

AFCA Rules and Operational Guidelines – Proposed Amendments

Submission by Legal Aid Queensland

9 May 2023

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to AFCA's Consultation on proposed changes to AFCA Rules and Operational Guidelines resulting from the 2021 Treasury Independent Review of the AFCA Scheme. 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 and Farm and Rural lawyers provide specialist advice and representation to in consumer law matters, including mortgage stress, housing repossession, debt, contracts; loans; telecommunications and unsolicited consumer agreements.

LAQ's Farm & Rural Legal Service lawyers provide specialist advice and representation to rural producers and rural based businesses. We assist clients who have severe debt related problems, are in dispute with their lenders, are facing financial hardship relating to their business or have been issued with an enforcement action notice by their bank or financier. We frequently represent farmers at mediations held under the *Farm Business Debt Mediation Act (Qld)*.

LAQ's Experience of AFCA

LAQ has had extensive experience dealings with AFCA. This experience includes:

- (a) Referring clients to AFCA.
- (b) Providing minor assistance and advice to clients running their own cases in AFCA.

- (c) Representing clients in AFCA through the conciliation, recommendation, and determination processes of AFCA.
- (d) Being a member of AFCA's Consumer Advisory Panel (CAP).
- (e) Attending AFCA's Consumer Advocate Liaison Meetings (CALM).

LAQ's experience of AFCA has been mostly positive. This view has been shaped by the following engagement with AFCA:

- (a) AFCA provides a free and independent dispute resolution service for the clients we assist.
- (b) AFCA consults on issues with Industry and Consumers and is open to discussing and receiving feedback on its approach to deciding cases on specific issues affecting consumers.
- (c) AFCA promotes transparency through its engagement with industry groups and consumers through its AFCA CAP and CALM meetings.
- (d) AFCA makes publicly available approach documents to relevant financial issues that set out the approach AFCA will use in deciding cases of that type which come before it.

LAQ currently has concerns over:

- (a) The consistency of preliminary views decisions being made by AFCA.
- (b) AFCA's approach to matters involving farmers and the small business structures that they operate. In particular, we hold the following concerns:
 - a. There is a lack of transparency or guidance regarding how AFCA looks at appropriate lending in agribusiness and small business matters;
 - b. There is a lack of transparency or guidance regarding how AFCA determines fair and equitable outcomes in agribusiness and small business matters;
 - c. There is a lack of transparency or guidance regarding how AFCA calculates compensation in agribusiness and small business matters;
 - d. There is a lack of specialist agribusiness and/or small business knowledge held by AFCA adjudicators, leading to complaints from farmers and small business owners being misunderstood, misinterpreted or not receiving an adequate response from AFCA;
 - e. The approach of AFCA to only award non-financial loss to individuals ('natural persons') may disincentivize banks from dealing with some small business or agribusiness complaints in a fair or effective manner through IDR. This is discussed further under Question 9.

We understand AFCA now seeks changes to its Rules and Operational Guidelines in order to address the Independent Review Report recommendations following the 2021 Treasury Consultation on the AFCA Scheme.

Answers to questions

Proposal 1: Paid Representatives

Q1. Do you think that the proposed Rules amendments in relation to Paid Representatives appropriately address Recommendation 4?

LAQ supports the new defined terms for paid representatives and excluded paid representatives subject to Schedule E.

Through LAQ's consumer advice service, we are exposed to regular issues in situations where paid representatives such as debt management firms and claims management officers for insurance law disputes are targeting particularly vulnerable community members who are not aware that AFCA is a free process and that they do not need to pay someone to lodge a complaint with AFCA. We are also aware of the poor conduct of paid representatives in this regard.

LAQ strongly supports in relation to the proposed amendment to C.2.2g) that AFCA provides the complainant with a Notice setting out the reasoning supporting exclusion of the complaint and providing the Complainant with an opportunity to provide further information.

