maurice blackburn lawyers

22 May 2023

Executive General Manager Jurisdiction
Australian Financial Complaints Authority
GPO Box 3
MELBOURNE Vic 3001

By email: consultation@afca.org.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in response to the Consultation Paper on the AFCA Rules and Operational Guidelines – Proposed amendments.

Maurice Blackburn Pty Ltd is a plaintiff law firm with 34 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, abuse law, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

We congratulate AFCA on prioritising its response to the recommendations of the Independent Review Report, and its commitment to consultation in the development and implementation of its responses.

Maurice Blackburn notes that of the 13 proposals outlined in the Consultation Paper, the vast majority are administrative in nature. To that end, we restrict our submission to offering input on 3 of the proposals that we consider are most likely to directly impact consumers, namely:

- Proposal 2: Complainants;
- Proposal 3: Appropriate Settlement Offers; and
- Proposal 4: Previous Settlement Agreements.

Our input on these matters appears on the following pages.

Maurice Blackburn would be delighted to discuss our input in more detail with AFCA officials, if that would be beneficial to the process.

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Proposal 2: Complainants

The Consultation Paper tells us that Proposal 2 is in response to Recommendation 5 of the Independent Review Report, and that:

> *AFCA's Rules …… currently only provide limited ability to exclude or close a complaint where a Complainant's conduct towards AFCA staff is inappropriate and unreasonable and does not comply with AFCA's Engagement Charter.*
>
> *This includes instances where a Complainant's conduct is threatening, intimidating, abusive, bullying, discriminatory or otherwise unreasonable. Unfortunately, in a small number of complaints, AFCA staff have been threatened with physical violence and highly abusive conduct.* (p.10)

Maurice Blackburn applauds AFCA's commitment to providing a safe working environment for its staff.

We note from the discussion in the Consultation Paper that AFCA is mindful that some behaviours which could be interpreted as threatening, intimidating, abusive, bullying, discriminatory or unreasonable may be the result of complainant vulnerability or cultural differences. The Consultation Paper tells us that:

> *It should be noted that AFCA has undertaken a significant program of work to ensure that its service is accessible to complainants living in vulnerable circumstances. This includes in 2023, a strategic program of work to build skills and expertise in cultural and trauma informed practice. It should be noted that the above proposed provisions will operate taking into account these matters*. (p.13)

While we endorse the program of work described above, we do not see that it is reflected in the proposed adjustments to the Operating Guidelines, as articulated on page 12 of the Consultation Paper. As a result, there is no requirement for AFCA to take issues of vulnerability into account when making a determination about whether a complainant should be excluded.

Perhaps a requirement for AFCA to have satisfied the sections in the Engagement Charter related to allowing for vulnerability could be added to the proposed procedural fairness process in B.6.7.

Maurice Blackburn also accepts AFCA's strong desire to minimise the impacts on efficiency caused by vexatious complainants. In our reading, the provisions of Proposal 2 would allow AFCA to exclude a complainant for up to 12 months if he/she lodges a complaint which is substantively the same as a previous complaint that was discontinued by AFCA.

While we understand the benefits of this amendment to AFCA, we are concerned that it may inadvertently capture a complainant who is trying to do the right thing and to approach their complaint in a more constructive and productive way after it was discontinued by AFCA. Take the following hypothetical situation as an example:

> An unrepresented complainant has their matter discontinued by AFCA, due to the complainant's inability to comprehend and engage with the complaints process. In good faith, he/she then engages a paid or unpaid representative to help them express their complaint in a manner more acceptable to AFCA and to work through the merits of the complaint in a more constructive and objective manner.

We would hope that there is sufficient discretion in the system to recognise that the circumstances are different, even if the complaint itself is essentially the same.

Finally in relation to Proposal 2, we note proposed B.6.2 which tells us that:

> *An exclusion under rule B.6.1 must be in writing provided to the excluded person. An exclusion must specify the period for which it applies. This must not be for longer than 12 months.*

As AFCA will be aware, all matters have specific time limitations which must be adhered to. We believe it would be appropriate for an excluded complainant to be able to *lodge* a complaint, even if that complaint cannot be heard until the exclusion period has ended. This would avoid the potentially unintended consequence of a consumer being denied the opportunity to lodge a meritorious complaint about another matter or issue they are facing because of the imposition of a blanket exclusion period.

We suggest that B.6.4 could be adjusted to allow for discretion in such circumstances.

Proposal 3: Appropriate Settlement Offers

The Consultation Paper tells us that:

> *Rule A.8.3 currently gives AFCA the ability to exclude a complaint where the Complainant has been appropriately compensated for their loss.*
>
> *The Rules do not, however, include a specific provision which provides AFCA with discretion to exclude a complaint where a Complainant has failed to accept an appropriate settlement offer from the Financial Firm.* (p.13)

Maurice Blackburn accepts the need to deter participants in a complaint process from failing to respond in a timely or reasonable manner to an offer made in good faith. The implementation of consequences for such an approach is appropriate.

In court processes, as referred to in your consultation briefings, the equivalent sanction lies in "*Calderbank*" offers or Offers of Compromise under the respective court rules. In these circumstances, the failure to respond to an offer has the potential to lead to costs consequences against a party at the conclusion of the matter. Importantly, however, the matter is allowed to proceed beyond the rejection or expiry of the offer.

Maurice Blackburn believes that, depending on the circumstances, *excluding* a complaint due to a failure to respond to an offer goes beyond how these mechanisms work in the courts and may be too harsh a penalty in many cases.

