSWA's positive experience engaging with a customer advocate in circumstances where the matter fell outside AFCA's jurisdiction. On the basis of this experience, we value the pivotal role customer advocates may play.

Case study - The Ebe's story – C989453

Ms Ebe and Mr Ebe were married and had a joint account with their financial firm. The Ebes owned two properties: Property 1 and Property 2. In 2001, the Ebe's divorced and finalised their property settlement, with Ms Ebe getting sole title in Property 1 (her home).

During the course of, and continuing after the relationship, Ms Ebe suffered family violence. Mr Ebe constantly threatened and abused Ms Ebe and her children. Out of fear for the safety of herself and her children, in 2006 Ms Ebe signed as guarantor for Mr Ebe's brother and sister-in-law with the financial firm.

Mr Ebe was originally on the agreement as a second guarantor but was subsequently removed. Upon signing the guarantor agreement, Ms Ebe was under the impression that the loan was secured with Property 2, and was not provided with independent legal advice.

Again, in 2009 Ms Ebe signed as a guarantor for Mr Ebe's own personal loan with the lender. Property 1 was used to secure the loan.

Further, in 2010, Ms Ebe signed on as a co-borrower on a joint loan with the financial firm to cover Mr Ebe's debts. This was also secured by Property 1.

The financial firm failed to make reasonable inquires into Ms Ebe's situation, and dealt solely with Mr Ebe. Ms Ebe was not advised to obtain independent legal advice, and was not aware of her liabilities as guarantor.

Ms Ebe did not contact CCLSWA until a judgement was made against her and she was making unsustainable repayments towards the judgement debt.

As there was a judgement, Ms Ebe was not able to bring the matter to AFCA. CCLSWA contacted the financial firm's customer advocate on behalf of Ms Ebe.

As a result of our negotiations with the financial firm's customer advocate, Ms Ebe was able to have the mortgage removed from Property 1, released from the guarantees and loan and she was refunded all payments she had made towards the court judgment debts.

11.2. While the financial firm's customer advocate provided an alternative to AFCA in Ms Ebe's circumstance, CCLSWA maintains that a very clear distinction needs to be made between the role of a customer advocates and the role of AFCA.

11.3. CCLSWA has received correspondence from financial firms where the customer advocate's role is promoted as an alternative to AFCA, rather than an optional process. It is presented such that a consumer may surmise that they may either seek further review of their complaint by the consumer advocate ***or*** with AFCA, but cannot do both.

11.4. We have extracted the following from a financial firm's final IDR response to illustrate how confusion regarding a customer advocate's role may arise from correspondence that does not clearly explain the process.

> If you are still unhappy with the outcome of our review, then please contact our [redacted] Customer Advocate. The role of the Group Customer Advocate is to provide an objective and independent review of the outcome of your complaint. The Group Customer Advocate's recommendations are binding on [redacted] but it's up to you if you want to accept or reject the recommendation.
>
> The [redacted] Customer Advocate can be contacted by email: [redacted]
>
> Information to include in your correspondence:
>
> - Your customer number and complaint reference number
> - Your preferred contact details
> - A brief description of your complaint
>
> If despite our best efforts, you remain dissatisfied you can contact the Financial Ombudsman Service Australia on 1800 367 287, email info@fos.org.au or mail GPO Box 3, Melbourne VIC 3001. If you choose to pursue this option, you will need to do so within 2 years from the date of this correspondence.

11.5. The above extract also implies that the consumer is required to submit the matter for review to the customer advocate before proceeding to EDR, effectively creating another layer in the IDR process.

11.6. While CCLSWA sees value in the customer advocate's role, we concur that they should not be presented as a further mandatory step in the IDR process.

11.7. It is our experience that matters referrable to customer advocates are likely to be more complex or require consideration beyond 'black letter law'. We appreciate that, in such circumstances, a customer advocate may be more flexible in their approach than IDR departments, or even AFCA. This flexibility may be hampered by customer advocates being required to comply with maximum IDR timeframes.

11.8. We are mindful that unnecessary delay may increase dissatisfaction with the IDR processes and result in complaint fatigue. Accordingly, while we can see the benefit of customer advocates not being subject to IDR timeframes, we believe that any proposed exemption for customer advocates should have very clear parameters.

11.9. This may be achieved by requiring an IDR response to include a separate information leaflet on the role of a customer advocate, allowing a consumer to make an informed decision regarding their next steps in the IDR process – clearly juxtaposing the customer advocate and AFCA.

11.10. Additionally, if a consumer elects to have a complaint reviewed by a customer advocate, we suggest that this requires a consumer's express consent to an extended timeframe for a 'customer advocate IDR response'.

11.11. CCLSWA advocates that it should be made clear that the customer advocate is a part of the IDR process but not a required step before going to the EDR scheme.

