



National Legal Aid

# Approach to Responsible Lending – Consultation Paper

Submission to AFCA

11 September 2023

## Introduction

National Legal Aid (NLA), representing the directors of the eight Australian state and territory legal aid commissions (LACs), welcomes the opportunity to contribute to the consultation on the Australian Financial Complaints Authority's (AFCA) new Approach to Responsible Lending.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

### **About the work of Australia's legal aid commissions**

LACs are independent, statutory bodies established under respective state or territory legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged. The individual LACs are also generally referred to as Legal Aid.

The work of LAC solicitors focusses on assisting the most vulnerable consumers in our community, including persons with disability and cognitive impairment, persons with low literacy, young persons, First Nations persons, culturally and linguistically diverse persons, and consumers who are experiencing or have experienced domestic and family violence. Often people who need to access LAC services are experiencing multiple intersecting circumstances of disadvantage.

LACs with consumer protection units have extensive experience in providing specialist advice to clients as well as lawyers and financial counsellors in relation to mortgage stress, financial hardship, housing repossession, debt, credit contracts including personal loans and car loans, and Buy Now Pay Later (BNPL).

## Audience for the AFCA Approach document

Page 4 of the draft Approach document states that the approach is for financial firms, consumer representatives and consumers. We agree that the Approach document will be helpful for financial firms and consumer representatives because it comprehensively sets out the relevant issues that AFCA would consider, in relation to a responsible lending complaint.

As it is currently drafted, we do not agree that it would be a useful document for consumers.

In our experience, to engage with a document, consumers require something that is:

- (a) short and easy to follow
- (b) expresses information and concepts in clear simple English
- (c) avoids legal jargon where possible.

The Approach document:

- (a) is 61 pages long
- (b) contains explanations which would not be clear and easy to follow for consumers experiencing vulnerability, e.g., it contains a quick reference guide with 40 dot points which would overwhelm consumers and risks making the process appear too difficult
- (c) contains examples on pages 14, 15 and 20 which are confusing and lacking in context.

More particularly, the Approach document is not tailored to enable consumers in vulnerable circumstances to gain an understanding of their rights in a responsible lending case.

We recommend that a shorter document be developed for consumers, which is labelled as such and is no longer than 5 pages.

The Approach document (as currently drafted) should still be available but could be identified as suitable for financial firms and consumer representatives. This arrangement would be similar to the Guides published by the Australian Competition and Consumer Commission (ACCC), e.g., the 18 page “Consumer guarantees: A guide for consumers” and the 40 page “Consumer guarantees: A guide for businesses and legal practitioners”.

## Response to Consultation Paper Questions

### Section 3: How we decide if a financial firm has met its responsible lending obligations

#### Assessing reasonableness of inquiries and verification steps

#### **Question 1: Do you consider our approach to assessing the reasonableness of inquiries and verification steps aligns with the guidance in ASIC RG 209?**

- Yes, the AFCA approach aligns with ASIC RG 209. We consider this to be appropriate as it ensures the provision of consistent information and commentary to consumers and financial firms about responsible lending.

**Question 2: Do you have any other comments about our proposed approach to assessing the reasonableness of inquiries and verification steps?**

- Quick reference guides are a useful tool to assist consumers to further refine and articulate their responsible lending complaint.
- However, as currently drafted, the quick reference guides are too detailed, lengthy and potentially overwhelming for consumers experiencing vulnerability.
- E.g., “Guide three: Information we may request from complainants” contains 40 different dot points that consumers may be asked about. This is likely to see consumers experiencing vulnerability decide the process is too difficult to pursue, or cause panic that they may not have information that meets all of these questions.
- The quick reference guides could have the unintended consequence of alarming consumers about their AFCA complaint.

**Changes the financial firm could reasonably have foreseen**

**Question 3: Does our approach to considering a financial firm’s assessment of reasonably foreseeable changes in a complainant’s circumstances align with the guidance in ASIC RG 209?**

- Yes, the AFCA approach aligns with ASIC RG209.

**Question 4: Do you think it is reasonable for AFCA to consider that where a borrower will likely reach retirement age during the loan term, the lender should, as part of its reasonable inquiries and verification steps:**

- > **assess how the borrower will repay the loan in retirement and**
- > **if it appears likely the borrower will need to sell assets to repay the loan, make inquiries about whether the sale of those assets at that time meets the complainant’s requirements and objectives?**
- Yes, it is reasonable and appropriate for AFCA to consider this. In addition, it is consistent with the guidance at ASIC RG 209.202

**Question 5: Do you have any comments about our proposed approach to considering the reasonableness of applying interest rate buffers to loans?**

- AFCA’s approach is reasonable; and we have no further comments.

**Determining if a loan was unsuitable**

**Question 6: Do you have any comments about how we propose to seek and consider further information when we find a financial firm has made an error in its assessment?**

- The proposed process appears clear, balanced and fair.
- AFCA could consider amending point 5 to read “that a financial firm has inconsistent information about a complainant’s financial situation and that the inconsistency remains unresolved (often referred to as “red flags”), to be consistent with the discussion on page 14.