LAQ supports:

- the Notice being provided in writing to the complainant by AFCA and with follow up verbal communication,
- the Notice setting out:
 - the reasoning behind the proposed decision to exclude the complaint,
 - what this means,
 - the implications of a complaint being excluded and closed by AFCA,
 - options moving forward including:
 - pursuing a fresh claim through a new representation or by acting on their own behalf,
 - time limit for lodging the new complaint,
 - recommendation that the Complainant obtain independent legal advice and a referral to Legal Aid or a community legal centre.
- that a reasonable amount of time be provided to the Complainant to respond and lodge a new complaint.

With the exception of the above points, LAQ considers the proposed Rules amendments in relation to Paid Representatives appropriately address Recommendation 4.

Proposal 2: Complainants

Q2. Do you think that the proposed new provisions in relation to Complainant conduct are appropriately drafted and achieve the right balance in their application?

In LAQ's submission, this power should only be used in the rarest of circumstances. LAQ is also concerned that "otherwise unreasonable conduct" is very broad and may give rise to a much wider definition of inappropriate conduct than AFCA originally intended. AFCA's focus should be on reasons to keep a complaint in the system, not wider definitions that potentially allow more complaints to be excluded.

Whilst LAQ supports the provision of a safe working environment for AFCA personnel, LAQ considers that AFCA's role is to support and assist vulnerable Australians in circumstances where they:

- are distressed as a result of financial hardship,
- come from vulnerable communities including:
 - First Nations Communities,
 - culturally and linguistically diverse communities,
 - people experiencing family violence,
 - are experiencing mental health conditions,
 - living with a disability which adversely impacts their ability to engage with AFCA and supporting services,
 - at risk of financial abuse due to age, family situations and community expectations,
 - have experienced disadvantaged following a natural disaster,
 - requiring language and hearing interpreter's services,
 - are in prison,

People in these circumstances are:

- (a) often highly distressed;
- (b) have multiple issues that they are dealing with outside of the AFCA complaint;
- (c) struggle to have the bandwidth to deal with another administrative request that the process would impose;
- (d) struggle with communication.

These are the very people that AFCA's processes are set up to assist without the need for them to attend Court. LAQ is concerned that this process will make it harder for

them to access a fair hearing on their complaints. AFCA needs processes that allow all Australians and not just middle-class Australians who are usually better able to understand and access processes such as AFCA's.

Decisions to cancel a complaint on the basis of the complainant's conduct need to be carefully managed and ensure that AFCA meets its obligations under relevant Administrative Law, Human Rights and Anti-Discrimination laws.

AFCA should ensure that any complainant receives and is provided natural justice in accordance with the principles of Administrative Law.

AFCA needs to ensure that its personnel are recruited and trained to provide trauma informed services, skilled to de-escalate challenging situations and understand the needs of clients from vulnerable communities. AFCA needs to ensure that there are supports available for personnel undertaking this work and that mechanisms are implemented to handle challenging complainants in a way that protects personnel and the rights of the complainant.

LAQ does not support amendments to the Rules to permit AFCA to exclude a complainant for a period of up to 12 months on the basis of conduct issues relating to previous engagement with AFCA. Particularly where an exclusion period would deny the complainant the opportunity to lodge their complaint with AFCA within required time limits and have their matter considered through the AFCA process. This would be a denial of complainant's rights to procedural fairness and access to justice.

In LAQ's submission, it would be more appropriate that before a complaint and complainant is excluded from the AFCA process other alternatives are considered such as:

- (a) Communication only occurs in writing.
- (b) Communication only occurs in direct response to requests for information from AFCA.
- (c) Communication only occurs in direct response to submissions made by the financial firm.

LAQ is concerned that these amendments would disproportionately disadvantage vulnerable Australians from the groups described above.

LAQ would support a vexatious litigants process, similar to that which is used by the Courts, being examined by AFCA.

Proposal 3: Appropriate settlement offers

Q3. *Do you think that the proposed change to Rule A.8.3 is appropriately drafted and will assist in delivering early and fair resolution of complaints?*

LAQ understands that AFCA has the ability to exclude a complaint where the Complainant has been appropriately compensated for their loss.

