

# AFCA Legacy Rules Changes Consultation

Submission by Legal Aid Queensland



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## Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission in response to the AFCA Legacy Rule Changes Consultation.

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 provide advice and representation in credit and consumer law matters. The unit provides advice to clients, financial counselors and lawyers in relation to mortgage stress, housing repossession, loans and other debts, contracts, insurance, telecommunications and unsolicited consumer agreements. This includes advice, assistance and representation to consumers accessing AFCA on credit, debt and insurance related disputes.

LAQ supports AFCA’s expanded legacy jurisdiction because:

- it will provide a cost free access to justice for consumers in vulnerable circumstances who may not have had the ability, at the relevant time the Financial Services Providers (FSP’s) conduct affected them, to have their complaints heard;
- it allows for valid consumer complaints, which would otherwise have been excluded from AFCA’s jurisdiction because relevant time limits had expired to be considered and determined;<sup>1</sup> and
- it will make financial services providers accountable for conduct not previously reviewed by a court or tribunal.

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<sup>1</sup> See draft Rule F1.2 and Operational Guideline F1.2.

We support the use of the example in the *Operational Guidelines* to explain the new legacy jurisdiction as it provides industry, consumers, consumer lawyers and consumer advocates with practical guidance about how the rules will be interpreted and applied. We recommend AFCA consider adding further examples, dealing with legacy complaints.

## Consultation questions:

### 1 Does the proposed change satisfy the requirements of the new authorisation conditions?

Yes, the rules satisfy the requirements of the new authorisation conditions.

### 2 Do the Operational Guidelines adequately explain how Section F will apply?

Yes, the *Operational Guidelines* are well written and are expressed succinctly. However, we raise the concerns detailed below.

#### *Operational Guideline F1.3*

LAQ supports the ability for AFCA under this guideline to:

- subject legacy complaints to the same process under Section A of the rules as any other AFCA complaint; and
- modify AFCA processes when dealing with legacy complaints to respond to the type and nature of disputes that arise as legacy disputes start being submitted to AFCA.

We also support giving AFCA the ability to ask parties to provide a statutory declaration setting out their attempts to obtain information requested by AFCA and the reasons why they have been unable to do so.

#### *Cases where information is not readily available*

LAQ is concerned about how cases where there is little information available will be treated by AFCA. We support the view that it should be a very rare occurrence that a legacy case will not be investigated by AFCA because of a lack of information. The purpose of the legacy jurisdiction is to give consumers access to a hearing about their complaint and fairness in process and outcome. It would defeat the purpose of the jurisdiction to refuse to deal with a legacy complaint because of a lack of information.

#### *Operational Guideline F2.1(b)*

LAQ supports the view expressed in Operational Guideline F2.1(b) that whether a Financial Firm's conduct occurred and ended before 1 January 2008 is a question of fact. This approach will encourage consumers to lodge a claim and have it assessed by AFCA whether their matter falls within the legacy complaints jurisdiction rather than not lodging a complaint at all.

#### *Operational Guideline F2.1(c)*

LAQ is concerned by the reference:

*"Where a court or tribunal has not made final orders but the legal proceedings have been discontinued by agreement between the parties, rule F.2.1 (e) may apply to exclude the legacy complaint."*

It is important for AFCA to be aware that legal proceedings can be discontinued by agreement for a myriad of reasons that do not necessarily mean the dispute has been finally settled. It is important that both Guideline F2.1(c) and (e) address this issue.

#### *Operational Guideline F2.1 (d) and (e)*

Regarding the explanation “AFCA will not consider a legacy complaint in relation to which a decision or determination about the merits of the complaint has been made by a Predecessor Scheme or AFCA”, LAQ submits further explanation is required to allow consumers to understand whether they are prevented from bringing a legacy complaint by operation of this rule.

The matters currently missing from the Guideline which should be explained more fully for consumers include:

- What is meant by finally settled and full and final satisfaction of the consumer’s complaint? The information contained in Rule 2.1(c) and its guidelines is very general in nature. More specific information should be provided regarding legacy complaints; and
- The guidelines should specifically set out how the following disputes will be treated:
  - matters resolved independently by the parties while an AFCA or predecessor complaint was current;
  - matters resolved by a Recommendation being accepted;
  - matters resolved by AFCA or a predecessor scheme’s conciliation process;
  - matters where a complaint has been previously lodged by a consumer in AFCA or a predecessor scheme but the matter was closed because of a lack of response by the consumer. In LAQ’s submission, this category (b) (iv) above should not be viewed as a consumer having had their complaint heard; and
  - matters where a complaint has been closed because a consumer has not responded.

### **3 Do you have any other comments about the proposed change?**

#### *Default Judgements*

LAQ is aware of AFCA’s limited jurisdiction to consider matters relating to default judgements in Rule 7.2(f) and C1.2 (d) of its rules and the guideline.

In F2.1(c) of the proposed *Operational Guidelines* it is suggested that AFCA is unable to look at a matter where a court or tribunal has made final orders (regardless of whether they were made in the absence of the complainant’s defence).

Financial firms obtaining default judgements that limit access to EDR, and purported also legacy complaints, is a significant impediment to consumers obtaining access to justice and fairness for credit and debt matters. Default judgments should be considered within the legacy complaint jurisdiction.

This impact on access to justice and unfairness manifests itself in two ways:

- a. With respect to Rule 7.2(f) and C1.2(d), under AFCA's current interpretation of these rules the ability to lodge a legacy complaint is subject to the consumer:
- applying to the court to have judgment set aside;
  - selling the security property to discharge the debt;
  - refinancing the debt;
  - organising any personal hardship other than financial hardship (i.e. medical concerns)

These rules have been applied to deny access to AFCA where a consumer has been trying to negotiate a repayment arrangement with and the financial firm then obtains a default judgment before the consumer accesses their rights under AFCA or becomes aware of their rights to access AFCA.

This problem is most evident in the behavior of some financial firms who obtain judgment and then bankrupt consumers who have no assets and are on very low incomes or have assets they were trying to protect and have had reasonable repayments arrangements for the debt refused by the Financial Firm.

- b. The object and purpose behind the Government expanding AFCA's jurisdiction to hear legacy complaints is allow consumers to have their complaints about the conduct of financial services providers back to 1 January 2008 reviewed. The focus of the change is on empowering consumers and allowing their complaints to be fairly considered and determined.

Operation Guideline F2.1(c) which excludes from legacy complaints court matters that have been resolved through a default judgement, does not allow the consumer to be heard in line with the intent of AFCA's expanded jurisdiction. A consumer who has had a default judgement entered against them has not had the opportunity to present to the court any complaints they may have against the financial firm or produce evidence in their defence. Consumers should have access to the legacy complaints jurisdiction where a default judgement has been made against them.