

Treasury Consultation – Review of the Australian Financial Complaints Authority

Submission by Legal Aid Queensland



Review of the Australian Financial Complaints Authority

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to the Review of the Australian Financial Complaints Authority (AFCA). 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 Civil Justice Services lawyers have extensive experience providing specialist advice and representation to vulnerable clients in banking and finance, credit and debt, insurance, telecommunications and consumer law. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to responsible lending, insurance, mortgage stress, housing repossession, banking and financial issues, financial hardship, debt, contracts, loans, telecommunications and unsolicited consumer agreements.

LAQ regularly assists and represents clients with complaints about credit, banking, debt, insurance and broker issues that fall within the terms of reference of AFCA. LAQ regularly assists clients with representation and assistance with complaints they have made to AFCA. LAQ also regularly refers consumers to lodge complaints with AFCA. This submission is informed by that knowledge and experience.

LAQ’s Experience of AFCA

LAQ has had extensive experience in dealing with AFCA over the past 2 years. 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 and Recommendation and Determination processes.
- (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 largely 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 its engagement with 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.
- (e) Prior to the Pandemic AFCA was active in the community attending a wide range of community and professional events and beginning a roadshow to improve the accessibility of AFCA to everybody.
- (f) AFCA is working on a fairness project that will continue to improve AFCA's approach and processes and the fairness and appropriateness of decisions being made by AFCA.
- (g) AFCA's ability to deal with the legacy complaints it inherited from the Financial Ombudsman Service and the Credit and Investments Ombudsman.

LAQ strongly supports AFCA's decision to start naming financial firms in its determinations. In LAQ's view, this approach improves transparency and accessibility to AFCA because it provides the public with important information about the unsatisfactory and poor practices of specific financial firms.

There were some initial delays, occurring subsequent to AFCA commencing, in dealing with some complaints as AFCA employed and then trained hundreds of new staff. We have observed an improvement in the timeliness of the AFCA complaints process.

In LAQ's experience, AFCA could improve in the following areas:

- (a) Greater transparency on systemic issues.

The process for investigation of systemic issues by AFCA remains unclear. The process for informing consumers appears to occur later in the systemic investigation process. This approach can result in delays which then impact the financial firm's ability to locate and contact all consumers when attempting to remediate a mistake.

- (b) Improving the consistency and quality of decision making.

AFCA has had a rapid expansion in staff over the past two years. It is important that AFCA provides initial and ongoing training to staff to ensure consistency of decision making.

- (c) Farmers and rural small businesses are not confident using the scheme.

AFCA should improve and promote its engagement with this sector and its approach to resolving these disputes.

- (d) Providing greater clarity as to what circumstances AFCA will take into account when exercising its fairness jurisdiction.

When considering complaints, it is unclear how AFCA weighs up the competing interests of lenders and their industry practices against what is fair and reasonable given the individual circumstances of the customer. For example, it is unclear in what circumstances fairness considerations would trump “commercial” decisions of a lender.

- (e) As a matter of fairness, panel determinations should include an industry representative who has industry knowledge and experience relevant to the circumstances of the complaint.

For example, if a farmer’s complaint relates to an agricultural loan in Queensland, so far as possible the Industry panel member should be familiar with the industry practices and conditions specific to agricultural loans at the time the conduct complained of occurred. Preferably, the consumer representative should also have some experience with the needs of farmers and small business.

- (f) When applying AFCA’s Rules, AFCA should look for reasons why the complaint falls within the scope of its jurisdiction instead of reasons why it falls outside its jurisdiction.

In relation to the legacy complaints jurisdiction, some farmers reported negative experiences. For these matters farmers were of the view that AFCA was inclined to only consider what banks were legally required to do rather than what was fair and reasonable given the circumstances. They also failed to take into account, the objectional behaviour of lenders prior to and during farm debt mediations which were the subject of settlements. AFCA also failed to consider complaints about the post-mediation conduct of lenders that were not the subject of settlement discussions.

- (g) Providing adjustments to the case management process as is appropriate for the individual circumstances of the consumer.

It can be difficult for unrepresented clients to feel confident that they can seek reasonable extensions on timelines imposed by AFCA.

- (h) Greater transparency on AFCA’s decision-making and case management processes.

LAQ has seen consumers given short deadlines to respond to requests for information. Consumers are often unaware of their rights under the Operational Guidelines and Rules to request an extension or the reasons for which an extension may be granted. Consumers are unlikely to be familiar with or read the Operational Guidelines and Rules. The processes AFCA follow should be put forward to consumers as a matter of procedural fairness.

