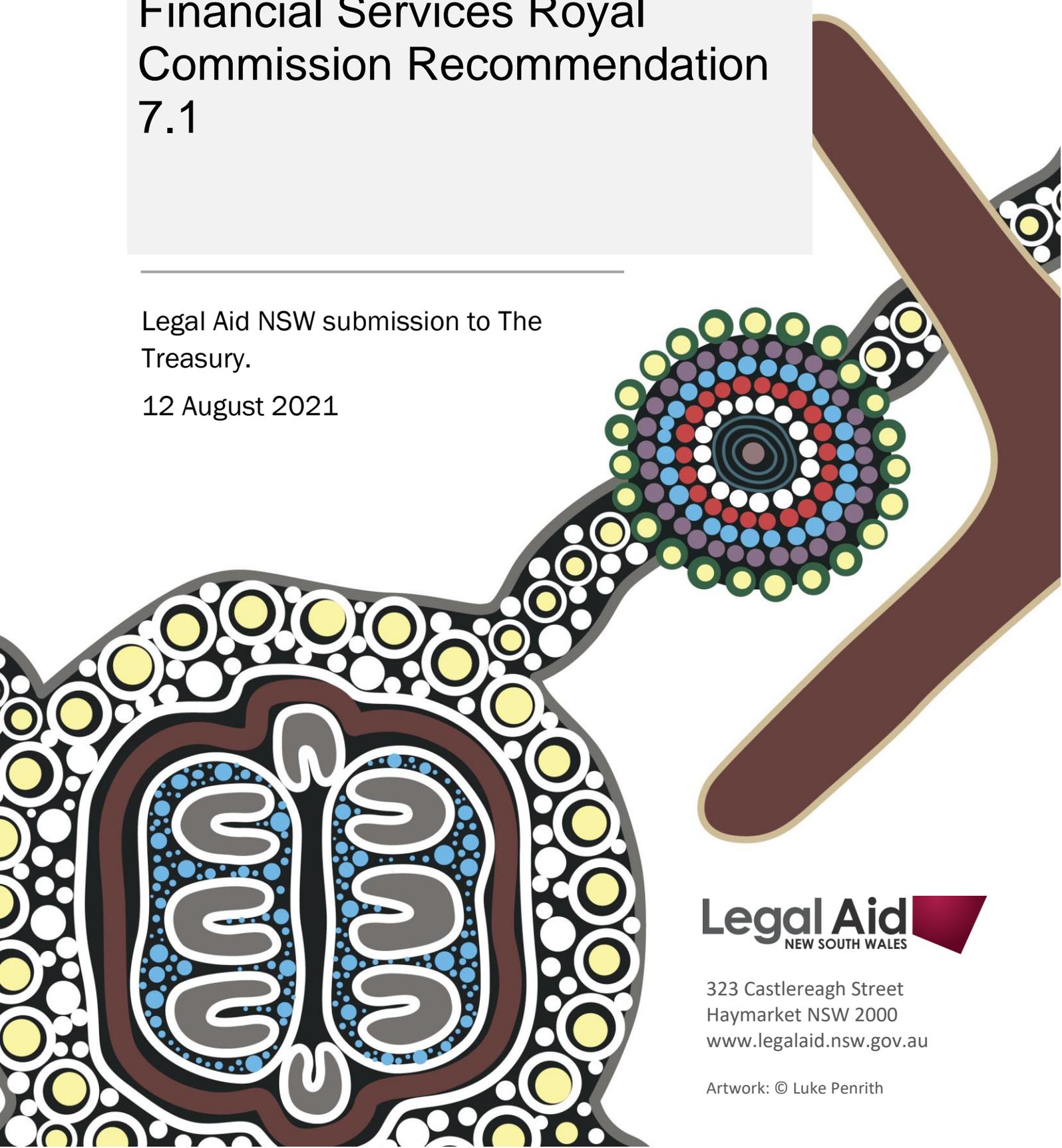


# Compensation Scheme of Last Resort: Proposal Paper

## Financial Services Royal Commission Recommendation 7.1

Legal Aid NSW submission to The Treasury.

