



**Redfern  
Legal  
Centre**

22 May 2023

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

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

Dear General Manager,

### **AFCA Rules and Operational Guidelines – Proposed amendments**

Thank you for the opportunity to respond to the proposed amendments to the Australian Financial Complaints Authority's (AFCA) Complaint Resolution Scheme Rules (**Rules**) and Operational Guidelines (**Guide**).

Given Redfern Legal Centre has specialist services in financial abuse and credit, debt and consumer law, this submission will focus on the proposed amendments as they relate to complainants experiencing domestic and family violence, as well as other disadvantage.

Redfern Legal Centre also endorses the submission made by Consumer Action Law Centre.

We would welcome the opportunity to meet with you to discuss our submission.

We have no objection to this submission being published.

Yours faithfully,

Camilla Pandolfini  
CEO  
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Submission to AFCA Rules and Operational Guidelines –  
Proposed Amendments

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Date: 22 May 2023



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## 1. Introduction: Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area and across New South Wales through its specialist state-wide legal services, including the Financial Abuse Service NSW.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are financial abuse, tenancy, domestic violence, credit and debt, employment, discrimination and complaints about police and other governmental agencies. Working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and policy and law reform. RLC works towards reforming our legal system for the benefit of the community.

RLC has over 30 years of specialist experience in domestic and family violence (DFV) in New South Wales. RLC received its first formal recognition for these services in 1996 with a Special Award for dedication and commitment to the prevention of domestic violence from the NSW Minister for Community Services. The award recognised a scheme pioneered by RLC – the Women’s Domestic Violence Court Assistance Scheme – a holistic approach to the provision of services for women seeking legal protection from domestic violence which has since been extended throughout NSW by Government. Additionally, RLC has initiated or been actively involved in projects which have led to the establishment of the Consumer Credit Legal Centre (now Financial Rights Legal Centre), Welfare Rights Centre, Prisoners Legal Service, Accommodation Rights Service and Macarthur Legal Centre, among others.

In 2014, RLC began providing legal services to victim survivors of financial abuse through our credit, debt and consumer law practice. RLC identified that there was a need for a more specialised and state-wide service for people experiencing legal issues associated with DFV and financial abuse, including family law expertise in financial matters such as property settlements, spousal maintenance and child support.

## 2. RLC’s Financial Abuse Service NSW

Since 2019, RLC has provided legal advice and representation to clients affected by financial abuse from an intimate partner in NSW, through our specialist state-wide Financial Abuse Service NSW. This is the only service of its kind in Australia. We provide free confidential legal advice, including co-advice appointments with specialist family lawyers advising alongside credit, debt and consumer lawyers, and representation in eligible cases. Our lawyers are trauma informed, understand safety risks and the complexities of abusive relationships, and are responsive to the non-legal needs of clients. In addition to providing legal support for victim survivors of financial abuse, the service provides community legal education and engages in capacity-building and reform work to drive systemic change and prevent financial abuse.

Our capacity-building work includes raising awareness among community sector workers, the general public, industry and Government, and providing a central source of information and resources on financial abuse. Our policy and law reform work includes submissions on policy development, reform and legislative change. We also work with Government, industry, regulators, ombudsman services and peak bodies to implement appropriate policies and procedures.

RLC also coordinates the [Economic Abuse Reference Group](#), a national network of 27 community organisations which work collectively with Government and industry to reduce the financial impacts of family violence. Members include DFV services, community legal services and financial counselling services.

This submission will only comment on the proposed amendments to the AFCA Rules and Operational Guide where they impact people experiencing economic abuse.

### 3. Financial abuse

Economic abuse or financial abuse is a form of family, domestic and sexual violence. It has significant and devastating impacts at an individual, community and societal level. Economic abuse in an intimate partner relationship can take various forms, including accruing debt or other liabilities in the other person's name, not contributing to joint loans, controlling all finances, not making shared financial decisions, withholding necessities, preventing someone from obtaining or remaining in employment, and stopping someone from accessing education or a means to become financially independent.

