



**Submission by the
Financial Rights Legal Centre**

Civil Justice Project Team

Justice for everyday problems: Civil
Justice in NSW, A consultation paper,
December 2016

February 2017

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2015/2016 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

For Financial Rights Legal Centre submissions and publications go to www.financialrights.org.au/submission/ or www.financialrights.org.au/publication/

Or sign up to our E-flyer at www.financialrights.org.au

National Debt Helpline 1800 007 007
Insurance Law Service 1300 663 464
Aboriginal Advice Service 1800 808 488

Monday – Friday 9.30am-4.30pm

Introduction

Thank you for the opportunity to comment on the Civil Justice Consultation Paper. The Financial Rights Legal Centre (**Financial Rights**) recognises that most questions in this consultation paper are largely directed at general consumers, we have developed this submission to provide our insights from guiding consumers through the NSW civil justice system as well as our extensive work in financial and legal literacy.

List of Recommendations

- The Financial Rights Legal Centre supports the development (and testing) of any measures that will assist to help prevent problems before they arise. New digital tools should be tested with behavioural insights in mind as pre-decision intervention can be very challenging.
- The development of any new digital tools must include a promotion strategy for competing with for-profit services online.
- Law Access should have the capacity to be a primary entry point for legal assistance in NSW as well as triage and refer clients to legal assistance services as required, and to co-ordinate the development and dissemination of legal information with information providers, including other government agencies and community legal centres.
- Financial Rights does not support expanding Law Access's legal advice role, nor do we support Law Access being funded to develop new legal content.
- The use of technology must always be accompanied by other strategies to overcome barriers that people face in accessing the justice system.
- The promotion of legal information should be done at the time when a legal dispute might be triggered (for example when legal action is commenced by someone's Strata or local council) as most people don't need to know and aren't going to remember legal resource information until they actually have a legal problem.
- Financial Rights recommends that NSW Justice consider the full and frank case study "Below the Belt" produced by Victoria Legal Aid to fully appreciate the problems that can arise in the production and distribution of an App.
- Any new online smart technologies or self-help programs should be developed by organisations that give advice and do casework such as Community Legal Centres and Legal Aid NSW.
- Debtors in NSW should be more consistently informed of their legal right to lodge their dispute in a free external dispute resolution service (ombudsman) instead of Court. In particular debtors should be referred to ombudsman schemes by the Courts when they lodge their defence or make an application to pay by instalments.

- The Financial Rights Legal Centre strongly supports the establishment of a national Retail Ombudsman as an alternative dispute resolution mechanism to hear and help resolve consumer complaints.
- Pawnbrokers should be required to be a member of EDR
- The NCAT jurisdiction should be made clearer as to the right of pawnbroking clients to seek orders to vary or set aside a pawn for non-compliance with Pawn Broking and Second Hand Dealers legislation.
- The Financial Rights Legal Centre supports the development of a national justice fund to provide consumers access to financial support and legal assistance. We also support a cap on adverse cost orders to ensure meritorious claims get a fair hearing.
- NCAT should relax restrictions on parties being represented by a solicitor, particularly in cases where an individual applicant is up against a business that is familiar with the NCAT jurisdiction or is represented by a solicitor. We suggest that NCAT could publish guidelines setting out when it will allow representation.
- TAAP services and the Tenants' Union of NSW should be properly and sustainably funded beyond the current funding which ends in June 2016.

1. Avoiding common problems

1. What would you like to know before making a financial commitment, such as buying something online, signing a phone contract or getting a plumber?

2. Would you use a pre-decision or pre-purchase checklist?

3. How could we better use data and technology to make sure you get information before problems occur?

4. What information would you find useful or wish you had known before you committed to something?

Financial Rights supports the development (and consumer testing) of any measures that will assist to help prevent problems before they arise. This includes the direct provision of information before a purchase decision, as well as increased consumer and (in our case) financial literacy measures generally.

However, this is far from easy to implement and may not be as simple as providing a pre-decision checklist. We provide the following example to help illustrate the problems that can arise.

Australia has seen a significant increase in the uptake of small amount credit contracts or pay day loans. A payday loan is probably one of the worst decisions someone can make and can have long lasting negative effects on their financial well-being. They used to be accessed via retail shop fronts or over the phone but consumers are now more and more accessing them online. In 2005 nobody used online channels to access a pay day loan. That rose to 68.8

percent of all pay day loans in 2015.¹ Combine this ease of access with the rise of TV and radio advertising aimed at new markets, and aggressive online marketing strategies, obtaining a pay day loan is becoming an increasingly normalised consumer purchase.

Intervening to provide a checklist or guidance in this process is however particularly difficult. Google “quick credit” or “debt help” a consumer is bombarded with hundreds of pay day loan ads that make obtaining a pay day loan a simple, quick and seemingly benign process. Decisions here can be sometimes made in a matter of seconds. Providing consumers with the tools they need to make a balanced and reasonable decision is almost impossible when it can be made in almost a click. Even if these businesses choose to provide appropriately balanced information or are forced by regulation to do so, this important and useful information can simply be ignored by a consumer desperate to access money just as easily as we all ignore an iTunes terms and conditions update notice.

