

12 April 2019

Mike D'Argaville
Legal Counsel
Australian Financial Complaints Authority

By email: submissions@afca.org.au

Dear Mr D'Argaville

Re: Australian Financial Complaints Authority (AFCA) Rules changes

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the proposed changes to expand AFCA's jurisdiction to deal with eligible complaints about conduct dating back to 1 January 2008 (**legacy complaints jurisdiction**).

This submission responds to:

- AFCA Rules Change Consultation paper, 18 March 2019;
- Draft amendments to the Rules;
- Draft amendments to the Operational Guidelines; and
- AFCA Scheme (Additional Condition) Amendment Authorisation 2019.

Consumer Action strongly supports redress for victims of misconduct by financial service providers (**FSP**), especially for conduct flowing from the Financial Services Royal Commission. Our views on effective redress for past disputes are set out in a detailed joint consumer submission to the Ramsay Review.¹

The proposed addition of Section F to the AFCA Rules establishes a past disputes forum to provide redress for claims that are outside existing External Dispute Resolution (EDR) time limits. While the draft amendments properly implement the Ministerial authorisation condition, gaps remain in the scope of this past disputes forum. For example, there is no redress for people whose complaint is against an FSP that is not a compulsory and current member of AFCA, such as insolvent firms.

Community outreach will be critical to the effectiveness of the legacy complaints scheme. As the application window for legacy complaints is only 12 months, it is imperative that outreach starts immediately. This should be done by disseminating information to those who work with communities in remote and regional areas across Australia, including community organisations and financial counsellors. This information will also need to articulate the meaning of 'conduct' which will be reviewed under the legacy complaints scheme, to increase the transparency of the process and make it easier for potential complainants to assess whether their claim is within AFCA's legacy complaints jurisdiction.

¹ Consumer Action Law Centre et al, *EDR Review – Supplementary Issues Paper – Last resort compensation for victims of financial misconduct* (July 2017) p 14, available at: <https://policy.consumeraction.org.au/2017/07/05/edr-review-supplementary-issues-paper/>

About Consumer Action Law Centre

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Question 1: Does the proposed change satisfy the requirements of the new authorisation conditions?

Yes. The proposed changes satisfy the requirements of the new authorisation conditions as they allow for complaints to be made regarding conduct of financial firms dating back to 1 January 2008 ('legacy complaints'). The conditions also exclude certain forms of conduct from being considered as legacy complaints, which are also included as exceptions under the proposed changes to AFCA rules and explained in the Operational Guidelines.

Question 2: Do the Operational Guidelines adequately explain how Section F will apply?

No. The Operational Guidelines do not adequately explain how the new threshold for 'conduct' under the new Section F will apply. Existing AFCA rules provide for different limitation periods that are dependent on the type of claim, while the new Section F provides that the relevant conduct is limited to acts or omissions on or after 1 January 2008, and loss caused by those acts or omissions. This method of determining whether a claim can be brought applies for all claims that can be brought under the legacy complaints scheme, and it is an entirely new concept which will need to be explained thoroughly.

Furthermore, this new rule doesn't appear to be absolute as the Operational Guidelines also outlines situations in which conduct involving advice given pre-2008 can be considered within the legacy complaints scheme. While we support an approach that allows the maximum number of complainants to bring claims, this approach does muddy the waters, making it complex for potential complainants and serving as a deterrent to bringing a claim. Many complainants that come to AFCA are self-represented, and the complexity of the new framework may necessitate legal representation.

A further articulation of how this 'conduct' threshold applies to different types of claims under AFCA would be helpful in enabling consumers to self-advocate. Also, it would be appropriate to explain which sections of the existing AFCA rules apply alongside the new Section F rules.

Question 3: Do you have any other comments about the proposed change?

The following outstanding issues must be addressed by AFCA and other relevant decision-makers to ensure a fair and effective legacy complaints jurisdiction, and to provide redress to all victims of misconduct flowing from the shocking findings of the Banking Royal Commission.

Application window and outreach

In our previous submissions we have expressed support for an application window of at least two years to lodge past disputes.² We note that AFCA is unable to change these time limits as it is limited by its authorisation conditions, but as a matter of principle a longer time limit is necessary to ensure accessibility to the scheme. Time will be needed to conduct outreach to remote organisations, to communicate the existence of this legacy complaint schemes to consumers, gather documentation relating to the claim and to ensure they have enough time to assess the suitability of their claims for the scheme.

