



AFCA Rules Change Consultation

Submissions by Consumer Credit Legal
Service (WA) Inc.

April 2019

1 Introduction

The Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) takes the opportunity to provide submissions for AFCA's Rule Change Consultation.

The following organisations have endorsed this submission:

- Financial Counsellors' Association of Western Australia
- Community Legal Centres Association (WA)

Details about each of these organisations are contained in Appendix A.

About CCLSWA

CCLSWA is well placed to provide AFCA with insight into whether the proposed change satisfies the requirements of the new authorisation conditions and whether the Operational Guidelines adequately explain how the proposed section F will apply.

CCLSWA is a not-for-profit specialist community legal centre based in the Perth metropolitan area. CCLSWA advises and advocates for consumers on consumer credit issues.

CCLSWA operates a free telephone advice line service which allows consumers to obtain information and legal advice in the areas of banking and finance. CCLSWA provides ongoing legal assistance to consumers by opening case files when the legal issues are complex and CCLSWA has capacity to do so.

CCLSWA also provides:

- (1) assistance to financial counsellors and other consumer advocates who work closely with disadvantaged and low-income individuals for the resolution of their credit and debt related problems;
- (2) community legal education programmes relating to credit and debt issues, including financial literacy programmes to high school students and select groups within the community;
- (3) contributions to relevant policy and law reform initiatives; and
- (4) a training and supervision programme for law students and graduate volunteer paralegals.

In providing these services, CCLSWA aims to create awareness, knowledge and understanding of consumer issues relating to financial services.

CCLSWA's mission is to strengthen the consumer voice in WA by advocating for, and educating people about, consumer and financial, rights and responsibilities.

In these submissions CCLSWA provides its experience and views and makes recommendations as to how the issues may be resolved.

2 Summary of Key Issues and Recommendations

Terms of Reference	Issues	Recommendation
Whether the proposed change satisfies the requirements of the new authorisation conditions	<ol style="list-style-type: none"> 1. The language used in the proposed change is written in passive voice. 2. The phrasing used in certain rules is unclear. 3. The definitions of key words are included at the end of Section F. 	<ol style="list-style-type: none"> 1. Reword the rules in active language to ensure that the information is clear and concise. 2. Rephrase certain rules in plain English to ensure that they are not misunderstood by the general public. 3. Move the definitions of key words to the beginning of Section F.
Whether the Operational Guidelines adequately explain how Section F will apply	<ol style="list-style-type: none"> 1. The guidelines are relatively long in comparison to Section F. 2. The guidelines do not explain what the effect on Legacy Complaints will be, if the Rules need to be amended after 30 June 2019. 3. The guidelines do not provide information on what particular approaches will be applied to the assessment of Legacy Complaints. 	<ol style="list-style-type: none"> 1. The guidelines should be re-written in certain sections to provide information that is more direct and concise. 2. Information should be included under rule F.1 of the guidelines to state that Legacy Complaints will or will not be subject to any amendment introduced after 30 June 2019. 3. Information should be provided to explain what approaches will be applied to the assessment of Legacy Complaints.
Any other comments about the proposed change	No further issues raised.	

3 Whether the proposed change satisfies the requirements of the new authorisation conditions

General Observations

- 3.1 CCLSWA propose a number of changes to the structure and wording of section F to improve its readability and clarity.
- 3.2 We recognise that the AFCA Complaint Resolution Scheme Rules are available to assist the general public, including vulnerable and disadvantaged consumers, in submitting a complaint regarding their financial rights. As such, it is important that the Rules are written in plain English and are easy to comprehend.
- 3.3 We recommend that section F is rephrased to use active voice which expresses the section in a clear and concise manner.
- 3.4 'Legacy Complaints' should be capitalised throughout the text.
- 3.5 We are concerned that there are references to the Rules as at 30 June 2019, which apply to Legacy Complaints. This does not consider the scenario where section F may need to be amended post 30 June 2019.

F.1.1 Legacy Complaints will be dealt with under this section of the Rules 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

- 3.6 We recommend that the first sentence be reworded into the active voice, for clarity. This will also mean the second sentence can be deleted as it would be unnecessary.