Having said that the example detailed further below regarding the requirement to provide a standard form notice under section 88 of the National Credit Code, provides an example where timely intervention can have a positive impact. The difference between this example and information being provided pre-decision or pre-purchase however is that that people receiving a standard form notice are at a point where there is a problem and are eager to find advice and a solution, whereas many are willing to ignore appropriate advice at time of purchase or decision, ie before a problem has arisen.

Nevertheless, we strongly believe there is value in examining ways to provide consumers with information to better inform them of the pros and cons, dos and don'ts of a purchase, and that this be provided prior to a decision. However this needs to be done in a way that takes into account consumer behaviours, motivations and values.

While in an ideal world these should be consumer tested with behavioural insights at the forefront (not simply giving consumers what they report they want) we believe that the need to test has sometimes been put forward by industry as an easy excuse to delay implementation of a particular intervention. If interventions are proposed we believe there are many circumstances where it is appropriate that they be implemented as a form of beta testing in the real world.

Recommendation

The Financial Rights Legal Centre supports the development (and testing) of any measures that will assist to help prevent problems before they arise. New digital tools should be tested with behavioural insights in mind as pre-decision intervention can be very challenging.

¹ *The Stressed Finance Landscape Data Analysis: A report by Digital Finance Analytics and Monash University Centre for Commercial Law and Regulatory Studies (CLARS) OCTOBER 2015*
<http://financialrights.org.au/wp-content/uploads/2015/10/The-Stressed-Financial-Landscape-Data-Analysis-DFA2.pdf>, Pg 13

Dealing with problems early

5. Have you tried to find information about an everyday problem? What was the problem and what information did you find useful?

From our experience Financial Rights knows that early access to financial counselling and legal advice supports consumers' engagement with legal problems in a variety of ways. However, we know that many people simply never find their way to a free financial counsellor or free legal service, instead turning to for-profit and non-legal sources for advice.

In the online space competition between for-profit financial and quasi-financial services is fierce. For free not-for-profit services like the Financial Rights Legal Centre, it is almost impossible to compete with for-profit companies in a browser search. For example, a Google search for 'debt help' brings up 15 results (including ads), 12 of which are links to for-profit companies.

Consumer advocates have observed an explosion in recent years of firms that provide quasi-financial service "solutions" to consumers in financial distress. Debt management firms can be categorised into four groups: debt negotiation, credit repair, Part IX debt agreement brokers, and personal budgeting services.

These businesses have a number of common elements, including:

- Targeting consumers experiencing financial stress, particularly low-income Australians;
- Failing to provide clear explanations of fees and charges during initial contact by consumers;
- Charging high up-front and ongoing fees for 'services';
- Suggesting high cost 'solutions' to debt problems that are not in the consumer's best interests, potentially leaving them in a worse financial position than before- even when there is a free dispute resolution service available to the consumer.

The lack of regulation in this sector is having a detrimental impact on people with debts or concerns about their creditworthiness. Debt Management Firms are almost always accessed by consumers online. This means that any promotion of new financial-related digital tools developed in NSW will be in direct competition with the plethora of Debt Management Firms now operating in that space.

Recommendation

The development of any new digital tools must include a promotion strategy for competing with for-profit services online.

6. What do you think of a network of trusted sources you can rely on?

In August 2016 the Victorian Government released a report on Access to Justice in its state. One of the recommendations in that report was to create a 'system manager' to have a co-ordination and oversight role across publicly funded legal information.

*"Stronger governance mechanisms would help to support more co-ordinated, integrated and accountable legal assistance services to the Victorian community, and enhance overall efficiency. Stronger governance would help the sector to transition to a co-ordinated system of legal assistance."*²

Like in Victoria, in New South Wales there is no entity that is currently responsible for central oversight of the quality and consistency of publicly funded legal information; nor is there a central agency whose task it is to review and track the available information, identify gaps and duplication, and facilitate further co-ordination of materials and information-sharing.

In NSW, Law Access could provide a co-ordinating role for publicly funded legal information, as well as being a single access point for a network of trusted legal assistance sources. While Financial Rights does not support expanding Law Access's legal advice role, we do believe they make an effective primary entry point for legal assistance NSW. We would support expanding their capacity to:

- minimise duplication and gaps in legal information materials available in NSW;
- co-ordinate the development and dissemination of legal information materials across NSW, including specialised materials that are created by community legal centres to meet their communities' needs;
- foster the development of legal information materials meet best practice and accessibility standards, including the provision of materials in plain-language, Easy English, and languages other than English; and
- track the quality, consistency, and currency of legal information materials, and develop strategies to promote standards.

Law Access should have the capacity to triage and refer clients to legal assistance services as required, and to co-ordinate the development and dissemination of legal information with information providers, including other government agencies and community legal centres.