12 August 2021



**Legal Aid**  
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## Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

# 1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

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## 2. Executive Summary

Legal Aid NSW welcomes the opportunity to respond to Treasury's Compensation Scheme of Last Resort: Proposal Paper (**Proposal Paper**), which seeks feedback from stakeholders on the legislation for a Compensation Scheme of Last Resort (**CSLR**) and its proposed operation. We welcome the Australian Government's ongoing commitment to establishing a compensation scheme of last resort, to ensure that consumers and small businesses receive compensation, where a financial service provider is found to have engaged in misconduct and the provider is unable to pay.

Legal Aid NSW has consistently supported the establishment of a CSLR, as per Recommendation 7.1 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Financial Services Royal Commission**), including in our submissions to the Financial Services Royal Commission Interim Report, the Ramsey Review, and the previous Treasury consultations on its implementation.<sup>1</sup>

Our feedback is informed by the legal services we provide to consumers in NSW and our direct casework experience, including Aboriginal and Torres Strait Islander consumers living in remote and regional communities. Many of our clients are already in financial hardship when they seek out credit and financial services, and so the impact of recalcitrant or asset-poor financial firms failing to pay compensation awarded by the Australian Financial Complaints Authority (**AFCA**), a Court or a Tribunal, is exacerbated.

Broadly, we support the proposed scope and operation of the CSLR, including Treasury's commitment that it be scalable, and that Treasury will consider the inclusion of other financial products and services into the scope of the scheme in the future, based on available data and the outcome of any periodic reviews.

However, we remain concerned about the exclusion of certain funeral funds from the scheme, which has the potential to leave a large cohort of Aboriginal and Torres Strait Islander people on low incomes without a cost effective or accessible means of redress.

Our responses to the issues in the Proposal Paper, and recommendations, are set out in further detail below.

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<sup>1</sup> Legal Aid NSW Submission to The Treasury, *Establishing a Compensation Scheme of Last Resort* (February 2020); Legal Aid NSW, *Financial Services Royal Commission Interim Report - Submissions in Response* (2018); Legal Aid NSW, *Submission to the Review of the Financial System External Dispute Resolution Framework* (2016).

## Recommendations

### **Recommendation 1**

That consideration be given to allow a mechanism for voluntary AFCA members to be included in the CSLR, where products would ordinarily be required by law to hold an Australian Financial Services Licence.

### **Recommendation 2**

We recommend the following amendments to the operation of the scheme:

- Any follow-up action taken by AFCA, for example contacting the AFCA member and seeking an explanation of non-compliance, should not delay a claim to the CSLR.
- The CSLR should not place any requirement on individuals to enforce the debt against the financial service provider themselves.
- Where there is insufficient information to confirm the financial position of the firm, the CSLR claim should proceed on the basis of the unpaid AFCA determination.
- Treasury or the CSLR should conduct a public consultation on the development of the customer service guidelines, including the timeframes that should apply for the assessment of scheme claims.
- There should be a discretion to allow for out of time applications to the CSLR in exceptional circumstances.
- Treasury should consider implementing a 'trigger point' where the claimant is notified of their rights to claim from the CSLR, for example, where a determination remains unpaid for a period of two months.
- Consumers should be notified of their right to make a claim under the CSLR through written notice at the time of the AFCA determination. The determination should include referrals to free legal advice and/or financial counsellors.

### **Recommendation 3**

Any shortfall in the CSLR fund should be borne by the Australian Government and industry, and there should be no impact on the claimant.

### **Recommendation 4**

That the legislation and/or regulations governing the operation of the CSLR require that at least one skills-based Board member has a consumer background.

### **Recommendation 5**

The first Periodic review of the CSLR should occur after two years of its operation, and thereafter every five years.

### 3. Scope of the scheme

Legal Aid NSW welcomes the comments in the Proposal Paper that the CSLR should be scalable. In particular, Legal Aid NSW supports Treasury's commitment to considering inclusion of voluntary AFCA members and insurance products within the scope of the CSLR in future. We note that products such as 'buy now pay later' schemes avoid consumer law and are not legally required to be AFCA members. In our experience, these products can cause considerable financial detriment to Legal Aid NSW clients and we would welcome their possible inclusion in future

Legal Aid NSW also welcomes Treasury's consideration of the future inclusion of court and tribunal decisions in the CSLR, based on relevant data, and following the outcome of any periodic reviews of the scheme.

