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Consultation on Proposed AFCA Rules

Legal Aid NSW submission to
Australian Financial Complaints
Authority

June 2018

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 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

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 LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services. Consumer issues constitute the largest category of service for our Civil Law Division, with 4,962 advice and 3,568 minor assistance services provided in the 2016/2017 financial year in areas such as credit, debt, motor vehicles, essential services, insurance and mortgage hardship.

Legal Aid NSW welcomes the opportunity to make a submission to the Consultation on Proposed AFCA Rules. Should you require any further information, please contact

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Q.1 Do the AFCA rules achieve a reasonable balance between user-friendliness and detail?

Yes. Legal Aid NSW considers that, on the whole, the Rules do achieve a reasonable balance between user-friendliness and detail.

There are a number of operational documents which work together to provide the framework for AFCA, its jurisdiction and approach to decision-making. These include the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (AFCA Act), the Rules, AFCA Operational Guidelines, complementary ASIC Guidelines, such as Regulatory Guides 139 and 267, and AFCA guidance notes or position papers.

To improve user-friendliness, we recommend cross referencing in each document where further detail will be set out in a different document. For the electronic version of the Rules, we recommend that the Rules be hyperlinked to the other relevant operational materials.

Legal Aid NSW also recommends that the electronic version of the Rules includes hyperlinks between the Table of Contents and the relevant sections to allow easy navigation.

Q.2 Before the Table of Contents is a “quick guide” summarising the key aspects of the Rules and their location. Is this helpful?

Yes. Legal Aid NSW considers that the quick guide is helpful to summarise the key aspects of the Rules and their location. The flow chart provides an easy to understand summary of the key aspects of AFCA’s jurisdiction with respect to accepting a complaint and the powers to award specific remedies.

To ensure that the quick guide meets the needs of consumers, we recommend that the guide be user-tested by consumer focus groups to ensure the approach, language and format is accessible to those with varying levels of understanding of AFCA.

Q.3. The rules contain a number of tables (for example, summary tables of the time limits to submit a complaint to AFCA and of the monetary restrictions on AFCA’s jurisdiction and compensation powers). Are the tables helpful in explaining these areas? How could they be improved?

Yes. Legal Aid NSW agrees that the tables are generally helpful in setting out time limits and monetary compensation caps. However, we consider that the tables are quite detailed and include legalistic language which may not be properly understood by a consumer trying to navigate the Rules without the assistance of an advocate. For example, the use of the term “NCC facility” in the time limit table is not defined in the Section E of the Rules.

To ensure that the tables are accessible to consumers, we recommend that:

- the tables be user tested by consumer groups; and

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- a single page plain English resource be developed to include all key information for each type of dispute. This would ensure a consumer receives all key information without having to navigate through irrelevant, and potentially confusing, information relating to other types of disputes and their time limits.

Q.4. Are there any aspects of the Superannuation Complaints Tribunal's jurisdiction that have not been adequately incorporated into the AFCA rules?

No comment.

Q.5. Do the AFCA Rules adequately provide for AFCA to meet its reporting obligations under the Corporations Act?

No comment.

Q.6 Are there any other issues that require consideration?

In our review of the Rules, Legal Aid NSW has identified a number of issues. We outline our concerns below with reference to the Proposed AFCA Rule number.

Proposed Rule A.4.6

Proposed Rule A.4.6 outlines the process of reviewing AFCA's decision to exclude a dispute. According to the Proposed Rule, AFCA may review the decision to exclude a dispute where it is satisfied that the objection "has substance".

We do not consider that Rule A.4.6 adequately outlines how AFCA will satisfy itself that an objection has substance, who will conduct that process, and who will conduct the review process.

We submit that Rule A.4.6 should include the following:

- Information about the process that AFCA will engage in when determining if the objection has substance, including who will engage in this process; and
- Information about who will determine the review process.

In our view, the decision about conducting a review, and the review itself should be undertaken by a senior AFCA employee, who did not make the original decision to exclude the dispute.

Proposed Rule A.7.1

Proposed Rule A.7.1 outlines prohibitions on Financial Firms in legal or debt recovery proceedings where an AFCA complaint has been commenced.

We note that Clause 17.1(d) of the CIO Rules states that:

if it has not already listed a default, the financial services provider must not list a default on the complainant's credit reference file.

Rule A.7.1 does not make clear that a Financial Firm cannot list a default on a Complainant's credit report.

We submit that Rule A.7.1(c) should state that the Financial Firm must not list a default on the Complainant's credit reference file. We consider that this amendment is in line with AFCA's approach in seeking to retain important strengths from the predecessor schemes.

Proposed Rule A.8.3

Proposed Rule A.8.3 outlines when AFCA may decide that it is not appropriate to continue to handle a complaint.