However, we would not expect Law Access to be the only entry point. Law Access should not be developing or duplicating content in areas where others already have specialist expertise and they should not detract from the capacity of community legal centres to recognise legal information needs and develop meaningful resources and face-to-face education targeted to

²Access To Justice Review Summary Report, Victorian Government, August 2016 : https://myviews.justice.vic.gov.au/application/files/4914/7554/7775/Access_to_Justice_Review_-_Summary_and_recommendations.PDF; page 9

their communities. Rather, a primary entry point would enable better harnessing of such resources for use across NSW.³

Recommendation

Law Access should have the capacity to be a primary entry point for legal assistance in NSW as well as triage and refer clients to legal assistance services as required, and to co-ordinate the development and dissemination of legal information with information providers, including other government agencies and community legal centres.

Financial Rights does not support expanding Law Access's legal advice role, nor do we support Law Access being funded to develop new legal content.

7. What do you think of creating an online platform that can provide information and simple tools to help solve common problems? What features or services would you want it to have that would help you get the information you need?

Financial Rights supports the use of online information and problem solving platforms for those people in NSW that are able to self-advocate. We have several such resources on our own websites, including two new interactive legal problem solving programs.

However, it is important to note that while greater use of contemporary technology can overcome some of the barriers that are currently preventing some people from resolving their everyday legal problems, not all members of the NSW community – for example, some people with disabilities or people without the means to obtain or access electronic devices – can use online technologies. The use of technology must always be accompanied by other strategies to overcome barriers that people face in accessing the justice system.

Financial Rights supports the Recommendation made by CLCNSW in its submission to this consultation to fund a new Digital Access Platform Service (DAPS). DAPS would give vulnerable people supported access to online legal information and dispute resolution services and tools. This service would be guided by CLC staff and volunteers who understand the legal processes, the client's needs, the dispute resolution tools and can provide legal advice.

Our experience of developing and promoting tools such as fact sheets and sample letters also suggests that users of such tools often require advice from a person with knowledge and experience also at some point in the problem solving process to provide practical guidance and strategy.

The Victorian Access to Justice Review has also recently recognised the need to maintain some offline resources:

³ Access To Justice Review Summary Report, Victorian Government, August 2016 : https://myviews.justice.vic.gov.au/application/files/4914/7554/7775/Access_to_Justice_Review_-_Summary_and_recommendations.PDF; Page 14

Legal information is increasingly provided online and that an online format can improve accessibility and convenience for Victorians who have the capacity to deal with their legal problems independently. However, for others, such as those who have low levels of English literacy, limited access to the internet, an inability to identify that a problem has legal implications, or a lack of confidence to take action, different kinds of legal support are required. Such supports include legal information materials specific to their needs, and face-to-face legal assistance services.⁴

Recommendation

The use of technology must always be accompanied by other strategies to overcome barriers that people face in accessing the justice system.

8. How else could we help you get the right information when you need it? Could smartphone apps or other technologies play a role?

9. Is there more that can be done to improve awareness and promote the availability of legal information?

Getting the Timing Right

The most important time to promote the availability of legal information is at the point in time when someone needs it the most. For example, there is a single national number for financial counselling in Australia and it gets promoted to debtors when they need it. If a debtor defaults on a credit contract, the creditor cannot enforce their rights under the contract before they provide a standard form notice under section 88 of the National Credit Code. Among other things, this notice includes the following:

If you are having financial difficulties you can also contact a financial counsellor on 1800 007 007 (free call)

*For information about your options for managing your debts, ring 1 800 007 007 from anywhere in Australia to talk to a free and independent financial counsellor.*⁵

Financial Rights Legal Centre is the NSW answer point for the above number. In 2009 prior to the mid-2010 commencement of the above legislative requirement we received 297 referrals directly from creditors and 560 from LawAccess. In 2016 we received 4,628 referrals from creditors via both default notices and other creditor initiated correspondence targeting people

⁴ Access To Justice Review Summary Report, Victorian Government, August 2016: https://myviews.justice.vic.gov.au/application/files/4914/7554/7775/Access_to_Justice_Review_-_Summary_and_recommendations.PDF; Page 13

⁵ See Form 12A, National Consumer Credit Protection Regulations 2010.

who are struggling with their payments and 662 from LawAccess.⁶ This shows the remarkable impact of timely information.

We note that the trigger of debt collection proceedings in the local court is such a critical one for informing people about the availability of legal information that we are once again in fierce competition with Debt Management Firms (see our answer to Question 5 above). People in severe financial distress are being actively targeted at this critical time. There are publicly available lists of people sued for debts but who don't attend court to defend themselves, resulting in default judgments in favour of the creditors. Debt Management Firms commonly obtain these lists and use them to target their marketing. One debtor we know of received 15 letters in a week after having a default judgment entered against him.

Insurers and other financial service providers are required to tell people about the availability of free external dispute resolution (ombudsman services) at the point of refusing to uphold a complaint. This requirement also commenced in 2010. Many of those consumers are then referred to other services such as Financial Rights for advice about, or assistance with, lodging their complaint. Referrals from the Financial Ombudsman Service to Financial Rights have also increased dramatically in this period from 127 in 2009 to 3,682 in 2016.

People don't need to know and aren't going to remember legal resource information until they actually have a legal problem. It is important to think about which forms of communication might trigger a legal dispute, because those communications could include information about where to find help. Good examples of such an opportunity in NSW might be when a person gets notice that legal action is being commenced by their Strata over unpaid dues or by their local council over land rates arrears. Information about legal resources could also be required in a Pawnbroker's *Notice of rights and obligations of person pawning goods*.

