

# Section F – Legacy complaints

## F.1 Application of this section

F.1.1

Legacy complaints will be dealt with under this section of the Rules effective as at 30 June 2019. All other complaints will be dealt with under the other sections of the Rules that apply as at the date the complaint was lodged.

### What is a legacy complaint?

A legacy complaint is a complaint about conduct of a Financial Firm that occurred on or after 1 January 2008, which would fall outside the time limits that would normally apply to complaints submitted to AFCA. The definition is set out in [rule F.2.2](#).

AFCA has a number of time limits, which still apply to complaints other than legacy complaints. These are set out in [rule B.4](#).

### What rules will apply when considering a legacy complaint?

When considering a legacy complaint, we must apply the AFCA Rules as at 30 June 2019. This applies regardless of the governing rules or Terms of Reference of any predecessor scheme that were applicable at the date the loss or right to bring an action arose, or the rules or Terms of Reference that applied if a legacy complaint was previously lodged with a predecessor scheme. This is different to other complaints, when AFCA must apply the rules that were in existence at the date the complaint was first submitted – [see rule A.23.5](#).

If a predecessor scheme has not dealt with a legacy complaint previously, AFCA can award the remedies set out in Section D of the rules as at 30 June 2019, even though a predecessor scheme may have been limited by lower compensation amounts. Similarly, AFCA must apply the current defined terms (such as for a small business) which may differ from those applied by predecessor schemes.

### Who can submit a legacy complaint?

A complainant must be an eligible person at the time their complaint is submitted to AFCA, even if not they may not have been eligible at the time the loss or right to bring an action arose – this is consistent with [rule A.4.1](#).

For example:

- A complainant (now an adult) may submit a legacy complaint about conduct in respect of his bank account in 2008 (when he was seven years old).
- A current director of a company may submit a legacy complaint on behalf of the company, even though they were not a director at the time of the misconduct.
- A former bankrupt may be prevented by operation of the Bankruptcy Act from exercising certain rights which do not revert back after they are discharged from bankruptcy.

## Who can a legacy complaint be about?

A legacy complaint must be about a compulsory member firm of AFCA, who is required to hold membership of AFCA under their license, credit representative or other legislative condition, rather than a member firm who participates in the AFCA scheme voluntarily.

A complaint must be about a Financial Firm that is a current AFCA member at the time the complaint is submitted – see rule A.4.2. This applies regardless of whether or not the AFCA member is solvent or operating their business at the time the legacy complaint is submitted to AFCA.

F.1.2

Legacy complaints will not be subject to the time limits set out in B.4.

## What time limits apply to legacy complaints?

The time limits set out in rule B.4 do not apply to legacy complaints. It is enough that the conduct complained about occurred on or after 1 January 2008 – see rule F.2.1(b).

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry considered whether any conduct, practices, behaviour or business activities by financial services entities since 1 January 2008 fell below community standards and expectations or otherwise broke the law. AFCA's time limits have been extended to reflect the Royal Commission's timeframe to allow complainants an opportunity to seek redress.

Some complaints cannot be considered as legacy complaints under Section F. AFCA can still consider these complaints however, provided they are within the time limits set out in rule B.4 – see rules B.4 and F.2.1(a)-(f).

F.1.3

In all other respects, Sections A to E of the 30 June 2019 Rules will apply to legacy complaints unless modified by Section F. In the event of inconsistency with the other sections of the Rules, Section F prevails as it relates to legacy complaints.

## What complaint resolution processes will AFCA apply for legacy complaints?

The complaint resolution processes set out in Section A of the Rules will apply to all complaints including legacy complaints.

We may, however, apply particular approaches to legacy complaints, given the unique nature of considering historical misconduct in circumstances where evidentiary issues make establishing a position difficult.

We may also modify the processes we apply when dealing with legacy complaints. This may include varying the referral back timeframe when we first receive a legacy complaint and refer it to the Financial Firm, conducting a greater number of conciliation conferences and referring legacy complaints more directly to decision, if they cannot be quickly resolved by agreement.

## What if relevant documents relating to a legacy complaint are not available?

In some complaints about events dating back to 2008 relevant documents may no longer be available due to the passage of time. Because of their nature, this may more often be the case with legacy complaints, and AFCA acknowledges this may make it more difficult to establish what happened. AFCA will do what it can to resolve these complaints fairly and in accordance with the requirements of the Rules.