LAQ is concerned that vulnerable consumers may not be able to properly articulate a complaint. As a result, all relevant outcomes may not be identified. LAQ also holds concern over consumers who may have been pressured to accept settlements. LAQ would support

transparency by AFCA as to who is making the decision as to whether the settlement offer is 'appropriate'. LAQ further supports guidelines be implemented surrounding the decision of whether a settlement offer is appropriate. Those guidelines should have regard to both non-financial loss, as well as direct and consequential loss.

LAQ supports AFCA recommending that the complainant obtain independent legal advice and a referral to a community legal centre or Legal Aid Commission in their area prior to dismissing the complaint.

Proposal 4: Previous settlement offers

Q4. Do you think that the proposed new Rule C.2.2g) and the Operational Guidelines discussion of settlement agreements is appropriately drafted?

LAQ is of the view that the proposed amendment to Rule C.2.2 is appropriately drafted and will assist in delivering early resolution of complaints in situations where:

- a. A settlement has been obtained,
- b. The subject of the settlement was not the subject of the present complaint,
- c. The settlement was obtained by means of fraud, duress or misleading and deceptive or unconscionable conduct.

Proposal 5: Sophisticated investor and professional investor complaints

Q5. Do you think that the proposed amendment to the Operational Guidelines appropriately responds to the Review Recommendation 6?

LAQ understands that AFCA routinely has only a small number of complaints lodged by these investors. The proposed change to exclude complaints from sophisticated or professional investors from AFCA's jurisdiction, unless there is evidence that they have been incorrectly or inappropriately classified, is supported by LAQ. We submit the proposed amendment to the Operational Guidelines in this regard appropriately responds to the Review Recommendation 6.

Proposal 6: Forward Looking Review mechanism

Q6. Are the proposed changes to the Operational Guidelines appropriately drafted and in keeping with Recommendation 9 of the Review Report?

LAQ considers the proposed changes to the Operational Guidelines appropriately reflect the accountability considerations included in Recommendation 9 of the Review Report.

Proposal 7: Complainant non-acceptance of Determination

Q7. Do you think that proposed new Rule A.15.3b is appropriately worded and provides clarity about the effect of a determination not being accepted by a Complainant?

LAQ submits that the proposed new rule appropriately reflects the instance of when a determination is not accepted by a Complainant.

Proposal 8: Accidental error in a Determination – slip rule

Q8. Do you think the Rules wording is appropriately drafted and provides clearer guidance and transparency about the existing slip rule?

LAQ supports introduction of a new rule which provides that where a clerical mistake or error in a Determination arising from an accidental slip or omission, AFCA may correct and re-issue the Determination.

LAQ submits that information about the process for correction of identified errors should be provided to the parties of the matter at the same time the Determination is provided.

LAQ submits that where a Complainant has identified a mistake or error in a Determination, an extension to the timeframe required to accept the Determination (30 days) should be extended to cater for the process involved in correcting that mistake or error. The timeframe for extension should be amended to 30 days from the date of the corrected Determination or notification from AFCA that no changes will be made to the Determination.

Proposal 9: Consistency of language about AFCA's monetary limits

Q9. Are there other areas in the AFCA Rules that you consider require similar administrative or minor changes?

- a) LAQ has had less positive experiences with AFCA regarding requests for extensions of for the complainant to provide supporting evidence. In our experience, AFCA has not been willing to grant time extensions (short or long) for evidence to be provided by the complaint.

Case study

LAQ supported a client in relation to an AFCA complaint. The client was an 88-year-old blind pensioner who lived rurally. LAQ sought an extension of time to provide medical evidence relating to the complaint. The AFCA case manager responded to the request with a response stating that an extension of time was not something AFCA can provide. The case manager recommended that the complainant withdraw and re-lodge the complaint when able to provide all relevant evidence. LAQ expressed concern that this practice was not consistent with Anti-Discrimination obligations pursuant to the *Anti-Discrimination Act 1991* (Qld).