Recommendation

The promotion of legal information should be done at the time when a legal dispute might be triggered (for example when legal action is commenced by someone's Strata or local council) as most people don't need to know and aren't going to remember legal resource information until they actually have a legal problem.

Developing Apps

We would also warn against the headlong rush to make an App to solve the world's problems. While Apps can be very useful and are potentially accessible by every person, there are a number of cons and hurdles that need to be taken into account when considering the development of an app in the legal advice/consumer protection space.

Firstly there are basic technical and subsequent resourcing issues. An app needs to be developed for multiple platforms (Android, iPhone etc) and be constantly updated in response

⁶ Referrals from LawAccess increased to 1,357 in 2010 in the wake of the GFC and then slowly reduced to the current level over the intervening years.

to inherent platform updates and requirements as well as the development of new unforeseen platforms. If not updated they can become unusable within weeks. It also goes without saying that given the nature of legal and consumer information the content needs regular updating. App are ongoing projects not one-off stand-alone solutions.

There is however a more important issue which, in short, is overcoming the “if you build it they will come” assumption. Victoria Legal Aid found this out with the development of their Below the Belt app aimed at providing legal information in an accessible form for young people. They stated in their evaluation of project that:

“Inherent was the assumption that young people would be motivated to independently download an app to address pre-emptively legal issues to do with sex, sexting and bullying. Research, including some research released after the app was launched, indicates that many young people lack legal capacity to independently problem-solve their legal issues and that young people would prefer to turn to a friend or trusted adult or simply Google for information. Young people primarily engage with apps as an entertainment tool – apps consequently have a strong existing association with entertainment and not with education or problem-solving real-life issues.”

A good marketing campaign may assist to spread the word but this may not overcome the inherent reluctance to reach for an App to solve a problem. Even if it does there remains limited marketing expertise in the legal sector and a significant lack of funds and other resources to implement effective campaigns.

While this is not an argument to not develop Apps and other technological solutions to improve access to justice, it is a note to ensure that if an App is to be developed, promoted and implemented that it be done with full consideration of the needs and wants of consumers, with behavioural studies, insights and lessons from previous and current approaches taken into account

Financial Rights recommends that NSW Justice consider the full and frank case study “Below the Belt” produced by Victoria Legal Aid to fully appreciate the problems that can arise in the production and distribution of an App. In considering what they would do differently Victoria Legal Aid stated:

“Determine the value proposition for the client. Any new product or service needs a strong value proposition for its client. What is in it for them? To better arrive at strong value propositions CLE would follow a line of enquiry that looks like this:

- *identify the issue the client is facing*
- *confirm if education is a solution*
- *scope options, including viability of options*
- *test options and assumptions*
- *decide on an option or decide not to proceed with any options”*

Recommendation

Financial Rights recommends that NSW Justice consider the full and frank case study “Below the Belt” produced by Victoria Legal Aid to fully appreciate the problems that can arise in the production and distribution of an App.

10. What do you think of using online tools that can help you take next steps, such as putting a complaint in writing? What other steps would you want an online tool to help you with?

The Financial Rights Legal Centre is about to launch two new resources designed to help consumers solve their own legal problems and take next steps. Both of these resources will be available for the public by the end of the financial year.

Sample Letter Generator

The first new legal resource is a dynamic sample letter generator. The Sample Letter Generator is aimed to assist consumers and community workers to create professional legal letters to send to financial service providers like banks, creditors and insurance companies. The tool is designed for consumers to use without assistance, and also for community workers to use with their clients. Some of the letters about credit, debt and banking are only applicable in NSW, but the insurance-related letters can be used all over Australia.

MVA Problem Solver

The second new resource has been designed to provide legal assistance and insurance information to people who have been involved in a motor vehicle accident (MVA). The MVA Problem Solver creates a central point of free and independent MVA insurance information and legal advice for Australian consumers. It has been designed to be

- consumer friendly, easy to read and easily accessible on any device;
- written in plain English with minimal legal jargon;
- interactive and a source of tailored legal information;
- shareable via Email, Facebook, Twitter or other social media;
- accessible (meeting level 2 of the Web Content Accessibility Guidelines (**WCAG**)); and
- the first port of call for those interested in advice with phone referrals embedded in the structure of the website as last resort.

Both of these new resources have been designed and programmed with ongoing evaluation in mind. Although we will not collect user data for privacy reasons, we will keep track of usage statistics and will allow user ratings and comments on the usefulness of these resources.

11. What do you think of using online smart technologies to help guide you and the other party to a resolution? When would you be most likely to use these?

Online smart technologies and self-help programs can be an excellent resource for people in NSW that are literate and able to effectively self-advocate. Financial Rights strongly believes that these programs should be developed by organisations that give advice and do case work. Caseworkers have the best understanding of how civil disputes actually get resolved in practice.

As discussed above, Law Access is well placed to be a primary entry point for referrals to legal information and assistance in NSW, but they are not well-placed to develop new online programs. Because workers at Law Access do not represent people in civil disputes they are not experienced with how civil disputes get resolved. Community legal centres and Legal Aid NSW are much better prepared to develop new smart technologies and online programs because of their extensive advice and casework experience.