#### 3.1 Exclusion of certain financial products from the scope

Legal Aid NSW is concerned about the exclusion of certain funeral funds from the CSLR. We maintain that the exclusion of the Aboriginal Community Benefit Fund (**ACBF**, now renamed Youpla) from the CSLR could leave a large cohort of vulnerable Aboriginal and Torres Strait Islander people without a cost effective or accessible means of redress, in the event that the entity becomes insolvent or is otherwise unable to meet its obligations.<sup>2</sup> Legal Aid NSW submits that financial firms selling funeral insurance products would now be required to hold an Australian Financial Services Licence (**AFSL**) and would be compulsory members of AFCA. ACBF is an anomaly in this regard and it is our position that it should be included within the scope of the CSLR.

##### 3.1.1 Background

The ACBF as it was previously known, is now administered by Youpla Administration Pty Ltd (**Youpla/ACBF**). Youpla sells three products, through the following three separate for-profit companies:

1. The Aboriginal Community Benefit Fund Pty. Limited (ACBF Product 1)
2. Aboriginal Community Benefit Fund No 2 Pty Ltd (ACBF Product 2)
3. ACBF Funeral Plans Pty Ltd trading as Aboriginal Community Funeral Plan (The Plan).<sup>3</sup>

We acknowledge the concerns of AFCA and Treasury, that the inclusion of voluntary AFCA members into the CSLR may result in members choosing to exit AFCA or not join at all, resulting in fewer consumers having access to a credible and free external dispute resolution service. Nevertheless, we submit that the unique circumstances that led to

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<sup>2</sup> Legal Aid NSW, submission to The Treasury, *Establishing a Compensation Scheme of Last Resort*, (February 2020).

<sup>3</sup> In this submission, the term Youpla/ACBF is used to describe all three ACBF companies.

Youpla/ACBF companies becoming 'voluntary', and the particular characteristics of their target market, warrant consideration of early inclusion. We outline these issues further below.

### 3.1.2 Why Youpla/ACBF companies are voluntary members of AFCA

In 2004, the Federal Court held that ACBF Products 1 and 2 do not fall within the 'funeral expenses policy' exclusion and are, therefore, financial products under the *Corporations Act 2001* (Cth).<sup>4</sup>

Shortly after, ACBF sought an exemption from the Australian Securities and Investments Commission (**ASIC**) from the requirement that it hold an AFSL. ASIC refused an exemption but did agree to a 'no-action position' on several conditions, including that the trustee became and remained a member of an external dispute resolution scheme.

ASIC reported the reasons for this decision as:

We refused to exempt the trustee of two funds that paid benefits upon the death of members with a view to covering funeral and incidental expenses. The Federal Court had ruled that the funds were not 'funeral expenses policies' under reg 7.1.07D and therefore were a financial product. As a result, the trustee needed a licence for the financial services involved in receiving membership contribution fees, holding assets on trust and paying benefits to members' nominees. We refused to grant an exemption because, given the Federal Court's decision, we did not consider that it would be appropriate to make a decision that would have the effect of facilitating the sale of the insurance policies without an AFS licence. However, we recognised that the trustee would need to carry out its obligations to existing policy holders. On this basis we were prepared to take a no-action position for the trustee's failure to hold an AFS licence on condition that the trustee:

- became and remained a member of an external dispute resolution scheme;
- did not take on any new members;
- did not take any action that would increase members' contribution fees; and
- did not provide financial product advice.<sup>5</sup>

In this report, ASIC anticipated that ACBF would only carry out obligations to existing customers, and not take on new customers. However, as a result of the undertaking, Youpla/ACBF created a new product; the Aboriginal Community Funeral Plan.<sup>6</sup> The Plan

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<sup>4</sup> *Australian Securities & Investments Commission v Aboriginal Community Benefit Fund Pty Ltd* [2004] FCA 963.

<sup>5</sup> Australian Securities and Investment Commission, *Report 39: Overview of decisions on relief applications from financial service providers* (August to December 2004) 1.21.

<sup>6</sup> *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 2, 443 – 444.

is a funeral expenses policy, and prior to changes in 2020 was not a financial product within the *Corporations Act 2001*, nor was it required to hold an AFSL.