- (i) AFCA should provide clearer guidelines as to how and when it considers compensation claims for direct and non-direct financial loss incurred as a result of the behaviour of the lender and the methods used to calculate those losses.
- (j) AFCA recommendations should include a better analysis of the legal basis for decisions made.

AFCA recommendations should be drafted to maximise consumer understanding and provide meaningful and accurate legal reasons for the decision. The reasons provided by AFCA should be drafted to aid understanding of the law, promote acceptance of outcomes, and provide clear guidance on options for review.

Delivering against statutory objectives

1. Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?

In LAQ's experience, there are circumstances where AFCA may not be meeting its objectives to resolve complaints in a free, fair, efficient, timely and independent manner.

LAQ, however, welcomes AFCA's on-going work on its fairness project which is examining ways that AFCA can continue to improve its processes.

In LAQ's view, AFCA's ability to achieve these objectives could be further improved by:

- (a) Strengthening AFCA's terms of reference to give it stronger powers to deal with paid representatives and claims agents of consumers that:
 - (i) Abuse, bully or otherwise poorly treat AFCA staff.
 - (ii) Do not act in the consumer's interest by for example failing to provide them with the details of settlement offers made by a financial firm.

In LAQ's view, where there is conduct of this type, AFCA should have the ability to permanently ban a representative from lodging complaints with AFCA on behalf of consumers.

LAQ is also aware that AFCA is developing an Engagement Charter that will set out what the public can expect from AFCA when it is dealing with consumers or their representative and what AFCA will expect from all people engaging with it.

- (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) AFCA has to balance the need to maintain its independence with the need to help unrepresented vulnerable clients identify the nature of their complaints. AFCA has a good practice of referring particularly vulnerable clients to services such as Legal Aid Commissions (LACs), Community Legal Centres (CLCs) and Financial Counsellors. However, for these referrals to continue to be effective, more funding is required for LACs, CLCs and Financial Counsellors to provide these services.
- (d) 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 is required to ensure that all people can successfully engage with the scheme.
- (e) For unrepresented clients who are not by definition vulnerable but are not legally trained, the process may not give them enough direction as to what information they could show to support the finding that they are seeking. It is not clear to LAQ that decisions at the recommendation stage have considered the law (including articulating the law that AFCA has applied).

1.1 Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes?

Overall, for the reasons outlined above, AFCA's dispute resolution approach and capability needs improvement before its decisions can be seen to be delivering consistent, predictable and quality outcomes.

LAQ notes that when issues have been directly raised with AFCA about its dispute resolution approach, AFCA engages with the issues in a prompt, open and engaging manner.

1.2. Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?

We are unsure if AFCA has good processes for the identification and appropriate response to systemic issues.

The process appears opaque.

The process could be enhanced by AFCA in the following ways:

- Frontline staff being trained and encouraged to report suspected systemic issues. This would then include those matters that are resolved at IDR or not proceeded with.
- AFCA investigating systemic issues relating to non-technical breaches of the law. Whilst AFCA is good at identifying and dealing with technical systemic issues, e.g. the imposition of an illegal fee, it does not deal well with systemic issues that relate to less tangible breaches of the law. This can include such matters as the way in which

a credit provider sells a product. A good example is that whilst there have been many complaints to AFCA about the mis-selling of add on insurance, we are unaware of any systemic investigation conducted by AFCA of the sale of these products.

- Providing a formal pathway for individual consumers and organisations to raise suspected systemic complaints. Whilst the AFCA CAP and CALM meetings have value as an avenue for consumer advocates to raise systemic issues, only members and attendees of those liaison groups have that capacity. There are other organisations and individuals that are not represented in these forums and do not have similar access to raise concerns. It is important that all groups are able to independently notify the AFCA systemic issues team about potential systemic breaches. One way this could be achieved is by having:
 - a dedicated email address that individuals and organisations can access, and
 - an appropriate response process.
- Notifying external organisations of the progress of systemic complaints lodged by the organisation. Where systemic issues are raised by external organisations or an individual, it is important that they are kept informed as to the progress of any investigation including whether the systemic complaints team have decided not to investigate the referral made or have closed the complaint without taking any action.
- Developing a road map clearly identifying the different roles the Code Compliance Committee, ASIC and the AFCA systemic issues team have in the investigation of systemic complaints, making that road map public and advising how issues will be referred between the various bodies.
- Providing consumer lawyers, consumer advocates, and the public with more specific information earlier in the investigation process about the nature and type of systemic issues and the proposed remediation.