Recommendation

Any new online smart technologies or self-help programs should be developed by organisations that give advice and do casework such as Community Legal Centres and Legal Aid NSW.

3. Getting help to solve a problem

12. Have you experienced problems trying to find the right advice or assistance to solve your problem? What were the barriers you faced?

13. What are the gaps in the advice and assistance services available in NSW?

Financial Rights believes that the following gaps exist in the advice and assistance services available in NSW

- Consumer law advice for non-financial/credit products
- Small business advice
- Retirement savings advice (for lower income elderly consumers who can't afford financial advice but have large sums of super money they don't know how to handle)
- Advice and assistance in the aftermath of poor financial advice – particularly where people have lost all their assets or are facing the repossession of their home as a result.

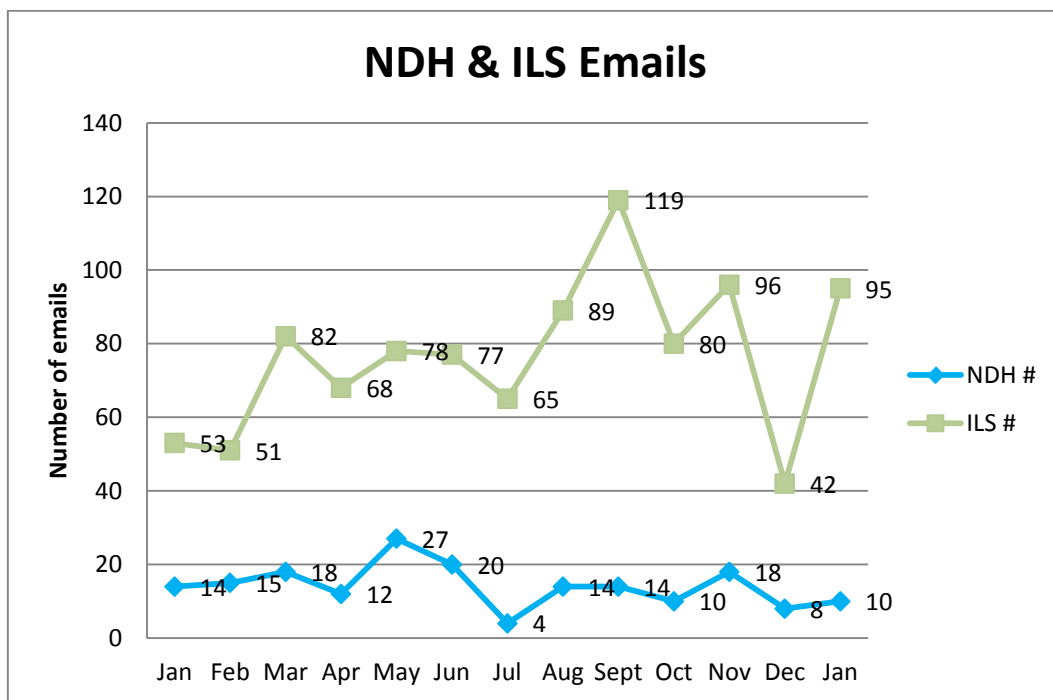
14. Have you had difficulty with the way the existing services are delivered (such as waiting times, no telephone or online access)?

Financial rights operates three advice lines:

1. We are the NSW answer point for the National Debt Helpline (**NDH**) (formerly known as the Credit and Debt Hotline in NSW)
2. We operate a national insurance law advice service (**ILS**)
3. We have recently piloted a national Aboriginal advice service for problems within our areas of expertise (**AAS**).

The first two lines are extremely busy with 27,736 and 19,576 calls respectively to them in the 2016 calendar year. For the NDH 62% answered live and another 15% captured by e-mail. For the ILS we could only answer 43% on average⁷ and could not provide a message service due to resourcing.

It is unclear how many unanswered calls are ultimately answered after trying again. In order to provide additional after hours access, and an alternative for people who are frustrated trying to get through on the phone, we provide e-mail enquiry forms. The graph below shows the take up of this option between January 2016 and January 2017.



We have long published fact sheets and sample letters to enhance the capacity for people to conduct their own advocacy. Fact sheets and online resources are developed in response to common issues that consumers face, for example, we may receive inquiries about one particular issue and so we will develop a fact sheet of that issue and publish it as it arises in response.

⁷ We have just received a one-off funding boost that will significantly increase our capacity to answer these calls for the next couple of years.

This is at least in part intended to take some pressure of our phone advice lines, allowing our staff to focus on more complex queries and more disadvantaged callers. We will be releasing the newer interactive tools covered above this financial year to provide more opportunities for self directed problem solving. Any strategic plan to address the gaps in civil justice for NSW residents should build on the efforts of specialist services like our rather than duplicate or compete with them.

