Consumer Credit Law Centre SA

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Submission to Australian Securities Investment Commission
CONSULTATION PAPER 311
Internal Dispute Resolution: Update to RG 165

1. Background to Consumer Credit Law Centre SA (CCLCSA)

This submission is in response to Consultation Paper 311 (CP 311) seeking feedback on the draft updated Regulatory Guide 165 *Internal dispute resolution* (draft updated RG 165). The submission is based on the Consumer Credit Law Centre SA's (CCLCSA) experience advising consumers who have used Internal Dispute Resolution (IDR) processes to complain to a financial firm.

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.

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.

Uniting Communities, through the CCLCSA, is particularly interested in ASIC's proposal to update RG 165 due to our extensive involvement in the provision of financial counselling and ongoing advocacy on a raft of measures associated with financial matters, financial stress, and financial hardship for low and modest income households. Our particular focus is providing support to low income and disadvantaged households.

The CCLCSA fully supports improving standards and requirements for IDR systems of financial firms to:

- Adopt the definition of *'complaint'* as provided under AS/NZS 10002:2014;
- Record all complaints received, including complaints resolved immediately at the first point of contact;
- Record a unique identifier and prescribed complaints data for each complaint received;
- Report IDR data to ASIC;
- Provide enough detail in IDR responses that satisfy minimum content requirements;
- Provide IDR responses to complainants within reduced maximum IDR timeframes; and
- Identify and escalate possible systemic issues in accordance with ASIC requirements.

The CCLCSA's view is that the above proposals will

- Decrease the number of consumers who abandon their complaint against a financial firm;
- Decrease consumer dissatisfaction; and
- Assist consumers to access fair and timely outcomes.

The CCLCSA welcomes improving access to transparent, fair and timely complaints processes for consumers. However, the CCLCSA notes that not all consumers with disputes against financial firms are able to access fair IDR processes compliant with the requirements set out in Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165). This is due to the fact that not all financial firms are required to hold a license, AFCA membership or be subject to following the standards and requirements for IDR processes.

The CCLCSA assists clients with disputes against financial firms operating in a regulatory 'black hole' who are not required to hold a license or follow any standards to manage complaints. Some of these firms include:

- Debt management firms;
- Entities exploiting the short-term credit exemption in the National Consumer Credit Protection Act 2010 (Cth);
- Buy now pay later providers; and
- Pawn brokers.

Consumers are not only excluded from escalating their complaint to AFCA, but also face dealing with firms with non-existent dispute resolution processes; or inadequate dispute resolution processes that fall significantly short of IDR standards and requirements made or approved by ASIC. The CCLCSA is of the view that the poor and unsatisfactory dispute resolution processes produce unfair outcomes and significant detriment to consumers.

The CCLCSA encourages ASIC and the government to intervene by utilising product intervention powers and introducing amending legislation to require these firms to hold a license, hold membership with EDR and comply with IDR processes set out in RG 165. Further, the CCLCSA advocates for law reform to implement regulation to require all financial firms to comply with national credit laws such as responsible lending obligations and a duty to act in the best interest of a debtor.

Case Study 1

Dylan, who had recently separated from his wife and son, was made redundant and was receiving Newstart Allowance. He entered two small amount credit contracts as he was desperate to see his son and wanted to keep making child support payments to appease his former wife in order so that he could still have contact with his child. Dylan then applied for a third pay day loan but was declined by the pay day lenders that he had previously borrowed money from. Unbeknownst to Dylan, the small amount credit providers most likely declined Dylan's application on the basis of the rebuttable presumption that, as he already had two payday loans in the preceding ninety days, he could not meet repayments without substantial hardship.

Dylan ended up applying for and obtaining another loan that he believed was an ordinary pay day loan. However, the lender was in fact an entity purporting to rely on the short-term credit exemption and an associate entity 'X' offering a collateral service to 'fast track' the application process.

Dylan received a sum of $350.00 credit from the lender. Within 49 days, the balance had more than tripled to $1171.00.

