

22 May 2023

Executive General Manager Jurisdiction  
Australian Financial Complaints Authority  
GPO Box 3  
Melbourne VIC 3001

**By email only:** [consultation@afca.org.au](mailto:consultation@afca.org.au)

To the Executive General Manager Jurisdiction,

**Re: Submission to AFCA Rules and Operational Guidelines – Proposed Amendments**

**Proposal 1: Paid Representatives**

**Q.1 Do you think that the proposed Rules amendments in relation to Paid Representatives appropriately address Recommendation 4?**

The proposed amendments do not appropriately address the assertion in the 'AFCA Rules and Operational Guidelines – Proposed Amendments Consultation Paper March 2023' ("**the consultation paper**") that "prior to excluding a Paid Representative, AFCA will provide any impacted Complainants with the opportunity to pursue their complaint with a new representative or to act on their own behalf."

Where a complaint is excluded or a Complainant is cut off from their Paid Representative, the Complainant can suffer detriment if they are not assisted by AFCA to find another representative. Complainants are often experiencing significant vulnerability, disadvantage and overwhelm at the time of lodging a complaint and can find it difficult to find another representative if a referral is not actively facilitated.

**Case Study 1**

██████ engaged a professional advocate to assist with her insurance complaint to AFCA following an earthquake event that caused loss and damage to her property. Midway through the complaint, the professional advocate ceased to act for ██████ because the insurer revealed that ██████ had made a claim a decade ago that she forgot to disclose to the advocate. The advocate did not provide any referrals for another representative and ██████ was left to progress the complaint by herself which caused her significant

stress and financial detriment, until she was eventually referred to Westjustice by another organisation.

- **Recommendation 1:** Insert a rule which states that AFCA must provide to a Complainant a list of contact details for referral options such as community legal centres or financial counselling agencies when deciding to exclude a complaint or Paid Representative.

## **Proposal 2: Complainants**

### **Q.2 Do you think that the proposed new provisions in relation to Complainant conduct are appropriately drafted and achieve the right balance in their application?**

The proposed new provisions as drafted do not achieve the right balance in their application. Rule A.8.4(b) includes the phrases “AFCA’s reasonable opinion” and “otherwise unreasonable”. These phrases are too broad and ambiguous – they require further elaboration so as not to allow AFCA to unfairly exclude a complaint or Complainant at its discretion. Whilst balancing the need for AFCA staff to be safe at work, there needs to be stronger protection around a Complainant’s right to have their complaint heard.

- **Recommendation 2:** Insert in Rule A.8.4(b) or in an operational guideline a definition for “otherwise unreasonable”, or simply delete the phrase “or otherwise unreasonable” from Rule A.8.4(b).

Further, a Complainant will likely suffer detriment to their financial position and health due to being excluded from pursuing a complaint. As stated in the consultation paper, AFCA should not lightly exclude a complaint because of a Complainant’s conduct. However, the correct balance has not been met when reading the rights of the Complainant in the proposed B.6 Rules.

Before deciding to exclude a complaint or Complainant, AFCA should assist the Complainant to find a representative. The Complainant should also have the right to have their excluded complaint immediately reopened or have the decision to make them an Excluded Complainant immediately overturned if they find a representative for their complaint.

- **Recommendation 3:** Insert a rule which states that when deciding to exclude a complaint or the Complainant on the basis of the Complainant’s conduct AFCA must provide to the Complainant a list of contact details for referral options such as community legal centres or financial counselling agencies and explain to the Complainant that having a representative can overturn the decision.

- **Recommendation 4:** Insert rules which state that a decision to exclude a complaint or Complainant on the basis of the Complainant's conduct toward AFCA staff can be immediately overturned if the Complainant subsequently obtains a representative for their complaint.

### **Proposal 3: Appropriate settlement offers**

Q.3 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?

