

12 April 2019

Mike D'Argaville
Legal Counsel
Australian Financial Complaints Authority
by email: submissions@afca.org.au

Dear Mike,

Re: AFCA Rules Change Consultation

Thank you for the opportunity to comment on the Australian Financial Complaints Authority (AFCA) Rules Change Consultation. We provide the following answers to the questions posed.

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

We think the proposed changes satisfy the requirements of the new authorisation conditions subject to the comments below.

Default judgements

The authorisation conditions specify that an excluded complaint includes “a complaint in relation to which a decision or determination has been made by a court or tribunal” [9 (4) (b)]. It is our view that a complaint will have rarely (if ever) have been considered let alone addressed in context of a default judgement. The case will usually have been pleaded on the basis of an alleged debt in contract and the consumer’s complaint (often based on a cross-claim for a breach of statute or application of a common law principle) will not be before the court at all.

We believe there is scope for AFCA to consider many complaints that have been determined by default judgment while remaining consistent with the authorisation, and that they should draft the rule change accordingly.

Compensation caps

It appears that the result of the rules as drafted is that complainants under the legacy scheme will have access to higher compensation limits than matters still open under the rules of the predecessor schemes. This means that people who have managed to lodge their claims within the relevant time limits will be worse off in some cases than people who have not but are now able to take advantage of the legacy scheme. This is inequitable and not in keeping with the spirit of the introduction of the legacy scheme, that being to ensure that people who have been affected by misconduct in the period examined by the Royal Commission are afforded an opportunity to have that misconduct properly compensated.

We submit that this issue should be revisited by any incoming Government. To facilitate this AFCA could make an assessment of how many currently open complaints may be affected by this

discrepancy. In the meantime, AFCA could at the very least work with relevant Financial Firms to seek consent to applying the current compensation limits where this would make a difference to the outcome of the complaint.

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

Generally the Operational Guidelines do adequately explain how Section F will apply, although there is room for greater clarification on some points.

Who can submit a legacy complaint?

The shaded box is confusing because the first two are examples of someone who can submit a legacy complaint and the last is an example of someone who may not. These should be separated to make this clearer. At the very least the last example should explicitly say “and may **not** be able to submit a legacy complaint as a result of this” or words to that effect.

We also note Consumer Action Law Centre’s submission’s comments in relation to the impact of the bankruptcy regime on complainants where an irresponsible or loan, or guarantee which could be set aside at law, has been the main cause of a bankruptcy. While it is not in AFCA’s power to address this, we urge AFCA to at least work with currently bankrupt complainants to seek the consent of the trustee in bankruptcy to pursue such complaints where appropriate, and consider any costs associated with the bankruptcy (legal costs, trustees fees and expenses) as relevant to the amount of compensation payable so that the bankruptcy could potentially be annulled.

Who can a legacy complaint be about?

For the avoidance of doubt this section should clarify that the Financial Firm need not have been a member of a relevant predecessor scheme at the time of the conduct. What is relevant is whether they are currently a compulsory member of AFCA. This is consistent with the authorisation instrument.

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

We recommend that AFCA maintain a bias towards considering all complaints and only in the most extreme of cases exclude a dispute that does not have all the documents required. We support the view that if it is not possible to resolve a complaint fairly, then that is when a complaint may be considered for exclusion.

We note the instruction that “*Financial Firms should revisit their document retention practices in the light of the requirement to respond to legacy complaints*”. We recommend that the Operational Guidelines should go further and specify that negative inferences will be drawn if there is evidence a Financial Firm has destroyed relevant evidence in the period between the announcement of the legacy scheme and the consideration of the complaint.

Do you have any other comments on the proposed change?

Window of opportunity and communication strategy

We note that the authorisation of a one year window to allow legacy complaints to be lodged is an extremely limited timeframe to ensure that those with legitimate legacy complaints are reached and made aware of the ability to lodge a dispute that would otherwise be out of time. This is particularly the case for marginalised and otherwise vulnerable communities in remote and regional Australia. We believe that it would have been more ideal if there had been a longer period of two years.

Because of this Financial Rights recommends that a strong communication strategy be put into place to publicise the changes and ability for legacy complaints to be made.

The communications strategy would also need to reach workers in the sector including financial counsellors and community legal centre and Legal Aid solicitors. Financial counsellors and solicitors on the National Debt Helpline, the Insurance Law Service and Mob Strong Debt Help line regularly field calls from clients who may have legacy complaints. These workers will need to be informed as to what to tell these people. We assume AFCA will also have procedures in place to properly inform potential complainants who make enquiries about legacy claims prior to the commencement date, or have complained and are about to be excluded as out of jurisdiction under the current terms of reference on the basis of a relevant time limit.

Resourcing

As AFCA will be well aware, additional resourcing will be required to boost capacity to deal with extra complaints.

Voluntary members

We note that a legacy complaint must be about a compulsory member firm of AFCA rather than a member firm who participates in the AFCA scheme voluntarily. This arises from the original authorisation under Section 9 (a) (a) which reads:

It is an additional condition relating to the authorisation of the AFCA scheme that the AFCA scheme must permit an eligible person to make a complaint if: (a) the complaint relates to a compulsory member of the AFCA scheme who is a member of the AFCA scheme at the time the complaint is made;

This is an unfortunate limitation. Given AFCA's hands are tied with respect to expanding upon this authorisation, we recommend that AFCA strongly encourage voluntary members of AFCA to consent to examining legacy complaints.

Yours faithfully,



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Appendix A – Point of Sale Credit Provision Case Studies

Case study – Large Department Store systemic mis-selling

Financial Rights last year acted on behalf of a large number of Aboriginal clients in the Northern Territory following the sale of goods at a Large Department Store via credit card and consumer lease contracts initiated in the store. The salesperson told our clients the goods were cheap, they could pick out anything in the store and it would be sent to them. The sales person did not ask what their income and expenses were and completed the application forms, usually for both a consumer contract and a credit card, without the clients understanding what was happening. All the application forms were filled out by the salesperson and were all completely incorrect. The credit and consumer lease providers involved (both non-bank lenders in this instance) subsequently approved the credit cards without verifying the information, or properly assessing the affordability and suitability of the card. The average spend by these consumers was \$12,500. Some of them had only entered the shop to browse or purchase a very low value item.

<other examples>