Dylan was not able to afford the first repayment. He asked for hardship assistance and was charged $20.00 to change the payment date. After he failed to make two repayments, Dylan noticed that X had changed the date of processing the direct debit; the third repayment date had been brought forward one day without notice to him. Dylan did not have adequate funds and was charged $30.00 Payment Reschedule Fee and a $49.00 Dishonour Fee. Dylan also incurred direct debit dishonour payments from his bank.

Concerned at how rapidly the debt was growing and the changing payment dates, Dylan contacted Internal Dispute Resolution (IDR) for X and outlined his complaint. Dylan felt stressed when he realised he would never have capacity to make the repayments. He was unable to meet the demands of X without not paying rent and risking eviction.

However, while Dylan was awaiting a response from IDR, he continued to be contacted by the collections section of X, who continued to demand that Dylan make payments and to process direct debits from his account.

The response from IDR was that a full review for affordability had been undertaken and that he was only approved for an amount that was deemed to be repayable based on his income and expenditure. X then referred Dylan to the terms of the contract that stated he agreed he was of sound mind and judgement to make decisions regarding his finances. X presented Dylan an offer to settle the dispute for $512.00 but Dylan made a counter-offer to settle the dispute for the sum of money borrowed.

Dylan did not hear back from IDR regarding his counter offer.

X collections continued to contact Dylan threatening to forward the debt to an external collections agency if he did not make payment within three days. X then contacted him and said they would either accept payment for the full outstanding amount of $1171.00 in lowered repayment amounts or alternatively accept a reduced amount of $820.00 if he made four weekly payments of $205.00. Dylan asked whether the response from collections was a response to his earlier counter-offer email to IDR. Later that same day, IDR sent an email offering to settle the dispute for $512.00.

Two days later, X sent an email advising that his account had been forwarded to an external collection agency, Ilion and Milton Graham.

Dylan reported that the contact from X was confusing, unprofessional and that he felt harassed.

Dylan also felt he had been tricked as he did not realise that X were different to a regulated small amount credit contract provider and was shocked at the very high-cost of credit.

Dylan then received weekly emails from other online lenders. When he applied for other loans, he was declined. However, the decline emails directed him to an online business that he believed used the same phone number as X.

This is an example of a poor IDR process and the black hole that these firms operate within. If there was regulation, Dylan would not have received contact from collections and his complaint may have been addressed properly and efficiently.

Case Study 2

Joan was served with a Summons for a Possession Order under the Real Property Act 1886 (SA). Joan was afraid of losing her home. She was contacted by 'Z', a company purporting to sell debt-management services. They told her that they would assist her to take

control of the legal situation and help her keep her home. She entered into an agreement with Z for them to provide these services for several thousand dollars.

Joan was then referred by Z to AFCA to stay the legal enforcement process. However, it then became apparent that Joan was not entitled to further hardship and that she was unable to obtain refinance. This meant that Joan had to negotiate sale of her property with her lender.

Joan used a free financial counsellor to assist with negotiating an agreement with her lender for Joan to be given the opportunity to sell her property herself. Joan then received an invoice from Z to pay several thousand dollars despite Z providing limited and inappropriate assistance to her.

Joan was already experiencing financial stress and did not have capacity to pay Z. Further, interest continued to accrue on Joan's loan account leading Joan to be put in a worse overall financial position. Joan wanted to dispute the agreement with Z. When she contacted Z, there was no IDR process. She was told by Z that her only option was to pay the account or else Z would legally recover the debt.

When Joan sought legal advice, she was told that she had legal grounds to dispute the agreement with Z. However, as Z did not hold a license or membership with AFCA, she was advised that she would need to file proceedings at court. Joan was busy trying to sell her home and did not have the money to engage a private solicitor.

If Z was required to follow the standards and requirements for IDR processes and Joan could escalate the dispute to AFCA, she would more likely get a fair outcome without needing to engage a solicitor/pro bono legal service.