15. Would you find a 24/7 web-chat advice service helpful?

Web-chat is well suited to some purposes and not for others. Web-chat has the capacity to provide some very basic information and guidance towards useful resources. It can be useful to introduce people to a service and mediate their further use through a different medium. It is not a very useful medium for providing legal advice or more complex financial counselling. We currently do not provide chat, but we have found that even using our quite detailed web-enquiry forms we have to contact people by phone more often than not to obtain further detail about their situation before we can provide accurate and meaningful advice.

16. What do you think of a warm-referral (“no wrong door”) approach to getting advice and assistance?

While this sounds ideal, there are a couple of practical impediments:

- a. There are many areas where free advice and assistance is simply not available. In such circumstances there is no right door. Too often people get flicked from service to service only to be spat out at the end more frustrated than they started.
- b. A busy service like Financial Rights cannot make warm referrals except in exceptional circumstances. For example, our staff are taking more than 100 calls per day on average; calling up other services and facilitating the client’s transfer would arguably halve the number of clients we can assist. This diminution in service levels is not justified as most callers are quite capable of making such calls themselves once pointed in the right direction (and sometimes told how to frame their approach). We do provide for facilitated warm referrals where the callers capacity or circumstances warrant it.

Despite these caveats, we support improvement in referrals. See particularly below in relation to access free dispute resolution.

17. What else would you find useful to help you get advice and assistance?

18. Are there circumstances in which it would be more helpful to get advice in person?

Sometimes it is easier for people to access advice in person (and to provide that advice). However, modern technology does enable more and more to be done over the phone and internet. Our service is able to receive and review documents by e-mail, view relevant documents on an insurer or lender’s website or lodge complaints online to ASIC or other regulators, and lodge disputes in an external dispute resolution service (such as the Financial Ombudsman Service or the Telecommunications Industry Ombudsman) while the person is on the phone.

19. What or where are the gaps in cheap and quick options for dispute resolution in NSW? (For example, is there a type of process or scheme you would like to use but isn't available? Are there types of problems that don't have quick and efficient options for resolution? Are there areas of NSW that could be better serviced?)

20. How can we improve awareness of the available options for informal dispute resolution?

As discussed above, it is important for people to get information about dispute resolution at the point of need. Including information about legal assistance and dispute resolution on late payment notices or insurance claim rejection letters gives people the information they need at the time when a dispute is often triggered.

As noted in the Consultation Paper, there are currently missed opportunities for NSW Courts and Tribunals to refer people to available dispute resolution options. This is particularly the case for NSW residents facing debt collection through the courts. Consumer credit debts (credit cards, personal loans etc.) are pursued in large tranches through the NSW Courts by debt collectors. Many affected debtors could potentially take advantage of their legal right to lodge their dispute in a free external dispute resolution service (ombudsman) instead, putting a stop on the legal proceedings until their matter had been rejected or decided by the scheme⁸. This option is available even if the debtor's only defence is that they are in financial hardship and want a reasonable time in which to pay. Sadly people are rarely alerted to this option by the Courts, even when they lodge their defence or an application to pay by instalments. In many cases they also get poor advice from other legal sources (both public and private) who are not aware of the available dispute resolution options. As there is a right door for these debtors, it is very sad to see them coming into contact with the civil justice system and still not finding it.

Recommendation

Debtors in NSW should be more consistently informed of their legal right to lodge their dispute in a free external dispute resolution service (ombudsman) instead of Court. In particular debtors should be referred to ombudsman schemes by the Courts when they lodge their defence or make an application to pay by instalments.

21. Are there any common problems that need an ombudsman-style scheme rather than having to take your case to a tribunal or court?

Retail Ombudsman

Financial Rights is strongly supportive of Australia establishing a Retail Ombudsman as an alternative dispute resolution mechanism to hear and help resolve consumer complaints. Financial Rights has extensive experience in working with the Financial Ombudsman Service, the Credit and Investment Ombudsman, the Telecommunications Industry Ombudsman and

⁸See the National Consumer Credit Protection Act 2009, ASIC Regulatory Guidance, and the Terms of Reference of the Financial Ombudsman Service and the Credit and Investments Ombudsman Service.

the Energy and Water Ombudsman NSW and we believe these services produce significant positive outcomes for consumers in terms of easy, low threshold access to alternative dispute resolution, resolution of issues and consumer satisfaction.

It is compulsory to join an external dispute resolution (EDR) scheme for Australian financial services. The model for a potential retail EDR scheme is the UK's Retail Ombudsman. The UK Retail Ombudsman is an industry ombudsman which began hearing complaints between consumers and retailers from 2 January 2015 relating to goods and/or services purchased either in stores or online.

However, the ombudsman does not have any legislative basis.⁹ Unlike FOS or the CIO it is an opt-in service with membership of the scheme voluntary and retailers pay for membership on a sliding scale. It is unclear whether this voluntary regime has led to haves and have-nots in terms of access to alternative dispute resolution and justice. In Financial Rights' view all retailers would ideally be members of the scheme.

