

Consultation on the proposed AFCA Rules

Submission by Legal Aid Queensland



Consultation – Proposed AFCA Rules

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Consultation on the proposed rules for the Australian Financial Complaints Authority (AFCA). LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Consumer Protection Unit lawyers have extensive experience providing specialist advice and representation to vulnerable clients making complaints to external dispute resolution (EDR) schemes and Ombudsman including financial services ombudsman. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to mortgage stress, housing repossession, debt, contracts, loans, telecommunications and unsolicited consumer agreements.

LAQ regularly assists and represents clients with complaints to financial services EDR schemes. This submission is informed by that knowledge and experience.

Structure and Ordering of the AFCA Rules

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

In LAQ’s view, the draft AFCA rules strike a reasonable balance between user-friendliness and detail.

However, LAQ highlights a number of terms in Part A of the rules such as:

- (a) A4.3 (c) and A4.5 which refer to a time limit or timeframe;
- (b) A4.4 which refers to the fact that AFCA must exclude certain types of complaints; and

- (c) A4.6 which refers to whether an objection has substance.

None of these terms provide a consumer with any guidance as to what the time limits are or what types of complaints might be excluded. It is important that the above terms either:

- (a) specifically mention the time limits or types of complaints that are excluded; or
- (b) provide a cross-reference to the other rules or the parts of the Operational Guidelines, which contain the detail that consumers will need to effectively understand their rights and obligations under the complaint they have made to AFCA.

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

LAQ supports the idea of the “quick guide” preceding the Table of Contents as a means of summarising the key aspects of the Rules and their location. This quick guide is likely to reduce the amount of time consumers and consumer advocates have to spend looking through the new rules in order to engage AFCA and the new rules.

In LAQ’s view, the Table of Contents might be further improved by the addition of another section to it, which contains references to parts of the rules:

- (a) most commonly misunderstood by consumers and consumer advocates, about the jurisdiction or rules of the previous schemes; or
- (b) which are new or different under AFCA compared to the previous schemes.

Alternately, this comparison could be published as a separate document and referenced in the rules.

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?

LAQ strongly supports the use of summary tables in the rules which set out the time limits and monetary jurisdiction for bringing complaints to AFCA.

In LAQ’s view, the summary tables set out in the AFCA Rules are effective because:

- (a) they clearly set out the time or monetary limits that apply to different types of complaints;
- (b) the relevant AFCA Rule is cross-referenced in the table so that consumers and consumer advocates can easily identify which rules apply ;
- (c) they provide a good starting guide for consumers and consumer advocates who are new to the AFCA rules.

In addition to the summary table, LAQ submits it would also be effective to develop individual factsheets or flow charts covering time limits and monetary jurisdictions for each area of law that could be included in either the Operational Guidelines or as part of a separate Position

Statement. These flowcharts or factsheets would provide an easy reference relevant to their particular complaint.

Superannuation Complaints

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

LAQ has no submissions in response to this question.

Reporting Obligations

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

In LAQ's view the AFCA Rules do adequately provide for AFCA to meet its reporting obligations under the Corporations Act. LAQ also welcomes the ability of AFCA under Rule 18.2 to report to ASIC other serious breaches including non-compliance with AFCA's rules.

General

6. Are there any other issues that require consideration?

Primary Producers

LAQ welcomes Rule C1.2 (d) and C1.3(b) (i) which clarifies that AFCA will be able to deal with disputes of \$5 million or less brought by primary producers where the disputes concern issues unresolved following a farm debt mediation.

For clarification and completeness, LAQ suggests that that the second paragraph of Rule C1.2 (d) should be amended from:

“For the avoidance of doubt, AFCA may handle a complaint by a Primary Producer about issues unresolved after a mediator has tried to resolve them in a farm debt mediation”,

To read:

“For the avoidance of doubt, AFCA may handle a complaint by a Primary Producer about:

- (a) issues unresolved after a mediator has tried to resolve them in a farm debt mediation; or
- (b) issues between the financial firm and primary producer that were not examined or dealt with in the farm debt mediation.”

Farm debt mediations do not have the power to examine all financial issues that might arise between a financial firm and a primary producer or the issues may only become apparent during the mediation process and it should therefore be clear when the option of accessing AFCA is available to the primary producer.

Independent Assessor

LAQ welcomes the introduction of the Independent Assessor who has the role of reviewing complaints made about the standard or service provided by AFCA. The Independent Assessor is likely to be an important part of AFCA's quality control process.