The CCLCSA also notes that the draft updated RG 165.11 does not define which core IDR requirements will be subject to a legislative instrument and will be enforceable.

2. Feedback on list of proposals and questions

The CCLCSA provides the following feedback on selected questions outlined on pages 36 to 40 of CP 311.

B1 Q1 Do you consider that complaints made through social media channels should be dealt with under IDR processes?

Yes. Consumers are encouraged to utilise digital technologies to interact with their financial firm. Research shows that social media is being used by many consumers as a preferred mode of communication for customer service interactions with organisations. Therefore, it should be expected that consumers will also use digital technologies such as social media platforms to express dissatisfaction to, or about a financial firm, relating to its products, services, staff or the handling of a complaint.

The definition of complaint under Australian Standard AS/NZS 10002:2014 which includes expressions of dissatisfaction made 'about' a financial firm, means that complaints made on social media platforms - where a complainant more often than not is implicitly expecting a response - should be dealt with through the firm's IDR process.

B2 Q1 Do you consider the guidance in draft updated RG 165 on the definition of 'complaint' will assist financial firms to accurately identify complaints?

Yes. The CCLCSA considers that guidance provided in the draft updated RG 165 on the definition of 'complaint' will assist financial firms to better identify complaints. In particular, the CCLCSA is supportive of the provision of clear guidance that a complaint should not be described as 'feedback', an 'inquiry' or 'comment' where a firm does not consider the matter to have any merit, or when the dissatisfaction has been made verbally.

Consumers should not be required to use the term 'complaint' or 'internal dispute resolution' to trigger the IDR process. The CCLCSA receives numerous complaints from consumers who report of verbally expressing dissatisfaction to their financial firm but are never referred to IDR because their dissatisfaction was not recognised as a 'complaint' in the first instance. This often happens when a consumer makes a complaint to branch staff or to a smaller firm. The CCLCSA regularly assists clients who have already tried to make a complaint to their financial firm, but have required assistance using the express terms 'dispute', 'internal dispute resolution' or 'complaints team' in order for the firm to recognise that the consumer is making a complaint. This suggests that many firms require a consumer to expressly use the word 'complaint' or 'dispute' to trigger any IDR process.

The CCLCSA supports the provision of clear guidance that a consumer is not required to expressly state the word 'complaint' or to put their complaint in writing in order to trigger IDR processes.

B2 Q2 Is any additional guidance required about the definition of 'complaint'?

The CCLCSA refers to draft updated RG 165.35 (b) and seeks better clarity about 'simple requests for information'. In particular, that a request for a copy of a credit contract, credit assessment and/or loan application should not be excluded from the IDR process.

B4 Q1 Do you agree that firms should record all complaints they receive?

Yes. The CCLCSA supports draft updated RG 165.57 that financial firms must record all complaints they receive, including complaints resolved immediately and/or by frontline staff.

The CCLCSA supports strengthening data integrity and consistent reporting approaches through the removal of the discretion to record complaints resolved within five business days.

B5 Q1 Do you agree that financial firms should assign a unique identifier, which cannot be reused, to each complaint received?

Yes. Unique identifiers will assist to keep track of complaints and assist ASIC to identify problems.

B5 Q2 Do you consider that the data set proposed in the data dictionary is appropriate?

The CCLCSA notes the importance of ASIC to track the end-to-end lifecycle of complaints. The CCLCSA supports setting minimum requirements for the collection of complaints data and broader dataset that can be used by ASIC to target ongoing surveillance and enforcement activities.

However, the CCLCSA notes that a vast majority of consumers abandon their disputes because of complaint fatigue and in order to capture accurate data of unresolved complaints, 'withdrawn' complaints should be limited to only those that have been actively withdrawn. Further, when a financial firm has not received a response back from the complainant, this should not be recorded as 'withdrawn'.