In Legal Aid NSW's casework experience, we are aware of instances where Youpla/ACBF representatives have encouraged members of ACBF Products 1 and 2 to move their policies to the Plan. This practice has also been documented in some AFCA determinations. One determination refers to a file note by an ACBF agent in 2006 which stated the following:

Visited [complainant] at her home address, Re-explained members Fund and Plan [...] We discussed... differences between fund m/ship and plan m/ship. She decided to go ahead with... plan for [ACBF Product 1 children's membership numbers] as she said her kids are still young and the extra cover will ensure that they have enough benefit cover, when they got older, as inflation will be a whole lot higher when they are older... <sup>7</sup>

The Financial Services Royal Commission recommended removing the exemption for licencing funeral expenses policies from the definition of 'financial product' under the *Corporations Act 2001* and *Corporations Regulations 2001*.<sup>8</sup> Currently, all consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* now apply to funeral expenses policies.

Similar to the preceding Treasury Discussion Paper, and as noted in Legal Aid NSW's submission to Treasury,<sup>9</sup> the Proposal Paper assumes that 'voluntary members' of AFCA are entities that are not required by legislation to be members of AFCA due to their status as AFSL or Australian Credit Licence (**ACL**) holders, but who choose to do so. However, the three Youpla/ACBF products listed above fall outside this definition.

### 3.1.3 Characteristics of the target market

Legal Aid NSW acts for Aboriginal and Torres Strait Islander clients across NSW in making complaints against Youpla/ACBF about its funeral insurance products. Since September 2020, AFCA has issued 21 published determinations which found that Youpla/ACBF engaged in conduct that was misleading and deceptive by a combination of the way it sold the Plan to complainants and branded the product. The AFCA

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<sup>7</sup> *ACBF Funeral Plans Pty Ltd, The Aboriginal Community Benefit Fund Pty Ltd, Aboriginal Community Benefit Fund No 2 Pty Ltd* (16 April 2021) AFCA Case 690652, 690926, 690943,

<sup>8</sup> *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol.1, Recommendation 4.2.

<sup>9</sup> Legal Aid NSW, submission to The Treasury, *Establishing a Compensation Scheme of Last Resort* (February 2020).

determinations also found that Youpla/ACBF engaged in unconscionable conduct and breached the duty of utmost good faith on the basis that:

- ACBF did not tell complainants that it was not an Aboriginal and Torres Strait Islander owned corporation and was not for the benefit of the Aboriginal community.
- ACBF did not tell complainants that payments made to the Plan would likely exceed the benefit amount payable under the policies.
- ACBF targeted the sale of its products to Aboriginal and Torres Strait Islander people, most of whom were vulnerable.
- ACBF used Aboriginal and Torres Strait Islander words, colours and imagery in its communications with complainants, leading complainants to believe it was an Aboriginal organisation.
- ACBF approached Aboriginal and Torres Strait Islander communities unsolicited.
- The product was not a 'plan' in its ordinary meaning, being a scheme for the payment of regular contributions, but an insurance product.

Legal Aid NSW acts in over 150 current matters and we have recently received 40 new enquiries requesting advice. Of these matters, over 95 complaints have been lodged in AFCA where we are awaiting determinations. Of the 40 recent enquiries, many clients intend to make a complaint to AFCA seeking a refund of premiums paid plus interest.

In considering the value of these funeral insurance policies to consumers, the Financial Services Royal Commission Interim Report stated that:

...the particular cases examined in evidence emphasise not only the view that the [funeral insurance] policies are of little value but also the corollary that the policies are too often sold by the unscrupulous to the unsophisticated and vulnerable.<sup>10</sup>

Legal Aid NSW notes the purpose of the CSLR is to target the areas of the financial sector with the greatest evidence of need. ACBF sold its products to the most vulnerable members of the community. The overwhelming majority of ACBF's clients were or are Aboriginal and Torres Strait Islander people. Many of its members do not work, have limited literacy and financial literacy, live in regional and remote communities, receive a Centrelink benefit and have no savings. Many clients have paid thousands of dollars to ACBF believing that it was an Aboriginal and Torres Strait Islander community-based organisation established to benefit the Aboriginal and Torres Strait Islander community.

Youpla/ACBF has indicated to Legal Aid NSW and other external agencies that they have solvency issues. If ACBF become insolvent, not only will Legal Aid NSW clients

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<sup>10</sup> *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 1, 263.

with complaints in AFCA not be paid, but clients who have maintained insurance cover with ACBF will not have benefits paid for funeral costs when someone dies.

These concerns are further illustrated by the following case studies.