The proposed change needs improvement to its drafting to deliver fair resolution of complaints. Rule A.8.3(d) assumes that an AFCA Case Analyst/Manager has all of the necessary information and knowledge to make their discretionary decision that "the Financial Firm has appropriately compensated the Complainant for their loss, or has offered the Complainant an appropriate remedy or compensation." A Complainant must be given an opportunity to make detailed submissions on the facts of the dispute and the resulting financial and non-financial loss they have suffered, particularly with the assistance of a representative.

#### **Case Study 2**

■■■■ was an elderly man who suffered from a disability that made it difficult for him to use AFCA's online complaints portal. He initially lodged a complaint to AFCA in relation to a Default Notice and threats of legal action he received for arrears on a secured car loan obtained as a business loan. The Default Notice and threat of legal action caused ■■■■ immense stress and he was hospitalised shortly after and was told that he needed premature heart valve replacement surgery.

The AFCA Case Manager indicated an intent not to continue to consider the complaint as ■■■■ had allegedly not suffered a financial loss. ■■■■ sought the assistance of Westjustice to make submissions on his behalf in relation to the incorrectly categorised business loan and his resulting loss; however, we were not allowed the opportunity to provide written submissions on the complaint as the Case Manager's view was that it was unlikely ■■■■ would obtain an outcome that he had suffered a loss.

#### **Case Study 3**

■■■■ was a client from a refugee background who had been the victim of financial fraud perpetrated by a scammer. She immediately rang her bank to notify them when she realised she had been a fraud victim, but was told no interpreter was available for her to communicate her situation. She was not able to report the loss until a further two weeks later when the Melbourne lockdown ended and she could attend a branch in person.

No offer of settlement was made by the bank until ■■■ was assisted to make an AFCA complaint. ■■■ notified AFCA she did not agree to the settlement, and the case manager subsequently found that ■■■ had no entitlement to financial loss concerning the money lost in the fraud.

On ■■■ instructions, we sought for the matter to proceed to final Determination. ■■■ was ultimately awarded for non-financial loss for a higher amount than originally offered by the bank due to the failure to supply an interpreter.

■■■ was satisfied and happy with the AFCA process and outcome. However, we are concerned that the proposed changes could have led in this situation to an outcome where our client was excluded from a fair final Determination.

- **Recommendation 5:** Amend Rule A.8.3(b) to make it clear that financial and non-financial loss is considered when assessing whether the complainant has suffered loss.
- **Recommendation 6:** Insert a rule which states that AFCA must provide to a Complainant a list of contact details for referral options such as community legal centres or financial counselling agencies when deciding not to continue to consider a complaint.
- **Recommendation 7:** Amend Rule A.8.3 and/or Rule A.8.5 to make it clear that AFCA may decide that it is not appropriate to continue to consider a complaint only if the Complainant has been provided the opportunity not only to object but to make submissions in relation to the facts of the dispute and their loss suffered.
- **Recommendation 8:** Amend Rule A.8 to state that a decision not to continue to consider a complaint must be made with the assistance of an Adjudicator or Ombudsman. This can be done on a fast-tracked basis in the interests of a timely and efficient complaint.

#### **Proposal 4: Previous settlement agreements**

Q.4 Do you think that the proposed new Rule C.2.2(g) and the Operational Guidelines discussion of settlement agreements is appropriately drafted?

The proposed new Rule C.2.2(g) should go further to explain other scenarios where it is not fair to rely on a full and final settlement reached in all the circumstances.

A Financial Firm should give a Complainant an opportunity to obtain independent legal advice to understand the terms and conditions of a full and final settlement before agreeing to it.

- **Recommendation 9:** Amend Rule C.2.2(g) to include that AFCA cannot exclude a complaint where the Complainant has not been given the opportunity by the Financial Firm to obtain independent legal advice before agreeing to a full and final settlement.

Some Financial Firms are required by applicable codes of practice and guidelines to use interpreters to communicate with Complainants. For example, the *General Insurance Code of Practice* states at section 101 that “where practicable, we will provide access to an interpreter if you ask us to, or if we need an interpreter to communicate effectively with you. We will record if an interpreter is used or if there are reasons we are unable to arrange one.”