Where a party does not provide the information AFCA reasonably requires, and does not have a reasonable excuse, AFCA can draw adverse inferences about this under rule A.9.5. However, where the party cannot provide the information because it has not been retained – because it was destroyed after the timeframe for which it should be kept had expired – AFCA would not normally draw such an inference. We may however, require parties to provide a statutory declaration setting out the steps taken to try to comply with AFCA's request for information and detailing the reasons they were unable to do so – [see rule A.9.2](#). If a party cannot provide information to support their position, we may find that they have not established their case.

If, due to the passage of time, there is so little information that we cannot resolve the complaint fairly and in accordance with our obligations under the AFCA Rules, and any other relevant obligations, we may consider whether we should not investigate the complaint further. We will not lightly exclude a complaint for this reason.

We will generally only decline to consider a legacy complaint due to lack of evidence if we consider it would not be possible to resolve the complaint fairly and in accordance with our legal obligations and the principles in Rule A.2.

If we consider a complaint should be excluded for this reason, we will follow the process for excluding a complaint set out in rules A.4.5 and A.4.6. Parties should use this as a final opportunity to provide the necessary information sought.

Various laws require Financial FirmFinancial Firms to retain documents for a set period of time. For example, section 286 of the Corporations Act requires companies to retain financial records for seven years after the transactions covered by the records are completed. We will not generally draw an adverse inference if a party is unable to provide information that is no longer required to be held.

Financial Firms should revisit their document retention practices in light of the requirement to respond to legacy complaints. Complainants who intend to submit a legacy complaint should retain relevant documents that will help establish or support their position.

Our Chief Ombudsman or his or her delegate may decide on further approaches as appropriate to decide a legacy complaint.

## F.2 Requirements for legacy complaints

F.2.1(a)

AFCA will not consider a legacy complaint:  
unless it is submitted to AFCA between 1 July 2019 and 30 June 2020.

### When can a legacy complaint be submitted to AFCA?

The responsible Minister has changed the authorisation conditions of the AFCA scheme, requiring us to accept legacy complaints for a period of one year, between 1 July 2019 and 30 June 2020. Subject only to any further changes to the authorisation conditions, we will not extend this one-year period.

Although we will retain Section F in the Rules after this one-year period expires, until all legacy complaints have been dealt with, we will only apply Section F to legacy complaints received during that period.

F.2.1(b)

AFCA will not consider a legacy complaint:  
about conduct that occurred and ended before 1 January 2008.

### What conduct can be considered by AFCA in a legacy complaint?

We can consider a legacy complaint about conduct by a Financial Firm that occurred on or after 1 January 2008. Such conduct includes acts or omissions by the Financial Firm resulting in loss suffered by the complainant.

### When is the conduct considered to have occurred and ended?

We will not consider a complaint that is only about conduct that occurred and ended before 1 January 2008, even if the loss occurred after 1 January 2008. This means that our ability to consider complaints about ongoing relationships where advice or service has been provided before and after 1 January 2008 is limited to acts or omissions on or after that date, and loss caused by those acts or omissions.

There is no requirement for a complainant to have been aware, or reasonably been aware, of such conduct or loss. This means, however, that a complaint about conduct that occurred and ended before 1 January 2008, where the complainant was not aware of the loss until on or after this date, does not come within the rules as a legacy complaint. Similarly, a Financial Firm is not able to rely upon a complainant's awareness or an IDR Response to submit that the time limit to lodge a complaint has expired.

Whether a Financial Firm's conduct occurred and ended before 1 January 2008 will be a question of fact and will be considered based on the circumstances of each particular complaint.

For example:

- AFCA cannot consider a complaint about a statement of advice given in 2007, unless the legacy complaint is about the Financial Firm's conduct on or after 1 January 2008 by:
  - implementing a strategy contrary to the advice given.
  - continuing a strategy recommended in the earlier advice in circumstances where the advice was inappropriate.
  - failing to provide ongoing advice or review as promised in the advice given.
- AFCA cannot consider a complaint about a credit decision to lend in 2007, unless the legacy complaint is about the Financial Firm's conduct on or after 1 January 2008 to lend further funds not previously contemplated, or to refinance existing loans.
- Where fees or charges have been applied to an account from 2005 and continued to be applied after 1 January 2008, AFCA could generally only consider the complaint in relation to fees or charges incurred on or after 1 January 2008. This will depend on the circumstances of each complaint, however, and if fees or charges have been incorrectly applied, AFCA would expect the Financial Firm to appropriately remedy this.

F.2.1(c)

AFCA will not consider a legacy complaint:

in relation to which a decision or determination has been made by a court or tribunal.