Financial abuse is a hidden epidemic in Australia. A recent report by Deloitte Access Economics found that 43 Australian women were subjected to financial abuse every hour in 2020.<sup>1</sup> Around 85% of women who access DFV services in Australia say that they have experienced some level of financial abuse in their relationship.<sup>2</sup>

### 4. AFCA's approach to dealing with complainants experiencing vulnerability

We value the strong partnership between AFCA and RLC alongside other community organisations, and AFCA's support for complainants experiencing vulnerabilities, including financial abuse. However, we are concerned that the AFCA Rules and Guide omit consideration of issues specific to complainants experiencing vulnerabilities, including financial abuse, as highlighted below.

We commend AFCA's work to ensure that its service remains accessible to complainants experiencing vulnerability, and its commitment to upskilling and capacity building its staff in cultural safety and trauma-informed practice. We encourage AFCA to approach future consideration of the Rules and Guide through this lens. We worked with AFCA to update its 'Approach to joint facilities and family violence' in 2022. We would welcome the opportunity to assist with any future reviews to ensure that people experiencing financial abuse are better supported to achieve appropriate outcomes through the AFCA process.

### 5. Summary of Recommendations

Proposal 1:

- Inform complainants of excluded Paid Representatives about the impact and reasons for exclusion of their complaint.
- Exclusions of Paid Representatives should not be limited to 12 months if the issue is not rectified.
- Lawyers and accountants should be considered Paid Representatives.
- At the time of excluding a complaint, AFCA should provide appropriate referrals to the affected complainant such as free financial counselling services and free legal services.

Proposal 2:

- Provide more detail in the Rules and Guide about the types of conduct by complainants that may warrant their exclusion.
- Consider the complainant's circumstances, especially if they are experiencing vulnerability, in considering the exclusion of complaints.
- At the time of excluding a complaint, AFCA should provide appropriate referrals to the affected complainant such as free financial counselling services and free legal services.

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<sup>1</sup> Deloitte Access Economics (2022) The cost of financial abuse in Australia (Commonwealth Bank of Australia). <https://www.commbank.com.au/content/dam/caas/newsroom/docs/Cost%20of%20financial%20abuse%20in%20Australia.pdf>

<sup>2</sup> Australian Bureau of Statistics, Data and Information Regarding the Personal Safety Survey. In: 4906.0 - Personal Safety Survey Australia 2012. Canberra (AUST): ABS; 2013. Available from: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4906.0Main+Features12012?OpenDocument>

- Where the complainant can demonstrate they have addressed the problem, AFCA should give them the ability to reopen the complaint rather than lodging a new complaint, especially where a new complaint would be out of time.

Proposal 3:

- Amend the Rules to include that, before excluding a complaint on this basis, AFCA will undertake a detailed consideration of the complaint and give the complainant a positive statement that the settlement offer they previously received was fair, and AFCA's reasons for this decision.
- The complainant should be given adequate time to consider AFCA's decision and receive independent advice before AFCA excludes the complaint. This is especially relevant to ensure the Financial Firm does not finalise the complaint.

Proposal 4:

- Expand Rule C2.2(g) to allow AFCA to also consider complaints despite there being a full and final settlement between the parties, if the complainant can show that the Financial Firm acted unfairly in obtaining the settlement or the Firm did not comply with, or the settlement is inconsistent with, AFCA's Approach to Terms of Settlement.

Proposal 5:

- Undertake a brief check of the basic details of complaints involving sophisticated or professional investors for risk of mis-classification as standard practice, even if this issue is not raised by the complainant.

Proposal 11:

- Provide more transparency in the Guide on who an appropriate panel member is, and how that is decided.

Proposal 12:

- Expand the definition of financial services to include debt management or credit repair services even where the underlying debt was related to another form of debt, for example telecommunications debts.

Proposal 13:

- Include percentage proportions in AFCA's annual report in addition to raw numbers, such as how many complaints each Financial Firm was the subject of as a proportion of their customer base and/or market share.