A new version of the *Banking Code of Practice* is also soon to be released which may contain enforceable provisions in relation to use of interpreters.

The *ACCC & ASIC Debt collection guideline: for collectors and creditors* also states that “For someone who cannot speak English, appropriate interaction requires that the debtor can understand you. The assistance of an English-speaking family member or friend to translate should be sought, but only if the debtor proposes or agrees to this. Otherwise, the collector or creditor will need to engage a professional interpreter.”

- **Recommendation 10:** Amend Rule C.2.2(g) to include that AFCA cannot exclude a complaint where a Financial Firm is relying on a full and final settlement reached with a Complainant without the use of an interpreter where the Financial Firm was required by law, a code of practice or other enforceable instrument to use an interpreter, or if use of an interpreter would otherwise have been reasonable in the circumstances.

A Complainant may also not be able to understand a full and final settlement they have agreed to due to a communication barrier such as a lack of cognitive capacity, an intellectual disability, or other barrier that is known to the Financial Firm. It would not be fair to rely upon a settlement agreement in these circumstances to exclude a complaint.

- **Recommendation 11:** Amend Rule C.2.2(g) to include that AFCA cannot exclude a complaint where a Financial Firm is relying on a full and final settlement reached with the knowledge that the Complainant had a lack of cognitive capacity, intellectual disability, or other communication barrier which meant that the Complainant could not understand all terms and conditions of the settlement.

### **Proposal 7: Complainant non-acceptance of Determination**

Q.7 Do you think that proposed new Rule A.15.3(b) is appropriately worded and provides clarity about the effect of a determination not being accepted by a Complainant?

The proposed new Rule A.15.3(b) is appropriately worded and clear in terms of AFCA's intention for the rule. However, Rule A.15.3 may have an unintentionally harsh impact on a Complainant who has been unable to respond within 30 days of receiving the Determination due to reasons outside of the Complainant's control.

AFCA Determinations currently take numerous months to reach from the date of complaint lodgement to date of Determination. A lot can happen in a Complainant's life in that time, including but not limited to health issues, injury or hospitalisation, being a victim of family violence, or overseas travel. It would be unfair to exclude a Complainant from relying on an AFCA Determination in their favour due to unforeseen circumstances or a life event disabling them from responding to the Determination within the timeframe.

- **Recommendation 12:** Amend Rule A.15.3 to include provision for AFCA to allow an extension of time on the 30-day timeframe for a Complainant to accept a Determination if fair in the circumstances. The Operational Guidelines should state what AFCA considers to be relevant circumstances for an extension.

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

Q.9 Are there other areas in the AFCA Rules that you consider require similar administrative or minor changes?

- **Recommendation 13:** Rule A.3.1 may soon need to be amended to account for AFCA's upcoming complaints portal.
- **Recommendation 14:** Clarify in Rule A.7.2(d) whether the Complainant merely lodging a defence or defence and counterclaim allows or does not allow a Financial Firm to continue with legal proceedings.

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

Q.10 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?

The proposed Rules A.8.5 and A.8.6 are not appropriately drafted as they should specify a minimum timeframe (e.g. 14 days at a minimum) within which a Complainant may object or provide submissions to AFCA's decision.

Often Complainants are afforded only 7 days to respond, which is a very short amount of time given the complexity that AFCA complaints and Complainants' individual circumstances can entail.

- **Recommendation 15:** Further to our Recommendation 7 above, amend Rules A.8.5 and A.8.6 to include a minimum timeframe (at least 14 days) within which a Complainant may object or provide submissions in response to AFCA's decision, and allowing for both the Complainant to apply for an extension and AFCA to consider an extension to the timeframe.

Yours sincerely,

**Mortgage Stress Victoria and Economic Justice Team**  
**Westjustice**