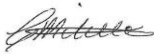
Conclusion

CCLSWA is grateful for the opportunity to provide feedback on ASIC's proposals for updating RG 165.

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



Gemma Mitchell
Managing Solicitor

Consumer Credit Legal Service (WA) Inc.

Appendix A

Correspondence from SACC Lender in Ryan's Case Study

25 October 2018

Dear [CCLSWA]

Re: [Client]

Before we deal with the specific issues you have presented, it would be useful to place the whole matter in context.

1. [Lender] makes no secret of the fact that it is in business to lend money.
2. The Corporations Act demands that all companies must trade only while solvent. In fact, it is a criminal offence, with substantial penalties imposed on company directors, if a company trades while insolvent (see Sections including 133, 141 and 347A).
3. The key to a money lender's solvency is that the lender is repaid the loans it advances to consumers.
4. Without such repayments, [Lender] could not pay its bills when due and payable.
5. [Lender] operates in a very competitive market, with your client free to choose from numerous lenders.
6. Your client is over 18, legally entitled to vote, marry, have a family and seek and obtain employment.
7. Even the Hon. Kelly O'Dwyer, then Minister for Finance, Minister responsible for non-bank lending and strongly pro-consumer - has commented that consumers have to take some personal responsibility for their lending decisions.
8. [Lender] does not automatically lend to every loan applicant. In fact, the company's average rejection rate is 72% of all applications.
9. [Lender] was thoroughly investigated by ASIC in 2017 and found to be compliant in its lending practices.
10. [Lender] has always adopted a policy of compassion when approached by consumers claiming financial hardship after acquiring their loan. However, while that frequently involves [Lender] waiving all future fees and charges, it is not and cannot be a policy of giving money away. The issue of remaining solvent and avoiding criminal charges for our directors and loss of employment for all our staff, demands at least seeking payment of the principal outstanding.
11. Our loan application assessment process involves lending money with relatively limited gross profit margins and we set out to achieve the then Minister's expectation that we obtain "*a reasonable understanding of the consumer's ability to meet all the repayments*" (see the National Consumer Credit Protection Act's Explanatory Memorandum, 2009, at paragraphs 3.69 and 3.139).

As ASIC determined in 2017 (and there has been absolutely no change to the process since), we fulfil ASIC's requirements as detailed in ASIC Regulatory Guide 209 at paragraphs RG 209.18(b) and 209.19 - we "*determine whether the consumer has the capacity to meet their payment obligations... to a reasonable standard*".
That assessment of capacity includes recognising that, after living expenses and meeting the loan repayment obligations, there should be a buffer or surplus amount, in accordance with ASIC's expectations in Regulatory Guide 209, at paragraph RG 29.99(a).

Assessing that capacity does not include taking responsibility for the consumer's money management. If, after making the repayments, the customer chooses to spend all their discretionary income or buffer, calculated by [Lender], and leave only small credit amounts or no credit amounts in their bank account, that is not [Lender] responsibility.

12. [Lender] also satisfies all statutory requirements included in the National Consumer Credit Protection Act 2009 and the National Consumer Credit Protection Regulations 2010. In particular, Sections 129 and 130 in regard to assessment, including reasonable enquires, establishing requirements and objectives and seeking an appropriate level of verification in accordance with Section 130(1A).
13. However, this determination of affordability is not simply because the Commonwealth law demands it, it occurs because it is good business practice. [Lender] cannot afford to lend loans that, from the outset, are never going to be repaid.
14. Our assessments are reasonable and are scaled, as ASIC permits, to reflect the type of simple loan we offer (in accordance with ASIC Regulatory Guide 209, at paragraph RG 209.25). They consider suitability over the loan term in accordance with Section 129 and, in accordance with Section 131, [Lender] carefully considers whether or not "*it is likely that... the consumer will be unable to comply with the consumer's financial obligations under the contract...*". We set out to determine:
    a. if there is "*a real chance of a person being able to comply*", in accordance with the standards laid down by Justice Davies in *ASIC v The Cash Store* 2014; and
    b. "*to determine whether the consumer would have the capacity to meet their payment obligations*" (ASIC Regulatory Guide 209 at paragraphs 209.18(b) and 209.61).
15. As indicated above, to achieve this determination we obey the then Minister's Explanatory Memorandum, "*...to ascertain a reasonable understanding of the consumer's ability to meet all the repayments, fees, charges and transaction costs associated with the loan*".

    It is to be noted that the Minister did not present the standard as being a "perfect understanding" or even a "comprehensive understanding". If the Minister did not expect such, then no consumer or consumer representative has the right to attempt to implement such a standard, claiming support under the Commonwealth regulatory regime.