Since September 2015, the Retail Ombudsman has introduced a "gold tick" scheme whereby members who undergo extra vetting by the Ombudsman and pay it an additional £100 annually,¹⁰ can display their enhanced accreditation status and be recognised as a 'trustworthy trader'. According to the ombudsman's website, the gold tick means that the trader:

*has terms and conditions of business that are legally compliant, fair and easy to understand, has a fair returns policy, has a fair complaints policy, their VAT status (if applicable) has been verified, as have their contact details, and a unique check of the trader's website has been carried out.*¹¹

The Retail Ombudsman service in the UK is free to consumers with the decision of the ombudsman only binding the member retailers who would be contractually obliged to comply with a decision. This is similar to the way FOS and CIO work in Australia.

To be eligible for assistance from the Retail Ombudsman, the aggrieved consumer must first have complained directly to the trader and given the trader eight weeks to reply, and, that complaint must have occurred in the preceding six months. If after eight weeks the dispute remains unresolved, the consumer can then seek assistance from the Ombudsman. The ombudsman's office will first attempt to settle the dispute through negotiation, then by making a recommendation (if negotiation fails), and finally by having the ombudsman make a decision which is binding on the trader. If the consumer disagrees with the determination, they may take the matter to court.¹²

⁹ The TRO is described on its website as 'a non-statutory organisation'. See: 'Terms of Reference and Membership Rules' dated 1 June 2015 at <https://www.theretailombudsman.org.uk/membership-terms-of-reference-and-rules/>

¹⁰ <http://www.pcr-online.biz/news/read/policing-pc-retail-is-the-retail-ombudsman-s-new-gold-tick-just-what-tech-shopsneed/036902>

¹¹ <https://www.theretailombudsman.org.uk/what-does-it-mean-to-be-retail-ombudsman-compliant/>

¹² <http://www.telegraph.co.uk/finance/personalfinance/11333939/New-Retail-Ombudsman-can-investigate-your-shopping-complaint-but-it-comes-with-a-catch.html>

Recommendation

The Financial Rights Legal Centre strongly supports the establishment of a national Retail Ombudsman as an alternative dispute resolution mechanism to hear and help resolve consumer complaints.

Pawnbrokers

Financial Rights regularly advises consumers who have entered into pawn contracts. The consumers are generally vulnerable. The legislation in respect of pawns is complicated. Consumers have limited consumer protections under the National Consumer Credit Protection Act 2009 (**NCCP**) in respect of hardship variations. However, the NCCP does not require a pawn broker to be a member of an EDR scheme. Consequently, consumers are seeking to challenge a pawn as being unconscionable or in breach of the Pawn Broking and Second Hand Dealers legislation are required to make applications to the very limited jurisdiction of NSW Civil and Administrative Tribunal (**NCAT**). The NCAT forms in respect of pawnbroking tend to focus more on the Tribunal's jurisdiction in respect of stolen goods, as opposed to the ability of the Tribunal to review that the contract and any extension of a pledge complies with the Act. Further, whether in the circumstances a pawn contract ought to be set aside on the basis of any unconscionability.

Recommendation

Pawnbrokers should be required to be a member of EDR. The NCAT jurisdiction should be made clearer as to the right of pawnbroking clients to seek orders to vary or set aside a pawn for non-compliance with Pawn Broking and Second Hand Dealers legislation.

22. How else could we ensure that you have access to quick and cheap options for dispute resolution?

23. What are the barriers you faced when you have been involved in a court or tribunal process?

Overly complex forms and procedures

Generally speaking, consumers report finding it difficult and overwhelming to bring claims before a court or a tribunal. In the first place, the issues consumers face can be difficult due to the natural complexity of the products or services that they are dealing with, for example, the Australian Consumer Law guarantee and warranties provisions or the jurisdiction of the NCAT over pawnbroking. They have a limited understanding of their rights and obligations and have limited experience, if any, of working within the court and tribunal system including what

evidence is required, who has the burden of proof, and what remedy they may be entitled to (rectification, damages etc). This is not helped by processes that are overly legalistic, bureaucratic and administratively complicated.

Financial Rights has found that compared to ombudsmen schemes the NCAT is more technical, legalistic and difficult to navigate for a consumer. Forms at NCAT are unnecessarily complex: references to subsections of acts and regulations, and legal jargon like 'natural person' will confuse even educated non-lawyers, and anyone with a literacy problem or who speaks English as a second language will find the form almost impossible to use. The NCAT website suggests that a litigant can simply write down his or her issues in a dot point list, list the important events, and gather documents, but Financial Rights has found that this has not been enough in practice. Litigants instead are asked to number each page, create an index and place all the documents in two identical folders. In addition, for small amount matters Financial Rights has anecdotal experience that consumers are encouraged by Tribunal Members to “not bother” with seeking recovery of small sums such as \$600.

Risk of adverse costs orders

Even when legally represented there are significant barriers to entry for consumers including cost, time, and significant imbalance of power and resources. Particularly noteworthy are the disincentives created by adverse costs orders. Financial Rights is currently experiencing significant reluctance from already financially vulnerable yet significantly harmed clients to enter into a class action against a financial service provider. This is understandable given what is at stake for our clients versus the resources of the financial service provider and the potential to escalate costs to the point where the cost benefit analysis makes little sense for individuals involved. While there may be formal equality between the parties, there are significant structural imbalances through an imbalance of resources that discourage meritorious litigation. In order to address some of the financial barriers that low-income court users face Financial Rights supports the development of a national justice fund similar in form to the Hong Kong Consumer Legal Action Fund – which provides consumers access to financial support and legal assistance – and the Victorian Law Aid scheme that assists in civil litigation.