## 6. Detailed responses to proposals in the Consultation Paper

### Proposal 1 – Poor conduct by paid representatives and unlicensed representatives

We strongly support the amendments to the Rules and Guide under Proposal 1 to expand AFCA’s powers to exclude paid representatives that are not acting in the best interests of a complainant, or that are unlicensed. However, it is critical that AFCA does everything in its power to contact a complainant directly and assist them to continue their complaint if the exclusion of a Paid Representative would impact their complaint being heard, particularly if it would extinguish the legal rights of the complainant altogether (for example if a claim would become statute barred). We expect that amendments to the Guide will sufficiently clarify this.

We urge AFCA to consider the following improvements to aspects of this Proposal:

- Exclusions of Paid Representatives for a failure to meet the (i) appropriate licensing obligations (new B.6.5.a) or (ii) rectify issues raised by AFCA (new B.6.5.b), should not be limited to 12 months if the issue is not rectified. While exclusion on this basis should result in an unconditional ban for a period (even if licensing requirements are subsequently met), bans should continue indefinitely while the Representative continues to be unlicensed, or AFCA’s concerns remain outstanding.
- Lawyers and accountants should be considered ‘Paid Representatives’ and subject to the exclusion power (new B6.5). Membership of a professional body is no guarantee of good advice. There are numerous private lawyers and accountants whose primary business model is to provide financial services related advice to clients yet provide poor quality advice. If AFCA believes that a lawyer or accountant is not acting in the best interests of their client, it may be a better outcome for complainants if AFCA has the power to exclude the Paid Representative.
- Additionally, ensure that AFCA’s referral powers allow it to raise concerns about the conduct of lawyers or accountants with their relevant oversight body (such as state Legal Services Boards or CPA Australia).

AFCA should consider ways to proactively inform the complainant clients of excluded Paid Representatives about the impact and reasons for the exclusion. Page 149 of the Guide currently states AFCA will contact complainants “directly to discuss the issue” when a Paid Representative engages in inappropriate conduct per C2.2(g) and (h) of the Rules. We expect that this will continue to apply to an exclusion per new Rule B4.1.

We also recommend that at the time of excluding the complaint, AFCA provide appropriate referrals to the affected complainant such as free financial counselling services and free legal services. This is particularly important for complainants experiencing disadvantage who may not be in a strong position to represent themselves in their complaint, which may have informed their decision to engage the Paid Representative in the first place.

### Proposal 2 – Exclusion of complainants

We agree that abusive or threatening conduct by a complainant toward an AFCA employee is unacceptable. We appreciate that the Guide clarifies that this should only result in the complete exclusion of a complaint/complainant in extreme circumstances.

We commend AFCA’s work to support complainants experiencing vulnerability. We suggest that the Guide explicitly requires that consideration be given to the complainant’s circumstances, especially if they are experiencing vulnerability, in considering the exclusion of complaints.

We suggest that more detail be provided in the Rules and Guide about the types of conduct by complainants that may warrant their exclusion. Specifically, that before exercising this power, AFCA will consider the impact of any form of disadvantage a complainant may be experiencing. This should also form part of AFCA's work to upskill its staff on cultural safety and trauma-informed practice, for example highlighting the various ways in which trauma can affect an individual's interpersonal interactions.

We also recommend that at the time of exclusion of a complaint, AFCA must refer the complainant to relevant free financial counselling and free legal services, especially for complainants experiencing vulnerability as noted above. The Guide should make it clear that if the same excluded complaint is then raised with AFCA by an unpaid representative, the complaint will no longer be excluded and will be reopened. We suggest deleting the words 'on behalf of' in new Rule B 6.4 that suggest that AFCA will not consider complaints raised by excluded complainants' new representatives.

Where the complainant can demonstrate they have addressed the problem or their personal circumstances have changed such that the unacceptable behaviour is unlikely to reoccur, we recommend that they be given the ability to reopen the complaint rather than lodging a new complaint, especially where a new complaint would be out of time. The complainant should be informed of the potential consequences of opening a new complaint rather than reopening the original complaint. We are concerned that otherwise, where a complaint has been excluded on this basis and there is a delay in the complainant re-engaging with AFCA while they address their unacceptable behaviour, the complainant may lose their ability to have their complaint heard by AFCA.