16. You will note that neither the legislation, nor the Federal Court, attempt to prescribe certainty.

17. To this end, it is important to note that Section 128 demands an assessment up to 90 days before the credit day (when the loan is issued) and Section 130(1A) demands bank statements for the period of 90 days, prior to the credit day, be examined during the assessment process. Further, the assessment is not prescribed in the legislation to cover any other time other than "*the period in which the credit day occurs*" [Section 128(c)], "*the period the assessment covers*" (the loan term), as specified by the credit provider [Section 129(a)], and via the bank statement analysis of "*the immediately preceding period of 90 days*".

    We note that ASIC has indicated that an examination of bank statements to determine a consumer's regular expenses is acceptable - "*In general, we consider that transactions listings for accounts may be sufficient to meet this requirement*" (see Regulatory Guide 209 at paragraph RG 209.70).

18. ASIC also emphasises the importance of the assessment or credit day. Credit providers are expected to "*...find out about the particular consumer's current situation...*" (see ASIC Regulatory guide 209 at paragraph RG 209.30).
19. [Lender] identifies the period the assessment covers to be the term of the loan being applied for. No retrospective application, or application beyond the loan term, is ever stated or implied.
20. Given this statutory and company procedures environment, on compliance and legal professional advice, [Lender] will not accept attempts to merge into one assessment a number of different assessments, for different loans, over an extended period.
21. The National Consumer Credit Protection Act is prescriptive. Sections 131(3) and 132(1)(a) demand that the consumer be able to comply with their financial obligations under their credit contracts, without suffering "*substantial financial hardship*". This is defined as being unable to comply without selling their principal place of residence.

    We note that ASIC expands this test by including the sale of "*other assets*" (see Regulatory Guide 209 at paragraph RG 209.107). [Lender] does not accept that simply "hardship" constitutes "*substantial hardship*", nor does the Commonwealth Parliament and nor does ASIC [see ASIC Regulatory Guide 209 at paragraph RG 209(101)].

22. [Lender] maintains that, if a consumer is able to meet their obligations and has not felt compelled to seek hardship relief, given the invitation to do so in their [Lender] credit contract and in their copy of the Form 5 Information Statement, then this history supports the company's claim that an adequate assessment has been undertaken and that any claim of substantial hardship, post-complete repayment of the loan, has no validity.
23. Our assessments recognise there is always the possibility that circumstances may adversely change financially for the consumer during the term of the loan. We ask if any changes are expected. The test is "*reasonably foreseeable*" - not that you must assume such will occur [see ASIC Regulatory Guide 209 at paragraph RG 209.33(f)].
24. However, we are not in the position of fortune telling whether or not unexpected adverse financial circumstances will occur for the consumer on credit day - at the time the loan is taken out. ASIC recognises this challenge by determining that the assessment is made at the time of the application - it is a "*current*" assessment, as ASIC prescribes [see ASIC Regulatory Guide 209, paragraph RG 209.32(b)].
25. As discussed above, the legislation demands that the applicable time for the assessment must be no longer than 90 days before the credit day. [Lender] makes its lending

determination on the information that is available during the assessment process. There is no prescription that [Lender] has to undertake multiple assessments during the loan term, to determine if circumstances have changed (see Section 128).

Specific detail concerning the [Client] matter

1. The age of the client indicates a mature adult.
2. The financial history of the client indicates a financially aware borrower. We note he has had experience borrowing from other credit providers. That in only 2 of the loans granted did the loan term go past the original end date due to a failed payment.
3. We note that [Client] borrowed for various reasons including vehicle expenses, medical expenses, moving costs and home repairs/maintenance.
4. That the affordability for all loans offered to [Client] by [Lender] was within his budget even after including discretionary expenses, other loans and a Standard Buffer that is applied to all of the loans that we approve.
5. [Client] applied 2 more times after finalising his last loan in September 2017, but both applications were declined, and he has been blacklisted from applying again since.

The [Lender] offer

Our offer is presented after seeking compliance and legal professional advice and carefully reviewing Consumer Credit Legal Services request, industry best practice, and all the circumstances of [Client] situation.

[Lender] has made financial decision to refund [Client] $1690 to an account nominated by him.

Please understand that this is not an admission of guilt, but purely because of the policies of the AFCA.

If this matter should be escalated to the ombudsman, then the investigations they would undertake, not matter what the outcome, would be financially unviable.

Please contact me if you have any further concerns or to forward us [Client] account details.

Yours faithfully,

7 October 2019

Jacqueline Rush
Senior Policy Adviser
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

By email only: IDRsubmissions@asic.gov.au

Dear Ms Rush

Consultation Paper 311 – Internal Dispute Resolution: Update to RG 165- Supplementary Submission

CCLSWA previously made a submission to Consultation Paper 311 (**CP 311**) and participated in the stakeholder meeting on 25 September 2019 via telephone link from Perth.