F2 Requirements for Legacy Complaints

- 3.7 The rules listed under 'Requirements for a Legacy Complaint' should be restructured to separate the positive and negative requirements.

F.2.1 AFCA will not consider a Legacy Complaint...

- 3.8 The phrase used in rule F.2.1, 'AFCA will not consider a Legacy Complaint:' may cause confusion as to the definition of a Legacy Complaint, we recommend that this is rephrased.

F.2.1 (e)...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).

- 3.9 The wording used in rule F.2.1 (e) is unclear. We recommend that this rule is rephrased to plain English to improve its readability.

F.2.2 The following terms apply only to section F

- 3.10 The definition of a Legacy Complaint should be refined to ensure that it is clear and concise. We are concerned that the phrase "means an expression of dissatisfaction" is too broad. We are also concerned at the use of the phrase "but for" in the definition as the meaning of this is unclear to many people who would self-advocate at AFCA.

Redraft of Section F

3.11 We propose the following redraft of Section F:

F.1 Defined Terms

The following defined terms apply only to Section F:

Compulsory Member	A Financial Firm that is required or obligated to hold membership of AFCA, rather than having joined the AFCA scheme voluntarily.
Legacy Complaint	A complaint that meets the requirements set out in Rule F.3 against a Compulsory Member of AFCA about loss arising from conduct by a Financial Firm.

F.2 Application of this section

- F.2.1 This section of the Rules effective as at 30 June 2019 applies to Legacy Complaints.
- F.2.2 The time limits set out in B.4 do not apply to Legacy Complaints.
- F.2.3 In all other respects, Sections A to E of the Rules effective as at 30 June 2019 will apply to Legacy Complaints unless modified by Section F.
- F.2.4 In the event of inconsistency with the other sections of the Rules, Section F prevails.

F.3 Requirements for Legacy Complaints

- F.3.1 A Legacy Complaint is a complaint that:
 - a) is submitted to AFCA between and including 1 July 2019 and 30 June 2020;
 - b) is about the conduct of a Compulsory Member that occurred and ended before 1 January 2008; and
 - c) is about the conduct of a Compulsory Member who is a member of AFCA at the time the complaint is submitted.
- F.3.2 A complaint is not a Legacy Complaint if:
 - a) the complaint has previously been decided or determined by a court or tribunal; or
 - b) the merits of the complaint have been decided or determined by a Predecessor Scheme or AFCA; or
 - c) the complaint has previously been finally settled by the Complainant and the Financial Firm and AFCA has exercised its discretion under rule C.1.2, not to revisit the complaint, or
 - d) the Financial Firm is not a current member of AFCA at the time the complaint is submitted; or
 - e) the complaint relates to a superannuation death benefit; or
 - f) the complaint relates solely to a right or obligation arising under the Privacy Act.

4 Whether the Operational Guidelines adequately explain how Section F will apply

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.

- 4.1 The Operational Guidelines state that Legacy Complaints ‘must apply the AFCA Rules as at 30 June 2019,’ as opposed to other complaints which are subject to the rules in existence at the date the complaint is first submitted. It is unclear whether this means that Legacy Complaints would not be subject to any subsequent amendment that could be introduced to the Rules and prohibits any amendment from being made to rule F.
- 4.2 Given the nature of a Legacy Complaint and the discrepancy between Legacy Complaints and other complaints with reference to whether they are subject to the Rules as at 30 June 2019 or at the time the complaint is submitted, we recommend incorporating the Rule in A.4.2 into section F.2.1.
- 4.3 While it has been made clear under Rule F.2.3 that Sections A to E will apply to Legacy Complaints unless modified by Section F, the failure in F.2.1 to exclude claims against Financial Firms who are no longer a current member of AFCA may cause some confusion. This Rule is particularly relevant as it is highly likely with Legacy Complaints that the relevant Financial Firm will have since ceased to be an AFCA member.
- 4.4 In the alternative, references to ‘Compulsory Members’ could be adjusted to state ‘Current Compulsory Members.’