This would allow advocates to identify issues earlier and provide timely and appropriate advice to all consumers about their rights and any rights they may have to remediation.

1.3. Do AFCA's funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model?

LAQ has no comment to make on the current fee structure except to highlight the importance of AFCA remaining a free and accessible service for all consumers. The bedrock of the fairness and accessibility of AFCA and of all EDR schemes is that it is free and independent for all consumers.

Monetary jurisdiction in relation to primary production businesses

2. Do the monetary limits on claims that may be made to, and remedies that may be determined by, AFCA in relation to disputes about credit facilities provided to primary production businesses, including agriculture, fisheries and forestry businesses remain adequate?

LAQ's Farm and Rural Legal Service assists farmers and rural based businesses with debt related problems. AFCA's jurisdiction to determine complaints about credit facilities provided to primary production businesses is directly relevant to much of this work.

In LAQ's view, the current monetary limit for complaints of \$5,425,000 for each credit facility strikes an appropriate balance. We understand that there has been some consideration by the Australian Bankers Association of changing the current monetary limit to total indebtedness of the complainant and related entities in its Code. LAQ considers it vitally important that the AFCA limit continue to apply to each credit facility and not total indebtedness of the business and related entities.

In our experience, it would not be unusual for farmers to spend in excess of \$5,425,000 to acquire a neighbouring property and to borrow the full amount.

Many viable farming operations would cost more than \$5,425,000 to establish and run. Usually, a number of credit facilities are established rather than just one to purchase and run a farming enterprise. If a total indebtedness definition was introduced these farmers could no longer access AFCA. These farmers are not necessarily sophisticated. They are not big businesses. They cannot afford legal representation particularly against well-resourced lenders.

Case Study

LAQ assisted a farming couple who were very elderly and were in financial difficulty following drought. They were not sophisticated borrowers. While each individual facility was substantially less than \$5,425,000 all their credit facilities exceeded this amount.

With respect to related entities in farming situations, there are often related entities controlled by different family members where the combined credit facilities of the related entities would exceed \$5,425,000. Individual credit facilities owed by a family member are generally less than \$5,425,000 but those individuals would no longer be able to access AFCA if a total indebtedness definition that included related entities was introduced. This is particularly relevant where older farmers are assisting younger members of the family to purchase farming enterprises.

Internal review mechanism

3. **AFCA's Independent Assessor has the ability to review complaints about the standard of service provided by AFCA in resolving complaints. The Independent Assessor does not have the power to review the merits or substance of an AFCA decision.**

Is the scope, remit and operation of AFCA's Independent Assessor function appropriate and effective?

LAQ has not used the Independent Assessor because it was unaware of its existence. In any event, even if LAQ had been aware, it is not clear as to whether raising a complaint would result in a difference in the ongoing standard of service.

LAQ supports the existence of the role of the Independent Assessor to review standards of service complaints made by consumers and legal representatives of financial firms in principle but would like to understand what the Independent Assessors have achieved since their establishment and how engagement with the Independent Assessor would improve outcomes for LAQ's clients.

Promotion of the Independent Assessors service and transparency as to their role and functions is required.

4. **Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? How should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?**

LAQ is aware that all AFCA's Recommendations and Determinations are quality assessed by more senior staff before they are released.

In LAQ's view, this process provides an internal quality control mechanism where the substance of a decision is reviewed before it is released.

In LAQ's view there is room for improvement in the quality of the decisions being made but we support the AFCA process as a whole. It has delivered substantial benefits to consumers that would be very difficult to replicate through courts or tribunals.

This internal mechanism is important to ensure consistent, fair, timely and independent decisions are reached by AFCA.

LAQ does not support the ability for a decision of AFCA to be appealed to a Court or Tribunal. AFCA and all External Dispute Resolution schemes rely on free, timely and independent decision making to be effective. Any appeal rights would reduce:

- (a) the effectiveness and finality of AFCA decisions for consumers and Industry.
- (b) access to justice for consumers who cannot afford to become involved in Court cases.
- (c) the accessibility of the scheme for consumers.
- (d) the ability for AFCA to make timely and effective decisions.

Furthermore:

- (a) Industry already has the ability through the test case provisions in the AFCA Rules and Operational Guidelines to ask for a Court decision to be obtained on important issues. For example, the recent business interruption case.
- (b) Consumers do not have to accept decisions of AFCA and can still argue their cases in Court if they so choose even at determination stage
- (c) Consumers have the ability to provide further information to AFCA to challenge an AFCA recommendation before a final determination is issued.