We would like to take the opportunity to make further submissions in respect of a number of issues raised at the stakeholder meeting in regards to CP 311.

1. IDR timeframes

1.1. It was raised at the stakeholder meeting by industry that IDR timeframes can be blown out by delays on the part of the consumer and by their representatives. The example provided was where a consumer representative went on holiday and failed to respond to a financial firm for three months.

1.2. There are a number of factors that can contribute to delays in response to financial firms during the IDR process. These include a consumer's vulnerability, the staffing of the consumer representative organisation, a consumer's work and other commitments, and the need for support services for clients, whether that be a support person, translators, mental health professionals or assistance from carers.

1.3. CCLSWA is a small not-for-profit legal service which is staffed by 3.5 FTE solicitors.

1.4. In these circumstances it does not benefit the consumer as well as the financial firm to impose severe time frames. Therefore we would encourage that timeframes be relaxed at the request of a consumer.

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1.5. The below case studies are illustrative of circumstances where consumer's personal circumstances and vulnerability may lead to delays in responding to financial firm's IDR departments.

(1) We currently act for an elderly client who had an accident in 2018 and injured her wrist. As a result she was not in a position to deal with the financial firm or with communication from our office. This caused a considerable delay in the IDR process. However, CCLSWA kept the financial firm up to date with our client's situation throughout the delay period.

(2) We previously acted for a client who had severe depression and anxiety. Any communication from the financial firm or in relation to the financial firm caused her significant anxiety and distress. As a result she had to ensure that she had a session booked with her mental health professionals after every appointment we had with her.

(3) We currently act for a client who has limited English and is the sole carer for her five dependent children, all under the age of 10. It is often difficult to arrange for child care and an interpreter in order to meet with the client to discuss her matters.

(4) Our clients also have trouble taking time out to meet with our solicitors or discuss matters over the phone because of work commitments. We currently act for a client who is working full time whilst also caring for his partner who has PTSD.

1.6. These brief outlines of our client's personal circumstances serve to highlight the many factors that can impact on a consumer's ability to respond to IDR departments. Consumer representatives are also cognisant of their client's vulnerabilities and therefore make their wellbeing a priority over strict IDR timeframes.

1.7. However, we do not support financial firms being able to extend IDR timeframes indefinitely and to the detriment of a good outcome for the consumer.

1.8. We encourage consideration to be made in CP 311 for circumstances in which strict timeframes are not appropriate for vulnerable consumers.

2. Financial delegations/empowerment of staff

2.1. CCLSWA believes that if IDR teams were empowered to make decisions without reference to external departments or decision makers there would be better outcomes for consumers at IDR stage.

2.2. Below are two case studies of where staff of the financial firm did not have the authority or delegation to make decisions, resulting in poorer consumer outcomes and greater work for our staff in achieving an appropriate outcome for our vulnerable clients.

C996432

Our client had a dispute with a lender and we had an excellent experience dealing with their IDR team until the proposed terms of resolution were to be agreed in writing. Up to that point, the lender's IDR case manager was wonderful – really helpful and receptive to our client and had outlined terms in principle, that were appropriate for a vulnerable client.

Then the matter was referred by the lender's case manager to their external lawyers to draft the settlement agreement. We received a technical legal deed of settlement that was not appropriate for our vulnerable client. We attempted without any success to negotiate the deed directly with the lawyers, but as they were a well known firm of black letter lawyers, they refused to make any amendments to the deed. We had considered taking this issue to AFCA, however, we were able to escalate the matter within the lender's IDR team, using CCLSWA's contact within the lender's organisation. The contact was able to instruct the lawyers to make changes, to obtain an appropriate deed that we were comfortable with our client signing.

C993977

CCLSWA acted for a consumer with a complaint against a lender at AFCA. The complaint progressed to conciliation in September 2019. Our elderly, vulnerable client attended our offices so that she could be present for the conciliation and be available to come to a resolution.

At the end of the conciliation, after our client had put forward what she considered to be an appropriate resolution, the lender's representative informed us that she did not have the authority to agree to any resolution at this stage and would have to refer it back to her superiors.

Our client left our office extremely distressed that the matter had not been resolved. When we spoke with her the following day she said she was "not good". She was disappointed that the lender's representative did not have authority to resolve the matter during the call. At the conclusion of the conciliation she felt physically sick. She told us is scared of "being put out on the street" at 80 years old.

3. Conclusion

3.1. Ultimately we believe that the IDR guidance in RG 165 is intended to achieve the best outcome for the consumer and ensure fair, fast and effective outcomes at the IDR stage.

3.2. CCLSWA is grateful for the opportunity to provide input to CP 311.

3.3. CCLSWA would be happy to be of assistance in providing further information or details 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