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

- 4.5 The Operational Guidelines state that “we may, however, apply particular approaches to legacy complaints.” It would be beneficial for complainants to understand what type of alternative approaches will be applied to Legacy Complaints.
- 4.6 We are also concerned at the potential requirement for parties who are unable to produce documents to submit a statutory declaration. We consider this could be particularly onerous and daunting for complainants who are vulnerable or experiencing disadvantage.
- 4.7 We recommend that the Operational Guidelines are redrafted to emphasise the obligations of the parties to retain documents and the consequences of insufficient documentary evidence, as follows:

What if relevant documents relating to a Legacy Complaint are not available?

Extending the AFCA process to include Legacy Complaints about events dating back to 2008 may mean that in some cases relevant documents may no longer be available due to the passage of time. AFCA acknowledges that 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, the outcome is likely to depend upon the reason that the documents cannot be obtained.

Failing to Provide Documents that AFCA Reasonably Requires

There are often set time periods within legislation for which Financial Firms are required to retain documents. An example of this is section 286 of the Corporations Act which requires companies to retain financial records for seven years after the related transactions are completed. Where documents cannot be obtained because they were destroyed following the expiry of a statutory timeframe, AFCA would not generally draw an adverse 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.

In this situation, if a Complainant cannot provide information to support their position, we may find that they have not established their case.

However, where a party does not provide the information AFCA reasonably requires and does not have a reasonable excuse, AFCA can draw an adverse inference about this under rule A.9.5.

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 all relevant documents that will help establish or support their position.

Consequences of Insufficient Documentary Evidence

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 the 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.

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

F.2.1 (b) AFCA will not consider a legacy complaint about conduct that occurred and ended before 1 January 2008

4.8 In the example box it states that AFCA would expect the Financial Firm to appropriately remedy circumstances where fees or charges have been incorrectly applied, however the section is ambiguous as to whether the expectation for an appropriate remedy would extend to incorrect fees and charges from prior to 1 January 2008. We recommend this expectation be clarified.

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

4.9 We recommend that the word 'discontinued' is replaced with the word 'settled' to align with relevant practice and procedure, and for consistency of language used in the Rules and Operational Guidelines.

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

4.10 We recommend that the words 'it lacked jurisdiction' are replaced with the words 'it did not fall within the governing Rules or Terms of Reference at the time of the previous complaint', for consistency of language.

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

4.11 We have redrafted this Rule at paragraph 3.11 above and we recommend the Operational Guidelines to Rule F.2.1(e) be redrafted as follows:

Can AFCA consider a Legacy Complaint that has been settled between the parties?

We have discretion over whether to consider a complaint that has been settled in full and final satisfaction of the parties' obligations. Our discretion to exclude a complaint on this basis is outlined in rule C.2.1.

The guidelines to rule C.2.1 list some of the factors that we will consider when deciding whether it is appropriate to revisit a complaint that has been settled between the parties.

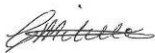
Whether a settlement agreement discharges the parties' obligations will be a question of fact and will be considered based on the circumstances of each particular complaint.

5 Conclusion

CCLSWA is grateful for the opportunity to provide input to the AFCA Rules Change Consultation and is happy to provide further information if required.

If you have any questions or would like to discuss these submissions further, please contact Gemma Mitchell on (08) 6336 7020.

Yours faithfully



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Appendix A

Financial Counsellors' Association of Western Australia

The Financial Counsellors' Association of WA (**FCAWA**) represents financial counsellors who are practicing in WA, and has a current membership of over 150 people. All services provided by the financial counsellors are free and independent, and managed by a variety of not for profit organisations. FCAWA provides training, support, policy and advocacy advice to the financial counselling sector, government, key stakeholders and consumers.

Community Legal Centres Association WA

The Community Legal Centres Association (WA) (**CLCA(WA)**) is the peak organisation representing and supporting 28 Community Legal Centres (**CLCs**) operating in Western Australia. Located throughout the state, CLCs are independent, non-profit organisations which provide legal services to disadvantaged and vulnerable people or those on low incomes who are ineligible for legal aid.

On behalf of our members, the CLCA (WA) is committed to the principles of human rights, social justice and equity, including the rights of Western Australians to equity in access to legal services. To do so, the Association also supports CLC's working together and with other organisations within the community.