To that end, outreach must be undertaken as soon as possible given the time limit for lodging these claims is one year. There must be appropriate advertising, communication with key agencies and health and community workers assisting consumers in financial distress and outreach to vulnerable communities, such as remote Aboriginal communities and newly arrived communities.³ This is to ensure as far as possible that anyone with an actionable claim does not miss out on obtaining compensation for financial misconduct.

Compensation limits

The following comments apply to complaints other than superannuation complaints.

One impact of the legacy complaints jurisdiction will be to create an historical inequity in the compensation available to people who previously filed FOS/CIO complaints, and those who make complaints under the legacy complaints jurisdiction. For consumer disputes, for example, the compensation cap for new AFCA complaints and for legacy complaints (from 1 July 2019) is \$500,000. By comparison, the recent cap for FOS and CIO complaints – some of which are still active and being decided by AFCA operating FOS and CIO rules – was only \$309,000.

To address this inequality, we recommend:

- AFCA work with FSPs that have open FOS/CIO disputes to consent to the higher AFCA compensation caps; and
- Working with the relevant FSPs, AFCA contact previous FOS and CIO claimants who compromised their claim (to bring their complaint within FOS/CIO limits) to allow for the balance of their claim over \$309,000 to be paid.

As the vast majority of consumer claims are within the compensation caps, it is likely to be only a small number of people involved. Nevertheless, if the policy reason for the legacy complaints jurisdiction is to provide redress for the wrongdoing uncovered by the Royal Commission, then the compensation available should be as consistent as possible.

² Consumer Action Law Centre et al, *EDR Review – Supplementary Issues Paper – Last resort compensation for victims of financial misconduct* (July 2017) p 17. Available at:

<https://policy.consumeraction.org.au/2017/07/05/edr-review-supplementary-issues-paper/>

³ Consumer Action Law Centre, *Establishment of the Australian Financial Complaints Authority* (November 2017). Available at: <https://policy.consumeraction.org.au/2017/11/29/joint-submission-establishment-of-the-australian-financial-complaints-authority/>

'Compulsory member' eligibility criteria

Many previous inquiries and consumer submissions have made the case for closing the known gaps in compulsory AFCA membership that prevent accessible justice for consumers.⁴ These include extending compulsory membership for the following firms:

- Debt management firms;
- Registered Debt Agreement Administrators;
- 'Buy now, pay later' providers;
- FinTechs and emerging industries;
- Small business lenders.

Just this week, the Senate Legal and Constitutional Affairs References Committee made this recommendation.⁵

These firms provide services of a financial nature but are not required to be members of AFCA. A further exemption exists for point of sale lending in car yards and retail outlets. Similarly, 'dealer issued-warranties,' a form of junk add-on insurance sold in car yards, fall outside AFCA's remit.⁶ We recommend immediate legislative reform to extend the requirement of compulsory membership to the providers of the above services, so that they will be within AFCA's jurisdiction and consumers of such services will be able to access justice.

As an interim measure, AFCA should work with these industries to encourage voluntary membership and develop expertise in its decision-makers for these products and services.

Bankrupts and their right to redress

The proposed Operational Guidelines, under the heading of 'Who can submit a legacy complaint,' includes an example of former bankrupts who are prevented by operation of the Bankruptcy Act from exercising certain rights which do not revert after they are discharged from bankruptcy.

It is, as a matter of principle, unfair to prevent persons who were deeply affected from the financial conduct exposed at the Royal Commission from accessing compensation for their losses because of bankruptcy. This is particularly unjust where the misconduct contributed to the bankruptcy, such as unaffordable loans in breach of the responsible lending laws. It would not be equitable to compensate only those who experienced financial misconduct but were able to keep themselves out of bankruptcy.

⁴ Consumer Action Law Centre, Submission to Royal Commission into Misconduct in the Banking, Superannuation and Finance Sector Part 2 (February 2018), p 18. Available at: <https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/02/180205-Consumer-Action-Sub-to-Royal-Commission-Part-2-FINAL.pdf> See also Treasury, Final Report into the Review of the financial system external dispute resolution and complaints framework (April 2017) p 198, Available at: https://static.treasury.gov.au/uploads/sites/1/2017/06/R2016-002_EDR-Review-Final-report.pdf

⁵ Senate Standing Committee on Legal and Constitutional Affairs, Resolution of disputes with financial service providers within the justice system (April 2019) p 34. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/bankandlegalsystem/Report.