LAQ expressed concern to the AFCA case manager about this practice, particularly in the interest of procedural fairness for both the Complaint and Financial Firm. We note that this case example has been discussed within the scope of our working relationship with AFCA by the CAP board process. However, LAQ still has significant concerns about AFCA's approach to requests for time extensions and consider rules based upon procedural fairness be considered for inclusion in the Rules.

- b) LAQ receives complaints from consumers about AFCA's monetary limit for non-financial loss. It is currently \$5,400. In LAQ's view this monetary limit is currently too low and does not give AFCA the scope to differentiate between conduct by a financial firm causing significant and extensive non-financial loss and less serious conduct. In LAQ's view the monetary limit should be increased to \$50,000 for each event.

- c) Without representation, in LAQ's experience the most vulnerable in our community still find it difficult to access and engage with AFCA. This is particularly so when the legal arguments are nuanced. AFCA has introduced processes to facilitate the engagement of the most vulnerable in our community where they are unrepresented, but further work and rules ought to be implemented to ensure that all people can successfully engage with the scheme. As a standard practice AFCA should be recommending that complainants obtain independent legal advice and provide referrals to Legal Aid or a community legal centre.
- d) For unrepresented clients who are not by definition vulnerable but are not legally trained, the process does not provide sufficient and clear direction regarding information and evidence they should provide to AFCA to support the result that they are seeking.
- e) LAQ holds concerns that routinely AFCA decisions at the recommendation/preliminary view stage do not consider the applicable law or disclose the law that AFCA has applied to reach the decision. LAQ supports transparent decision making and rules supporting this. LAQ hold concerns that where there has been a failure by financial firms to meet IDR obligations, AFCA may not award any compensation to small businesses or agribusinesses. AFCA's rules state that it *"will normally only award compensation for non-financial loss to individuals ('natural persons'). However, if the complainant is a company, but the company is simply a business vehicle for a 'sole trader' or self-managed superannuation fund, AFCA may award compensation to the individuals behind the company, if that is otherwise appropriate"*. It is unclear what AFCA's position is regarding the business structures of many small businesses and agribusinesses set up as trusts or corporate entities which appear to fall outside of these rules. In LAQ's view, awards for non-financial loss should be available to some small businesses and agribusinesses where it is fair and equitable to do so. Small business and agribusiness customers and their representatives would benefit from publicly available approach documents that set out the approach AFCA will use in deciding cases that come before it. LAQ would like to see specific guidance as to how AFCA looks at responsible lending, how it determines fair and equitable outcomes and it awards compensation in agribusiness and small business matters.

Proposal 10: Clarifying the objection process for Rule A.8.3

Q10. Do you think that the proposed Rules A.8.5 and A.8.6 are appropriately drafted and replicate the existing provisions under A.4.5 and A.4.6?

LAQ submits that the proposed Rules A.8.5 and A.8.6 appropriately replicate the existing provisions under A.4.5 and A.4.6, generally.

However, LAQ suggests including within the same Rule details of the relevant timeframe the Complainant must comply with if intending to lodge an objection to the decision.

Proposal 11: AFCA Banking and Finance Panels

Q11. Are there additional assessment criteria that AFCA should consider adopting to meet the stated objective?

Agribusiness and small business are areas where AFCA adjudicators should have access to specialist skills and knowledge. LAQ is concerned that currently, many complaints from small business and farmers are misunderstood, misinterpreted, or not properly considered, leading to an inadequate response from AFCA.

A prudent banker considering an agribusiness loan would obtain professional advice from industry specialists outside of the bank (for instance, regarding horticultural, agronomic and market issues). This specialist knowledge is required at the lending stage, so it should also be required at the adjudication stage to determine whether there have been shortcomings in a bank's approach to lending. LAQ suggests that further rules are implemented to ensure that AFCA adjudicators have access to advice from industry specialists to provide them with the information required for a determination, rather than simply relying on the advice of ex-agribusiness or small business bank managers.