### **Proposal 3 – Appropriate settlement offers**

We are concerned that changing this rule to allow AFCA to exclude a complaint where it believes the complainant has already been appropriately compensated for their loss or has made a settlement offer that hasn't been accepted will lead to unfair outcomes. Specifically, a complainant who believes the settlement offer they have been given is unfair is, by virtue of lodging a complaint, seeking AFCA's involvement to review and consider all the possible grounds of the complaint in its entirety and reach a fair assessment.

We recommend amending the Rules to include that, before excluding a complaint on this basis, AFCA will undertake a detailed consideration of the complaint and give the complainant a positive statement that the settlement offer they previously received was fair, and AFCA's reasons for this decision. The complainant should be given adequate time to consider AFCA's decision and receive independent advice before AFCA excludes the complaint. This is especially important because in many cases, the settlement offer has already been made by a Financial Firm and expired by the time AFCA decides whether to exclude the complaint. If AFCA excludes the complaint on this basis, the complainant will have no other recourse except through the court system, which is often inaccessible, especially for people who have experienced DFV.

Therefore, we recommend AFCA only exclude the complaint if the settlement offer is still open and capable of acceptance for a further 14 days, to allow time for the complainant to seek advice about accepting the offer before AFCA excludes the complaint.

### **Proposal 4 – Previous settlement agreements**

We support AFCA exercising its discretion to exclude complaints where there has been a full and final settlement with the Financial Firm. We recommend expansion of this to allow consideration of complaints if a settlement was obtained by unfair conduct on the part of the Financial Firm, as well as the other circumstances listed of fraud, duress, or misleading and deceptive or unconscionable conduct. This is consistent with section 76 of the *National Credit Code* (Cth) (the **Code**) which gives the court power to reopen unjust consumer transactions. The definition of 'unjust' in the Code includes 'unconscionable, harsh or oppressive'.

We recommend that Rule C2.2(g) be expanded to allow AFCA to also consider complaints, despite there being a full and final settlement between the parties, if the complainant can show that the Financial Firm



acted unfairly in obtaining the settlement or the Firm did not comply with, or the settlement is inconsistent with, AFCA's Approach to Terms of Settlement.

#### **Proposal 5 – Sophisticated and professional investors**

We support Proposal 5, but we recommend that AFCA undertake a brief check of the basic details of complaints involving sophisticated or professional investors for risk of misclassification as standard practice, even if this issue is not raised by the complainant. This is especially critical as there is a risk that a victim survivor of financial abuse might have signed on as a sophisticated or professional investor under coercion or duress or might have been the victim of fraud. Where the facts of the dispute indicate a risk of misclassification, AFCA should explicitly advise the complainant of the right to dispute their classification as an investor of these types.

#### **Proposal 11 – AFCA banking and finance panels**

We welcome the introduction of examples of banking and financial complaints or small business complaints that might be decided by the AFCA panel, and we support the examples provided. However, we suggest there is more transparency in the Guide on who an appropriate panel member is, and how that is decided.

#### **Proposal 12 – Financial Service definition**

We support the amendment to recognise AFCA's definition of financial service includes debt management and credit reporting assistance. We are concerned, however, that this is too strict a definition which will prevent some complainants from seeking redress through AFCA. We consider this definition should be expanded to include debt management or credit repair services even where the underlying debt was related to another form of debt, for example telecommunications debts, because the conduct being complained of is that of the debt management and credit repair service, not the provider of the underlying debt. Restricting this definition to debt management and credit repair services engaged in respect of debts owing to financial service providers draws an arbitrary distinction which is unlikely to be understood by complainants, who may find themselves able to bring complaints against debt management and credit repair services in respect of some, but not all, of their debts.

#### **Proposal 13 – AFCA's Annual Report**

We support the amendments regarding AFCA's annual report. We suggest that when reporting on data, AFCA also includes percentage proportions in addition to raw numbers, such as how many complaints each Financial Firm was the subject of as a proportion of their customer base and/or market share. Providing only raw numbers may lead to consumers choosing to engage with smaller Financial Firms with less complaints but less robust protections as they appear to be a 'safer' option. This would provide much more accessible and meaningful data for stakeholders and the public in comparing conduct across Financial Firms and help inform better policy.