

Lead Ombudsman – Small Business and
Transactions
Australian Financial Complaints Authority

By email: consultation@afca.org.au

Toll Free 1800 072 722
E sasbc@sa.gov.au
W sasbc.sa.gov.au

Chesser House
Level 4, 95 Grenfell Street
ADELAIDE SA 5000

GPO Box 1264
ADELAIDE SA 5000

ABN 34 643 517 562

Dear Lead Ombudsman

The South Australian Small Business Commissioner (SASBC) welcomes the opportunity to comment on the Australian Financial Complaints Authority's draft *Appropriate Lending to Small Business Approach*.

SASBC commends AFCA on producing a guiding document that assists small businesses to understand the rationale behind AFCA's decision-making process.

We provide the following comments on specific parts of the approach for consideration:

2.1 - Defining small business

SASBC acknowledges AFCA's definition of a small business under its own Rules as a business or group of related bodies corporate with less than 100 employees. Further, SASBC supports AFCA's acceptance of related industry codes and other legislative instruments that adopt alternate definitions of small businesses.

Legislation administered by SASBC intentionally does not prescribe a threshold limiting its ability to provide assistance to small and medium sized businesses. Such legislation includes:

- *Small Business Commissioner Act 2011 (SA)*
- *Retail and Commercial Leases Act 1995 (SA)*
- *Fair Trading Act 1987 (SA)*
- *Building and Construction Industry Security of Payment Act 2009 (SA)*
- *Farm Debt Mediation Act 2018 (SA)*
- *Late Payment of Government Debts (Interest) Act 2013 (SA)*
- Various industry codes

SASBC wishes to ensure that the above legislation, as well as small business commissioner legislation administered by other states and territories, falls under the remit of AFCA where it is relevant to a financial dispute.

In relation to company or individual complainants not operating a business, SASBC notes that these complainants may still be eligible to bring a complaint under AFCA's Rules if



they are an individual trustee of a trust or are a corporate trustee of a Self-Managed Superannuation Fund or family trust.

Although these are not strictly small business entities, SASBC acknowledges that there may be circumstances where AFCA is able to provide assistance. It is submitted, however, that these complaints should potentially be treated differently to those lodged by small businesses, as there is a possibility that any financial decisions made were based upon personal considerations as opposed to being primarily business based.

2.2 – AFCA’s fairness jurisdiction

SASBC applauds AFCA’s holistic approach in considering all relevant laws, codes and standards of industry practice that were applicable at the time of the conduct to ensure ‘fairness in all the circumstances’.

2.3 - Complaints in a farm debt mediation process

SASBC facilitates alternative dispute resolution of matters falling under the *Farm Debt Mediation Act 2018* (FDM Act).

Both farmers and financiers can lodge an application for mediation with SASBC, whereby formal mediation with an independent mediator from the office’s panel will be arranged. The majority of FDM matters referred to SASBC are successfully resolved.

Although SASBC is not aware of any farm debt mediation matters having been referred to AFCA, we submit that there is value in AFCA providing additional assistance in the scenarios detailed in the approach – i.e. where an agreement was not attained through mediation, where the farmer has experienced financial difficulty outside of the mediation agreement, where the financial provider has not complied with the terms of settlement, or the complaint relates to a financial service that was not the subject of mediation.

Of note is section 16 of the FDM Act, which provides that a creditor may satisfactorily participate in mediation without forgiving or reducing farm debt. It should be noted that a complaint by a farmer about a creditor failing to reduce or forgive any debt, would not amount to the creditor failing to participate in the FDM Act process in good faith.

3.6 – Considering if the financial firm should have asked for further information or clarification as part of a lending decision

SASBC commends the inclusion of a variety of factors affecting small businesses being taken in account in determining whether further inquiries are appropriate.

The extensive list of circumstances to be taken into account, such as the business owner’s experience, their client base, supply issues and account keeping concerns, is comprehensive and provides a necessary level of protection to small business owners who may not be overly familiar with the commercial lending process.

The SASBC advises that in some circumstances, issues relating to retail shop leases may cause great financial difficulties for small businesses. It may be relevant in some matters



for additional information to be requested with respect to the status of a retail lease, the option to renew and any specific detail regarding the existence of stipulated rent increases.

4.1 – AFCA’s Rules provide a range of remedies and 4.3 – AFCA applies a flexible approach to repayment of an adjusted debt

The level of flexibility in available remedies and the repayment of adjusted debts is conducive to small businesses, as often what may be viewed as a favourable remedy for one business may not suit the needs or circumstances of another.

Again, I thank AFCA for the invitation to comment on the proposed approach and look forward to viewing the final guide.

Yours sincerely



Nerissa Kilvert
SMALL BUSINESS COMMISSIONER

29 September 2023