## Can AFCA consider a legacy complaint that has been decided by a court or tribunal?

We cannot consider a legacy complaint that has already been decided by a court or statutory tribunal – this is consistent with [rule C.1.2\(d\)](#). This means that where a court or tribunal has made final orders (regardless of whether they were made in the absence of the complainant's defence), we cannot review those orders made.

However, we have limited jurisdiction to stay the execution of a default judgment, if the complainant is able to present a genuine and immediate alternative to execution of the default judgment – [see rule A.7.2\(f\)](#).

Where a court or tribunal has not made final orders but the legal proceedings have been discontinued by agreement between the parties, [rule F.2.1\(e\)](#) may apply to exclude the legacy complaint.

F.2.1(d)

AFCA will not consider a legacy complaint:

in relation to which a decision or determination about the merits of the complaint has been made by a Predecessor Scheme or AFCA.

## Can AFCA consider a legacy complaint that has been decided by a predecessor scheme?

We cannot consider a legacy complaint that has already been decided by a predecessor scheme – this is consistent with [rule C.1.2\(d\)](#).

We may consider a legacy complaint that has previously been excluded by a predecessor scheme because it lacked jurisdiction, because in such cases there has been no consideration of the merits of the complaint. However, if a predecessor scheme has dealt with the merits of a complaint, we cannot consider or deal with the complaint.

Where a predecessor scheme has not decided the complaint but it was resolved by agreement between the parties, [rule F.2.1\(e\)](#) may apply to exclude the legacy complaint.

In relation to whether a predecessor scheme has dealt with a complaint, please [see the guidelines to rule C.1.2\(d\)](#).

## Can AFCA consider a legacy complaint that has been previously decided by AFCA?

We cannot consider a legacy complaint that has previously been decided on the merits by AFCA. This is consistent with the authorisation conditions relating to legacy complaints. For a matter that is not a legacy complaint, [rule C.1.2\(c\)](#) will otherwise apply.

Where AFCA has not decided the complaint but it was resolved by agreement between the parties, [rule F.2.1\(e\)](#) may apply to exclude the legacy complaint.

F.2.1(e)

AFCA will not consider a legacy complaint:

that has previously been finally settled by the Complainant and the Financial Firm to whom the complaint relates (other than a complaint which can still be made under the Rules).

## Can AFCA consider a legacy complaint that has been settled between the parties?

We have discretion to not revisit issues settled in full and final satisfaction of the parties' obligations – this is consistent with [rule C.2.1](#). A complaint can, however, still be made under the Rules where we choose not to exercise this discretionary exclusion.

Please [see the guidelines to rule C.2.1](#) for some of the factors we will consider whether it is appropriate to revisit a complaint that has been settled between the parties. Whether a settlement agreement discharges the parties' obligations will be question of fact and will be considered based on the circumstances of each particular complaint.

F.2.1(f)

AFCA will not consider a legacy complaint:  
in relation to a superannuation death benefit.

### Can AFCA consider a legacy complaint about a superannuation death benefit?

No. The time limits set out in [rule B.4.1.3](#) continue to apply to any complaint about the payment of a superannuation death benefit. This is because Section 1056 of the Corporations Act continues to apply to a complaint in relation to a superannuation death benefit, which cannot be extended even if the parties agree. For further guidance, please [see Chapter 23 of the Transitional Superannuation Guide](#).

### Can AFCA consider a legacy complaint about other superannuation issues?

Yes. Time limits in relation to other superannuation complaints do not apply to legacy complaints. This means that AFCA can consider other superannuation legacy complaints, including complaints relating to total and permanent disability (TPD) or other insurance claims, fees and other services.

Transitional arrangements that are currently in place in relation to superannuation complaints will continue to apply subject to a complaint otherwise coming within this jurisdiction. Transitional arrangements that will continue to apply include arrangements in relation to complaints previously lodged and being dealt with by the Superannuation Complaints Tribunal.

F.2.1(g)

AFCA will not consider a legacy complaint:  
that solely relates to a right or obligation arising under the Privacy Act.

### Can AFCA consider a legacy complaint about Privacy Act obligations?

We will not consider legacy complaints that are solely about rights or obligations arising under the Privacy Act. In accordance with the change to AFCA's authorisation conditions, such complaints do not come within the legacy complaint jurisdiction.

We will, however, consider a legacy complaint that raised an issue which relates to privacy, provided it also has other issues that AFCA can consider.

For example:

- We will not consider a complaint solely about a bank sending statements to the wrong address in 2008.