Financial Rights also supports the capping of adverse costs orders. This would involve giving consumers claimants the ability to apply for the capping of costs orders to prevent the defendant from attaining an unfair advantage and discouraging otherwise meritorious litigation. A cap on adverse costs order would ensure that meritorious claims get a fair hearing when they would normally not proceed due to the clear risks involved for individuals and would have the benefit of ensuring that defendants do not strategically run up legal and court costs, leading to more efficient use of the courts.

Recommendation

The Financial Rights Legal Centre supports the development of a national justice fund to provide consumers access to financial support and legal assistance. We also support a cap on adverse cost orders to ensure meritorious claims get a fair hearing.

Legal representation at NCAT

Individuals are only allowed to be represented by an agent (for example, a lawyer) in 'exceptional circumstances' in the Civil Claims List.

We think it is reasonable for NCAT to prevent parties being legally represented to ensure NCAT is user-friendly, avoids excessive legalism and avoids creating power imbalances between parties who can afford representation and those who cannot. However, rules need to be flexible enough to allow legal representation where to do so would actually correct a power imbalance, or improve efficiency.

There is benefit to the efficiency of the legal system by clarifying grey areas of the law through NCAT hearings. Our clients at Financial Rights are made up of some of the most vulnerable members of the community who have a limited ability to put their case to an NCAT member. In some cases, allowing representation (where it would not otherwise compromise accessibility or fairness) may increase efficiency by reducing the length of a hearing and the need for NCAT itself to provide support for the applicant.

Consumer law disputes will frequently involve an inherent power imbalance between a relatively weaker (consumer) party and a stronger (business) party. In our experience as consumer advocates we have seen unrepresented consumers find themselves up against an opponent who, even if unrepresented, may have a far better understanding of the NCAT process, a more expert understanding of relevant facts and law, and are not intimidated by the forum in the way a first time applicant will be. Without assistance, our clients are likely to have none of those elements in their favour. In this case, legal representation may actually level the playing field.

By way of comparison, industry-based external dispute resolution schemes provide a more flexible approach to representation. They advise the parties that legal representation is not necessary. Because disputes are decided on the basis of information provided by the parties over the telephone and in writing and a hearing is not involved, the parties to a dispute are usually comfortable proceeding without legal representation. But legal representation is not prohibited. In fact, the Financial Ombudsman Service is even able to require a financial services provider to make a contribution to the legal costs of a consumer, although a cap of \$3,000 applies unless there are exceptional circumstances.

Recommendation

NCAT should relax restrictions on parties being represented by a solicitor, particularly in cases where an individual applicant is up against a business that is familiar with the NCAT jurisdiction or is represented by a solicitor. We suggest that NCAT could publish guidelines setting out when it will allow representation.

24. What are the gaps in services and information for you to represent yourself?

25. What do you think about online and virtual courts and tribunals?

Financial Rights supports further research and testing of whether online dispute resolution mechanisms could help increase access to NCAT for small civil claims.

However, there are more critical problems with the accessibility of NCAT that should be fixed before attention is diverted to expanding to online applications (see our answer to question one above).

In addition, it should never be compulsory for an applicant to make a claim online. As we discussed above, many people do not have reliable access to the internet, and many others will not be comfortable using the internet for this kind of thing. There should be no financial disadvantage if an applicant chooses to not apply online.

Other

We would like to take this opportunity to mention our support for the tenancy advice services available in NSW. The TAAP services not only function well but they are a critical and irreplaceable part of early dispute resolution services for tenants in NSW. Unlike NSW Fair Trading, the TAAP services and the Tenants Union provide tenants with independent and specialist advice and advocacy services.

While the Department of Fair Trading provides a very good service in relation to repairs, an independent, community based service which advocates for tenants, as opposed to a nonaligned mediator, is the best method of redressing the power imbalance that exists between many tenants and their landlords on a range of issues relating to tenancy law. Tenants can be from a variety of backgrounds, including those facing moderate to severe disadvantage, and are seeking to enforce basic rights in relation to access to shelter. Landlords on the other hand are enforcing property rights and should be expected to do so from their own resources.

In order to remain effective, these services need to be funded properly. Tenants' Advice and Advocacy Services provide one-on-one support and assistance to tenants in a way that no other services do. They do this in tenants' interests only, and they are the only services who assist tenants in hearings at the New South Wales Civil and Administrative Tribunal. The Tenants' Union of NSW also advocates for public interest tenancy issues in other venues including state and federal courts. Because of this, they are unique in their understanding of dispute resolution processes. This is important when giving information or advice to tenants about the various ways a dispute could be resolved. Well-advised tenants' make well-considered Tribunal applications, and are also aware of when matters can be better resolved outside of the Tribunal.

Recommendation

TAAP services and the Tenants' Union of NSW should be properly and sustainably funded beyond the current funding which ends in June 2016.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact the Financial Rights Legal Centre on (02) 9212 4216.

Kind Regards,



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