**Question 7: Do you have any comments about how we propose to use further information to determine whether the loan was unsuitable for the borrower?**

- The proposed process is explained clearly and appears balanced and fair.

**Section 4: How we determine fair outcomes and calculate complainant loss**

**Question 8: Do you have any comments about the way we propose to assess a complainant's loss and benefit?**

- AFCA's approach aligns appropriately with ASIC RG 277. It is clear and reasonable; and we have no further comments.

**Question 9: Do you have any comments about how we propose to assess loss and benefit for different types of loans?**

- At page 34 it is stated that *"There may be some circumstances where we would consider other benefits, such as rent avoided when purchasing a new home."*
- We are concerned that this inclusion is both uncertain and potentially unfair to the consumer.
- It generates uncertainty because the Approach paper does not clarify the circumstances under which AFCA will consider "rent avoided" as a benefit.
- Secondly, calculation of "rent avoided" is more likely to be unfair to the consumer as it will perhaps be calculated as a significant benefit to the consumer, due to the high rental costs in Australia.
- RG 277.114, RG 277.115 and RG 277.116 of the ASIC regulatory guide suggests that the licensee should only use assumptions if they are beneficial to the consumers.
- "Rent avoided" is a calculation that would be inherently laden with assumptions that are likely to be prejudicial to the consumers. This is inconsistent with RG 277.116.
- One issue that the quick reference guide does not deal with is the importance of consumers retaining a car in two circumstances:
  - (i) In rural and regional areas where a car is the only realistic option for consumers to travel around.
  - (ii) We are seeing a rise in consumers being forced to live in their cars because they have no other realistic alternative accommodation options. These considerations are an important part of any assessment.

**Question 10: Do you have any comments about how we propose to consider capital loss from investment property loans?**

- NLA does not have any comments about this.

**Question 11: We propose to determine how a complainant should repay any outstanding debt. This approach may allow a complainant to retain an asset and repay any outstanding debt over time if it is fair in the circumstances of the complaint. Do you have any comments about our flexible approach to determining fair outcomes when an unsuitable loan is secured by an asset?**

- The proposed flexible approach that allows the consumer to retain the underlying asset in some circumstances is beneficial for the consumer.
- As the AFCA Approach aims to ensure the delivery of consistent outcomes, we suggest that the underlying decision-making approach as set out in the examples at pages 32 and 37, should be crystallised as principles that would guide AFCA when they are making determinations.
- The example at page 32 relates to a consumer being able to surrender a motor vehicle in an instance where there is asset value depreciation and incur no further liability.
- The example at page 37 provides an outcome that is beneficial for the consumer as the consumer is provided with two choices including a choice to retain the underlying asset.
- When determining a fair outcome in relation to a responsible lending complaint, in each complaint AFCA should be guided by having to address the following questions:
  - **Question 1:** Is the loan unsuitable?
  - **Question 2:** (if the loan is unsuitable) What are the fair conditions and terms that should be imposed on the consumer and the lender to allow the consumer to retain the underlying asset?
    - This could mean that the consumer is to pay back the remainder of capital with either no interest or reasonable interest for longer. In some extreme circumstances it could mean a “life estate”.
  - **Question 3:** (if the loan is unsuitable) What are the fair conditions and terms under which the consumer incurs no continuing liability to the lender?
    - This could mean that the consumer can surrender the car and incur no further liability.
- By having the AFCA decision maker follow a process of posing and answering these questions in relation to every responsible lending complaint would result in consistent decisions and predictable outcomes.

### Other feedback

**Question 12: Do you have any comments about our tool which has been developed to assist financial firms provide detail to us about their unsuitability assessment?**

- We do not have any specific comments beyond observing that if the tool assists in AFCA making a timely and fair assessment of a responsible lending complaint, it will be of benefit to consumers and financial firms.

**Question 13: Do you have any feedback about the “Quick reference guides” included in the Approach?**

- We refer to our response to Question 2 and Question 9.

**Question 14: Do you have any other feedback about how the draft Approach meets our objectives?**

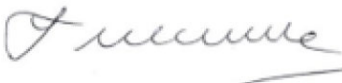
- Whilst it is AFCA’s position that “No determination (decision) can be seen as a precedent for future cases...” the Approach paper aims to create consistency in outcomes for responsible lending complaints. It would be appropriate for AFCA to consider past decisions as having some persuasive value, if not strictly seen as precedent setting.
- We note that brokers are outside the scope of this Approach; but we submit that a specific Approach paper dealing with complaints lodged about brokers would be very beneficial for consumers.

## Conclusion

Thank you for the opportunity to provide a submission on this consultation.

Should you require any further information from us please be in touch with the NLA Secretariat on [REDACTED] or [REDACTED]

Yours sincerely,



Louise Glanville  
Chair, National Legal Aid