We do not consider that Rule A.8.3 adequately outlines the process that AFCA will engage in when determining that it is not appropriate to continue to handle a complaint, particularly where the circumstances that give rise to this discretion include:

- "where the complaint is without merit" (A.8.3(a)); and
- where "the Financial Firm has committed no error" (A.8.3(b)).

We also note that the discretion in A.8.3 can be exercised "at any stage".

We are concerned that the circumstances outlined in A.8.3(a) and A.8.3(b) may give rise to instances where complaints are excluded from AFCA without the Complainant being afforded the opportunity to make adequate submissions about their complaint, and for AFCA to properly investigate the merit of the matter, and the errors the Financial Firm may have committed. This is especially a risk where A.8.3 can be exercised "at any stage", including at the very start of the matter.

We note that A.8.3 provides that if AFCA decides to stop handling a complaint, it will follow the process for excluding a complaint set out in rules A.4.5 and A.4.6, which includes that AFCA will give written reasons to the Complainant. As the Rules are currently drafted, it is unclear if the written reasons will canvas just the decision to exclude the complaint, or also why AFCA considers that the complaint does not have merit, or that the Financial Firm has not committed any errors. In our view, where a decision is made about the merit of the matter, AFCA should provide written reasons for this decision, and account for the process they used in making this decision.

We submit that Rule A.8.3 should be amended to:

- include the process that AFCA will undertake when deciding to stop handling a complaint; and
- clarify that AFCA will provide written reasons to the Complainant explaining why it considers that the complaint is without merit, or that the Financial Firm has not committed any errors.

Proposed Rules A.9.1 – A.9.5

Proposed Rules A.9.1 – A.9.5 outline the provision of information by parties and AFCA's power to require information.

We do not consider that Proposed Rules goes far enough in articulating the Financial Firm's obligations in obtaining and providing information relevant to the complaint to AFCA.

For example, Clause 16.3 of the CIO Rules states that:

Where the financial services provider is not in possession or control of the information or documents requested by the scheme, the financial services provider must procure, to the extent it is reasonably able to, another person to give the scheme the information or documents, failing which the scheme may draw any appropriate adverse inference against the financial services provider.

Further, TOR 7.3 of FOS' Terms of Reference states that:

Where a party to a Dispute without reasonable excuse fails to provide or procure information or to take any other step requested by FOS within the timeframe specified by FOS, FOS may take the steps it considers reasonable in the circumstances.

We submit that Rule A.9 should be amended to:

- Include an obligation on the Financial Firm to procure documents requested by the scheme, whether those documents are in the Financial Firm's possession or not;
- Include an obligation on the Financial Firm to take any other step requested by AFCA within the timeframe specified by AFCA; and
- Specify that a document ought not to be withheld from production if the confidential aspect of the document can be redacted.

Again, we consider that these amendments are in line with AFCA's approach in seeking to retain important strengths from the predecessor schemes.

We also note our June 2017 submission to Treasury's Improving dispute resolution in the financial system Consultation Paper and accompanying draft legislation¹. In that submission, we recommended that AFCA have the power to obtain information and documents in all financial disputes—not just to those involving superannuation. We also recommended that if a credit representative is not a party to a dispute between a consumer and a Financial Firm, the scheme may need the power to compel the credit representative to provide relevant documents to assist in resolving the dispute. Similarly, if the credit licensee is a franchisee and is not complying with a request for documents, the scheme could compel the franchisor to provide any relevant documents or information to assist in resolving the complaint.

Proposed Rules A.11.1 and A.11.2

¹ Legal Aid NSW, June 2017, Submission to Treasury's Improving dispute resolution in the financial system Consultation Paper. Accessed at: https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0019/27226/Legal-Aid-NSW-submission-to-EDR-Consultation-Paper.pdf

Proposed Rules A.11.1 and A.11.2 outlines the without prejudice basis of AFCA, as well as the confidentiality requirements of parties to a complaint. We consider that these Rules are too broad.

We submit that Rule 11.2 should be amended to exclude confidentiality in the following circumstances:

- Information is already in the public domain, as per Clause 33.2(b) of the CIO Rules;
- There is consent by the other party, in line with Clause 33.2(a) of the CIO Rules; and
- The Complainant is entitled to the document under statute, for example, a credit contract under the *National Consumer Credit Protection Act*.

Proposed Rule A.12

Proposed Rule A.12 outlines AFCA's process in making a preliminary assessment. Rule A.12 does not specify that the preliminary assessment must be made in writing or that it must provide reasons for its conclusions, contrary to TOR 8.7(a) of FOS' Terms of Reference.

Legal Aid NSW submits Proposed Rule A.12.1 should be amended so that AFCA must provide:

- the complainant with its preliminary assessment in writing; and
- reasons for conclusions reached in the preliminary assessment, as per FOS' Terms of Reference.