#### Case Study: Emma

Emma lives in remote Far West NSW. She receives a Centrelink benefit and cares for her husband who has chronic health issues. She has an ACBF membership where she pays for herself, her husband and her six grandchildren at a cost of \$108 per fortnight. She has been paying this since 2006. She lives in an Aboriginal Housing property and after paying her rent and bills (including ACBF) each fortnight, she has \$87 per fortnight left for food for her family.

#### Case Study: Bianca

Bianca lives in regional NSW. Bianca is illiterate and has always relied on Centrelink benefits. Bianca was a member of ACBF at various times between 1996 and 2018. Bianca had a number of policies for various family members over the years. Bianca had her policies cancelled due to non-payment several times. She first signed up to ACBF when she was 19 years old. At that time, she also signed up her one year old child and her new baby. AFCA have recently issued a determination in favour of our client for over \$30,000, which is the amount of premiums she has paid over the years. This amount of money is significant for a client who is very vulnerable.

Legal Aid NSW considers that there are serious, ongoing detrimental consequences that arise from excluding Youpla/ACBF from the CSLR. We consider that obtaining an AFCA determination that cannot be realistically enforced is not a sufficient alternative, particularly for vulnerable consumers, and does not offer any option for redress. We submit that there are strong policy reasons to include Youpla/ACBF within the scope of the CSLR, which outweigh the concerns of AFCA and Treasury regarding the risks of including voluntary AFCA members into the scheme.

## Recommendation 1

That consideration be given to allow a mechanism for voluntary AFCA members to be included in the CSLR, where products would ordinarily be required by law to hold an AFSL.

## 4. Operation of the scheme

### 4.1 Claims process

Legal Aid NSW considers that the CSLR claims process should be as short and streamlined as possible. In Legal Aid NSW's experience, it can take some months or in some cases several years for claimants to resolve their complaint through AFCA. Therefore, it is critical that the CSLR claims process avoids further delay in resolving matters.

#### 4.1.1 Requirement for AFCA to take "reasonable steps" to secure payment

The Proposal Paper states that prior to a CSLR applicant claiming compensation, AFCA will be required to take reasonable steps to secure payment. In Legal Aid NSW's experience, if a determination remains unpaid, AFCA closes the complaint, and notifies ASIC. The current AFCA Guidelines and Rules do not reflect the list of suggestions that AFCA is expected to take, to ensure that AFCA members pay the compensation owed.<sup>11</sup> Legal Aid NSW recommends that the reasonable steps outlined by Treasury should be specified in AFCA's Guidelines and Rules. In Legal Aid NSW's view, any follow-up action taken by AFCA, for example contacting the AFCA member and seeking an explanation for non-compliance, should not delay a claim to the CSLR.

#### 4.1.2 Individual action to obtain compliance

Legal Aid NSW is concerned that the Proposal Paper suggests that where steps are taken by parties other than AFCA to obtain compliance with the AFCA determination, for example, by the complainant themselves, that action can be taken into account in the assessment of whether reasonable steps have been taken, provided that action is in accordance with any guidance published by the scheme and is verifiable.<sup>12</sup> Legal Aid NSW considers that the CSLR should not place any requirement on individuals to try to enforce the debt against the financial service provider themselves. If a claim has been brought by an individual to AFCA, it is likely that they have already attempted to resolve the dispute and/or recover their lost money. It is unreasonable in these circumstances to require or encourage the individual to again try to enforce the debt against the financial services provider.

#### 4.1.3 Financial firm unable to pay

The Proposal Paper states that once a CSLR claim has been made following an unpaid AFCA determination, the CSLR operator will assess whether the relevant financial firm

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<sup>11</sup> The Treasury, *Compensation Scheme of Last Resort: Proposal Paper - Financial Services Royal Commission Recommendation 7.1*, (July 2021) 10.

<sup>12</sup> Ibid.

is unlikely to pay the compensation owed based on an assessment of the financial position of the firm. Legal Aid NSW supports this approach. However, we are concerned that a lack of information to inform this assessment may unreasonably delay the processing of the claim under the scheme, and may contribute to a claim not being successful. We recommend that, where there is insufficient information to confirm the financial position of the firm, that the CSLR claim proceed on the basis of the unpaid AFCA determination.

#### 4.1.4 Assessment of CSLR claim

Legal Aid NSW understands that the CSLR operator will create customer service guidelines with goals for the time within which a CSLR claim should be assessed and paid. Legal Aid NSW supports public consultation on the development of these guidelines, including the timeframes that should apply for the assessment of scheme claims.