The CCLCSA expresses concerns that data collection may not report on the fairness of outcomes reached for resolved complaints. The CCLCSA would encourage recording data that would enable examination as to the fairness of outcomes for complaints resolved through IDR. The CCLCSA suggests that data collected under data element 'complaint outcome' includes an independent qualitative assessment as to whether the outcome produced a substantively fair result for the consumer.

B8 Q1 Do you agree with our minimum content requirements for IDR responses?

The CCLCSA strongly supports the proposals in draft updated RG 165.74 – RG 165.77 to set out minimum requirements for the content of IDR responses.

Identifying and addressing all the issues raised in the complaint

The CCLCSA assists clients who have received IDR responses that do not properly address all of the issues identified and raised in their complaints. For example, a consumer might receive an IDR response dealing with a review of a decision to decline hardship when the consumer had also raised questions about the loan being unsuitable.

Setting out the financial firms' finding on material questions of fact and referring to information that supports those findings

The CCLCSA's experience is that a consumer is often not provided with information supporting findings of facts until the dispute is investigated by AFCA. If the firm was required to refer to information supporting findings of fact, this would better inform

and assist a consumer to assess the merit of their complaint and to work out what next steps they should take.

Providing 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.

The CCLCSA receives a number of enquiries from consumers who have not received clear and sufficiently detailed reasons from a financial firm with respect to IDR. These poor quality IDR responses make it difficult for consumers to assess the merits of their complaint. This in turn makes it hard for a consumer to assess the reasonableness of any offer made to them and the merit of escalating their dispute to AFCA. A consumer will then often have to speculate as to the reason/s that the complaint was rejected. If consumers are provided clear and adequate reasons for the IDR response, they will be better informed about the merit of their complaint which would in turn assist them to determine what to do next. This will lead to less complaints that lack merit being escalated to AFCA, which in turn will save the complainant, the financial firm and AFCA considerable time and expense.

B11 Q1 Do you agree with our proposals to reduce the IDR maximum timeframes?

The CCLCSA supports the proposal 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) from 45 days to 30 days; and
- Introduce a requirement that financial firms can issue IDR delay notifications in exceptional circumstances only.

The CCLCSA agrees that the current 45 day timeframe is too long, particularly when the financial firm is given another 21 days to resolve the complaint if it is referred back by AFCA. The CCLCSA receives a number of enquiries from distressed and exhausted consumers waiting for an IDR response. The CCLCSA agrees that reduced timeframes will lead to fewer complainants being abandoned.

Case study 3

Alan contacted the CCLCSA as he had made a complaint to IDR more than one calendar month ago and had not yet received a response. Alan thought that as he had not heard back from the financial firm, that the financial firm had rejected his complaint. The CCLCSA advised Alan that the financial firm had 45 days to provide an IDR response. Alan felt distressed that he had to wait so long for a response and mistakenly believed that the lengthy amount of time that had already passed meant that the financial firm was not intending to address his complaint.

The CCLCSA receives a number of calls from consumers who have not received a final IDR response, but believe that the financial firm has rejected their complaint. Consumers sometimes form the belief that their complaint has been rejected on the basis that they have not received a response from IDR within a reasonable time. The CCLCSA supports reducing the maximum timeframes so that consumers do not abandon their complaints after the exhaustion of waiting for an IDR response.

The CCLCSA refers to draft updated RG 165.181 and the maximum timeframe for IDR responses or IDR delay notification relating to credit-related complaints involving hardship notices or requests to postpone enforcement proceedings. The CCLCSA is of the view that if a creditor provider or lessor does not have sufficient information about a hardship notice to make a decision, that they must request the information no later than 5 business days after receiving the complaint (as opposed to the current 21 days). The CCLCSA advocates that section 72(2) of the National Credit Code (NCC) should be amended to require credit providers to adhere to this. The CCLCSA believes the complainant should retain the same timeframe to provide the requested information as set out in section 72 of the NCC. This change will avoid protracting IDR processes for hardship complaints which are often need to be addressed urgently.