In our view, the proposed amendment to Rule A.8.3, as articulated on page 14 of the Consultation Paper represents a 'blunt instrument' approach to these situations. We believe it is important that the Operational Guidelines clearly articulate:

- Who makes the assessment and decision that an offer is "*an appropriate remedy or compensation*", and what that decision is based on, and

- What opportunities exist for submissions to be made by parties as to what is causing the delay or refusal to accept an offer, including the opportunity to put forward further evidence demonstrating why the remedy of compensation offered is inadequate.

In our experience, many offers which seem reasonable or appropriate in hindsight may not have been seen as reasonable at the time they are received, particularly in matters with a long history of disputation or feeling or where the offer is made before the complainant has a proper opportunity to seek expert evidence on liability or quantum of their claim.

We suggest that a clear articulation of '*appropriate*' is necessary to ensure proper process.

Alternatively, the concept of '*appropriate*' should be replaced with the concept of 'reasonableness', which we submit shifts the focus to more subjective and circumstantial factors leading to the complainant's decision not to accept an offer at the time it is made. Use of the concept of reasonableness in the drafting of A.8.3 would also better align with this clear statement from AFCA:

> *It is only if the Complainant **unreasonably refuses** to accept the offer of settlement or compensation payment as resolution of the complaint, that AFCA will consider whether or not to continue to consider the complaint* (p. 14, **emphasis added**)

Either way, the assessment should be based on what was subjectively reasonable for the consumer at the time of the offer having regard to the information made available to them at that time, to any relevant vulnerabilities and to the background of the dispute between the parties.

Further, we have seen examples where at the Recommendation or conciliation stage a particular remedy or compensation is recommended, but rejected by one or both parties, and then a greater remedy or amount of compensation is awarded in a Determination. This demonstrates how subjective an assessment of an "*appropriate remedy or compensation*" can be.

We have seen at least one example where an AFCA officer strongly recommended to an unrepresented consumer that she accept less than $5,000 in compensation for loss of TPD insurance cover, which was rejected by the consumer, and after we were retained in the matter, the insurer was persuaded to reinstate her TPD cover, assess and pay a full TPD benefit of several hundred thousand dollars, plus interest. If this proposed mechanism was in place at that time, there is a risk that either this consumer would have accepted the $5,000 offer because of a concern that otherwise her complaint would be excluded by AFCA or it may have been excluded by AFCA and she may have decided not to pursue it through the courts. As a result, she would have been hundreds of thousands of dollars worse off.

We recommend that AFCA contemplate ways which respondents may seek to 'game the system' should the proposed changes be adopted. We envisage, for example, respondents making early and questionably "reasonable" offers – particularly in matters involving unrepresented claimants – then using the proposed changes to have the matter terminated before the issues and appropriate remedies are fully articulated and explored.

The Consultation Paper also tells us that:

> *This change aims to encourage fair settlement of meritorious complaints at an early stage in AFCA's process*. (p.13)

Maurice Blackburn believes that to truly achieve this aim, a parallel sanction must exist in circumstances where an offer of settlement has been made by a complainant, but the respondent has failed to respond reasonably or within a reasonable time. For example, if

a complainant makes an offer that is determined by AFCA to be appropriate, but it is rejected or ignored by the respondent, then that matter should be fast tracked to Determination or the respondent's unreasonable approach should be considered by AFCA when determining whether or not to award compensation for non-financial loss or legal fees (up to the monetary caps under the Rules).

Proposal 4: Previous Settlement Agreements

The Consultation Paper tells us that:

> *Rule C.2.2 does not …. currently list as an example a complaint that has been the subject of a full and final settlement between the parties*. (p.14)

Maurice Blackburn has no objection to the inclusion of the example, as articulated on page 15 of the Consultation Paper.

We do have concerns, however, that excluding a complaint on the basis of previous settlement agreements may have unintended consequences for some complainants. We offer the following two scenarios:

i. A consumer makes a complaint about a home loan provider which is offering no flexibility despite requests from the consumer for leniency because they can't make repayments[1]. That issue is resolved by agreement after the consumer lodges a complaint with AFCA. Sometime later, that same consumer may have another complaint about the same respondent about the same home loan – such as that, according to responsible lending laws, it was unaffordable and should never have been approved in the first place.

ii. A consumer makes a complaint in relation to a decision by an insurer related to the rejection of their claim under an Income Protection policy. Once that is settled, that same consumer may have a secondary course of action for a claim of consequential loss or interest pursuant to s 57 of the *Insurance Contracts Act*, which was not contemplated in the original decision.

In both of these scenarios, the same consumer is lodging complaints about the same financial service provider, about the same product or service – but the previous complaint was on a different matter of law. It would be inappropriate for AFCA to disallow the second complaint on the basis that a previous settlement agreement has been reached, at least not in circumstances where the consumer was not yet aware of their right to pursue the second cause of action when registering with the first (as is often the case where consumers are unaware of their legal rights and remedies until they are advised of same).

Maurice Blackburn believes the Operational Guidelines should make explicit that such scenarios are not captured by the Previous Settlement Agreements provisions.

Furthermore, Maurice Blackburn suggests AFCA develop clear guidelines as to what constitutes reasonable release agreements where unrepresented persons are involved, as our experience is that respondents can and do seek disproportionately broad or oppressive release clauses that are later relied upon to shield against separate causes of action which were not contemplated by the consumer at the time and for which no valuable consideration was paid by the respondent.

[1] E.g. technically an escalated request for hardship variation per s.72 of the *National Credit Code*.

We would be very pleased to be invited to participate in the development of such resources including through the use of real case studies.

Please do not hesitate to contact me and my colleagues on [redacted] or at [redacted] if we can further assist with AFCA's important work.

Yours faithfully,

Craig Parrish
Principal Lawyer & State Litigation Leader
MAURICE BLACKBURN LAWYERS