However, there is a risk that consumers interacting with AFCA might be confused about the role of the Independent Assessor. It will be important for AFCA to engage in an appropriate public awareness campaign about the role of the Independent Assessor which makes it very clear to consumers that the Independent Assessor does not provide an appeal function or a way for consumers to have a re-hearing of a decision that they did not like.

In LAQ's submission, it will be easier for AFCA to achieve this if the Independent Assessor's Terms of Reference or any Operational Guidelines that are developed provide guidance about what is meant by terms like:

- (a) Complaint handling;
- (b) Frivolous, vexatious or malicious; and
- (c) Standard of service.

Principles that Underpin the Scheme

Rule A2 of the AFCA Rules sets out the Principles that underpin the scheme. LAQ believes the wording of Rule A2.1(c) that sets out how the scheme will handle complaints can be improved. In LAQ's submission, this clause should be amended to "handle and investigate complaints submitted to it" in order to reflect that one of AFCA's most important duties is to investigate complaints.

EDR Benchmarks

LAQ refers to Rule 2.1(j) of the AFCA Rules, which requires AFCA to promote continuous improvement of its effectiveness, including by commissioning regular independent reviews of the complaints handling scheme's operations.

While LAQ acknowledges that effectiveness is an important benchmark when it comes to assessing External Dispute Resolution schemes, in LAQ's submission it is important that this Rule requires AFCA to promote continuous improvements of its operations against all EDR Benchmarks which include:

- (a) Fairness;
- (b) Accountability;
- (c) Accessibility;
- (d) Independence; and
- (e) Efficiency.

Restrictions on a Financial Firm During a Complaint

LAQ refers to Rule 7.1(c) of the AFCA Rules which sets out what a Financial Firm must not do while AFCA is handling a complaint. LAQ refers to Rule 17.1(d) of the CIO Rules which provides:

“If it has not already listed a default, the financial services provider must not list a default on the complainant’s credit reference file.”

LAQ recommends that a similar provision be included in the AFCA Rules as Rule 7.1(c) (iv) in order to ensure that complainants do not lose protections that exist under the current Ombudsman schemes.

The Provision of Documents

Rule 9.1(a) of the AFCA allows parties to a complaint the ability to not provide documents to AFCA where to do so would be a breach of confidentiality. In LAQ’s submission this rule should be amended to require documents to still be provided to AFCA where confidential parts of a document can be redacted.

Ability of AFCA to request Expert Reports

Rule 9.6 of the AFCA rules allows AFCA to seek expert advice from a legal, industry, medical or building expert and allows AFCA to require the Financial Firm to pay or contribute up to \$5,000 to the cost of the report.

LAQ has two suggestions regarding the drafting of this rule:

- (a) We envisage situations following natural disasters where AFCA might want to seek the assistance of scientific experts. There is a risk under the current drafting that AFCA might be prevented from doing this because scientific experts are not referred to.
- (b) The comparable CIO Rule, Rule 19.1(g) does not place any cap of the costs that a Financial Firm might be required to pay for expert reports.

Confidentiality

LAQ supports the need for the AFCA process to be confidential and on a “without prejudice basis”. However, in LAQ’s submission, paragraphs A11.1 and 11.2 are too broadly drafted.

These provisions should be amended to acknowledge that a document is not confidential where:

- (a) its disclosure has been agreed to by the party supplying it (CIO Rule 33.2(a)); and
- (b) the information is already in the public domain (CIO Rule 33.2(b)).

Extension of time limits for complaints

Rule B4.4 of the AFCA Rules allows AFCA to consider a dispute after expiration of the relevant time limit if AFCA considers that special circumstances apply. In LAQ’s submission this rule should be amended to reflect CIO Rule 6.4 which provides;

“The time limits under Rule 6.3 apply unless the scheme considers that exceptional circumstances apply or the financial services provider and the scheme agree to CIO having jurisdiction.”

In LAQ’s submission it is important that a Financial Firm and AFCA have the ability to agree to AFCA having jurisdiction. It is also important that the new Rules ensure that complainants do not lose protections that exist under the current Ombudsman schemes.

Test Case Provisions

Rule C2.2 (f) of the AFCA Rules sets out the requirements of a Financial Firm if AFCA agrees to allow a complaint to be treated as a test case. In LAQ's submission it is important that as part of that process a Financial Firm should be required to provide reasons that set out why the dispute should be treated as a test case.

Types of Remedies Available for a Complaint Other than a Superannuation Complaint

LAQ supports the types of remedies listed in Rule D2.1 that are available to resolve complaints other than Superannuation complaints. In LAQ's submission this list should also include the ability to vary or set aside a contract.