Proposed Rules A.12.2 and A.12.3 refer to a time set by AFCA within which the parties to a complaint can take steps in respect of AFCA's recommendation and/or determination. The Proposed Rules do not specify what that time is. We submit that the operational guidelines provide guidance about the relevant time periods so that it is applied consistency and fairly throughout the AFCA complaint process.

Proposed Rule A.16.1

Proposed Rule A.16.1 outlines the process for a Complainant to refer their concerns to AFCA's Independent Assessor.

We submit that Rule A.16.1 should be amended to clarify that a Complainant's representative, including consumer advocate organisations can refer their concerns to AFCA's Independent Assessor.

Proposed Rule A.17

Proposed Rule A.17 outlines AFCA's identification and reporting of systemic issues.

Rule A.17.1 provides a definition of a systemic issue. We recommend that this Rule be amended to reference the discussion about the definition of a systemic issue in Regulatory Guides 139 and 267.

Rule A.17.5 states that after identifying a systemic issue AFCA must report the issue to any body, including ASIC. This Rule does not specify a timeframe as to when the issue should be reported to the relevant body. We recommend that this Rule be amended to specify that AFCA must report systemic issues to ASIC in accordance with its obligations under Regulatory Guides 139 and 267, as per TOR 11.2(c) in FOS' Terms of Reference.

Proposed Rule B.2.1

Proposed Rule B.2.1 sets out the relationship between the Complainant and the Financial Firm that giving rise to the complaint.

We note that in Proposed Rule B.2.1(a) allows a complaint to be raised in relation to the provision of Financial Service by a Financial Firm. Financial Service is a defined term which includes a product or service that is financial in nature. We recommend that this definition be made clearer that a Financial Service includes the provision or failure to provide documents to the Complainant.

Proposed Rule B.4.4.2

Proposed Rule B.4.4.2 states that if AFCA considers special circumstances apply, it may consider extending the time limit for submitting a complaint in non-superannuation disputes.

We note that "special circumstances" are not a defined term. However, we submit that special circumstances should include where there is agreement between the parties to extend the time limit for submitting a complaint.

Proposed Rule C.2.2(d)

Proposed Rule C.2.2(d) states that AFCA may consider excluding a complaint where the complaint being made is frivolous, vexatious, misconceived or lacking in substance.

We submit that a complaint deemed as misconceived should not include complaints that are simply articulated incorrectly. We submit that AFCA should still take steps to identify grounds of complaint even when a complainant may not specifically identify the correct one. For example, where AFCA identifies maladministration in lending in the context of a financial hardship complaint, it should not be excluded for being misconceived.

We submit that where a complaint is deemed to be lacking in substance there is a risk which arises, in similar circumstances to our submissions in respect of A.8.3(a) and A.8.3(b). This Rule may give rise to instances where complaints are excluded from AFCA without the Complainant being afforded the opportunity to make adequate submissions about their complaint, and for AFCA to properly investigate the merit of the matter, and the errors the Financial Firm may have committed. Accordingly, a proper process should be included in the AFCA Operational Guidelines which clearly outline the process for assessing whether a complaint is lacking in substance.

Proposed Rule C.2.2(f)

Proposed Rule C.2.2(f) sets out another occasion in which AFCA may exclude a complaint where a Financial Firm treats the complaint as a test case. The Proposed Rule C.2.2(f) sets no requirement upon the Financial Firm to provide reasons for why they wish to treat a complaint as a test case.

TOR 10.1 of FOS' Terms of Reference states:

If a Financial Services Provider wishes a Dispute to be treated as a test case, the Financial Services Provider must give FOS a notice in writing containing:

a) a statement, with reasons, why the Financial Services Provider is of the opinion that the Dispute involves or may involve:

- i) an issue which may have important consequences for the business of the Financial Services Provider or Financial Services Providers generally; or
- ii) an important point of law;

We submit that Rule C.2.2(f) should be amended to:

- require the Financial Firm to provide written reasons in terms similar or the same as those set out in the FOS TOR.

We consider that these amendments are in line with AFCA's approach in seeking to retain important strengths from the predecessor schemes.

Proposed Rule D.2.1(b)

Proposed Rule D.2.1(b) sets out a non-exhaustive list of remedies available for non-superannuation Complaints.

TOR 9.1 of FOS' Terms of Reference states:

...FOS may decide that the Financial Services Provider or the Applicant undertake a course of action to resolve the Dispute including...

- f) the variation of the terms of a Credit Contract in cases of financial hardship

We submit that Rule D.2.1(b) should be amended to:

- include a specific reference to AFCA's power to decide that a financial firm must undertake a course of action to resolve the complaint by varying or setting aside a credit contract.

We consider that these amendments are in line with AFCA's approach in seeking to retain important strengths from the predecessor schemes.