#### 4.1.5 AFCA notified within 12 months

Treasury proposes to introduce a time limit on CSLR claims, to increase certainty for claimants, financial firms and the scheme's forward planning. The Proposal Paper suggests that an obligation is placed on a claimant, who must notify AFCA that their determination remains unpaid, or partially unpaid, within 12 months of the date of acceptance of the determination.

Legal Aid NSW is concerned that a 12-month time frame is not long enough for vulnerable clients, particularly in the early stages of the operation of the CSLR and before there has been an opportunity to build community awareness of the scheme more broadly. Legal Aid NSW clients often have complex and competing consumer law issues to resolve and may not have access to legal advice about outstanding AFCA payments within that timeframe. To overcome this issue, Legal Aid NSW suggests that there should be a discretion to allow for out of time applications in exceptional circumstances.

Legal Aid NSW also recommends that Treasury consider implementing a 'trigger point' where the claimant is notified of their rights to claim from the CSLR. For example, if a determination remains unpaid for a period of two months, then the claimant is notified by AFCA about their rights to make a claim and the time limit. However, to ensure that consumers are aware of their rights at the outset, we also suggest that their rights to make a claim under the CSLR should be clearly set out in a written notice at the time of the determination. The determination should also include referrals to free legal advice and/or financial counsellors.

## Recommendation 2

We recommend the following amendments to the operation of the scheme:

- Any follow-up action taken by AFCA, for example contacting the AFCA member and seeking an explanation of non-compliance, should not delay a claim to the CSLR.
- The CSLR should not place any requirement on individuals to enforce the debt against the financial service provider themselves.
- Where there is insufficient information to confirm the financial position of the firm, the CSLR claim should proceed on the basis of the unpaid AFCA determination.
- Treasury or the CSLR should conduct a public consultation on the development of the customer service guidelines, including the timeframes that should apply for the assessment of scheme claims.
- There should be a discretion to allow for out of time applications to the CSLR in exceptional circumstances.
- Treasury should consider implementing a ‘trigger point’ where the claimant is notified of their rights to claim from the CSLR, for example, where a determination remains unpaid for a period of two months.
- Consumers should be notified of their right to make a claim under the CSLR through written notice at the time of the AFCA determination. The determination should include referrals to free legal advice and/or financial counsellors.

## 4.2 Funding streams

The Proposal Paper sets out the CSLR funding model, which proposes an *ex ante* model where costs are estimated for the upcoming or remaining period of the claim year, taking into account all of the scheme’s funding streams and costs. The Proposal Paper then proposes that certain action can be taken at the discretion of the relevant Minister, where the subsector caps are exceeded – that is – where there are insufficient funds in the scheme. This includes that compensation claims be paid over multiple claim years, that a reduction in the value of compensation is made for particular claims, or the possibility that claimants are paid over time, or their payment reduced.

Legal Aid NSW does not support these proposals. We consider that, where there is not enough money in the CSLR fund, the shortfall should be made up by the Australian Government and industry levies, and should not be borne by the claimant.

### Recommendation 3

Any shortfall in the CSLR fund should be borne by the Australian Government and industry, and there should be no impact on the claimant.

#### 4.3 Governance

We understand that the operation of the CSLR will be underpinned by legislation, with a public company set up to operate the scheme.

Legal Aid NSW notes that the proposed Board of the CSLR will be accountable for the operator's administration of the scheme and will be subject to oversight by ASIC. In our view, it is critical that the Board includes representation from consumer perspectives, as well as industry. To ensure there is a balance between consumer and industry perspectives, we recommend that Treasury consider requiring in the legislation or regulations that one of the skills-based positions must have a consumer background.

### Recommendation 4

That the legislation and/or regulations governing the operation of the CSLR require that at least one skills-based Board member has a consumer background.

#### 4.4 Periodic reviews

Legal Aid NSW supports periodic reviews of the CSLR, but submits that the first review should occur after two years, and thereafter every five years. This will enable the identification of any unintended concerns early in the scheme's operation. By way of example, the operation of AFCA was initially reviewed after two years, before moving to five-yearly reviews.

### Recommendation 5

The first Periodic review of the CSLR should occur after two years of its operation, and thereafter every five years.



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