⁶ Consumer Action Law Centre, *Senate Inquiry: Resolution of disputes with financial service providers within the justice system* (March 2019) p 10. Available at: <https://policy.consumeraction.org.au/2019/03/06/submission-resolution-disputes-fsp-within-justice-system/>

This problem arises with debt agreements. Through our casework, we have encountered many consumers who were mis-sold inappropriate and unaffordable debt agreements, and upon default of their debt agreements have become bankrupt. There is little incentive for them to seek redress under AFCA's legacy complaints scheme as any funds they obtain from the scheme will form part of the debtor's bankrupt estate.

We strongly recommend that the Bankruptcy Act should be amended to exempt damages or compensation, obtained through AFCA or the courts, against financial service providers from forming part of the bankrupt's estate.⁷

This recommendation was also recently made in the Senate Legal and Constitutional Affairs References Committee report this week.⁸

Exclusion of Family Court property matters

AFCA excludes complaints that have already been dealt with by a court or a dispute resolution scheme established by legislation.⁹ The Operational Guidelines for the legacy complaints scheme also echo this. From our casework it has become apparent that this excludes consumers who have a claim against a financial firm but who have settled a family law matter relating to property.

In family law disputes, it is common for one of the parties to have liability for debts from loans which they have received no benefit. They have often signed on to be a joint borrower or been coerced into obtaining credit as a result of family violence or economic abuse from a partner. In this instance, the lender will have acted illegally or unfairly in inappropriately signing on one of the parties as a co-borrower or guarantor, failing to recognise undue pressure from another party.¹⁰

AFCA refuses to consider disputes against such lenders if the property has already been settled in a family court matter as it has been 'determined by a court' and thus outside the jurisdiction of AFCA. The solution of joining lenders to the family law property proceedings is difficult as this would require the Family Court to determine issues relating to credit legislation and financial industry codes of conduct, lengthening the process and making the litigation costly for parties. We are unaware of any cases where lenders have been joined as parties in such proceedings.¹¹

Instead, we recommend the approach that AFCA takes towards legacy complaints which have already been decided by predecessor schemes: where the predecessor scheme has not dealt with the merits of the complaint (i.e. the lender's conduct in relation to credit obtained through mortgaging a family home), AFCA should be able to consider or deal with the complaint.

⁷ Senate Legal and Constitutional Affairs References Committee, Resolution of disputes with financial service providers within the justice system (April 2019) p 31. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/bankandlegalsystem/Report

⁸ Senate Standing Committee on Legal and Constitutional Affairs, Resolution of disputes with financial service providers within the justice system (April 2019) p 31. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/bankandlegalsystem/Report

⁹ AFCA Rules, C1.2(d).

¹⁰ Consumer Action Law Centre, *Senate Inquiry: Resolution of disputes with financial service providers within the justice system*, March 2019. Available at: <https://policy.consumeraction.org.au/2019/03/06/submission-resolution-disputes-fsp-within-justice-system/>

¹¹ Consumer Action Law Centre, *Senate Inquiry: Resolution of disputes with financial service providers within the justice system* (March 2019) p 11. Available at: <https://policy.consumeraction.org.au/2019/03/06/submission-resolution-disputes-fsp-within-justice-system/>

Exclusion of default judgment

The exclusion of default judgment claims makes no sense as the merits of such a case will not have been considered by court, instead such a judgment is given based on a failure of a party to respond. In our opinion, it falls short of a 'determination' made by court and should therefore not be excluded from claims that can be heard by AFCA.

Accessibility of information

It would be useful to include resources for consumers to assess whether their claim is within the legacy complaints jurisdiction. One of the ways in which this can be done is by providing flowcharts or graphics with simple yes or no questions in plain English that assist consumers in understanding whether they are eligible. These resources should also be provided in a range of languages so that non-English speaking consumers can also determine their eligibility. A further tool that should be made available are the terms of reference for FOS and CIO, and the applicable legislation that applied during the time period of 1 January 2008 till today. Collating this information in one place will increase access to information, making the process of presenting a case at AFCA easier for a self-represented consumer.

A useful starting point would be the responsible lending obligations in the National Credit Act which applied to businesses engaging in consumer credit activities. They owed such obligations from 1 January 2011. In the legacy complaints scheme, AFCA will be recreating the conditions of that time the claim arose thus if the legislation was in force subsequently, it will not be relevant to AFCA's decision making. As a result, responsible lending claims pre-2011 are unlikely to succeed.

For further information, please contact Cat Newton, Senior Policy Officer at Consumer Action Law Centre on 03 9670 5088 or at cat@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive, flowing style.

Gerard Brody
Chief Executive Officer