

# **Treasury Consultation Paper – Establishment of the Australian Financial Complaints Authority**

Submission by Legal Aid Queensland



# Establishment of the Australian Financial Complaints Authority

## Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to Treasury's Consultation Paper on the establishment of the Australian Financial Complaints Authority (AFCA). LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Consumer Protection Unit lawyers have extensive experience providing specialist advice and representation to vulnerable clients in consumer law matters. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to mortgage stress, housing repossession, debt, contracts, loans, telecommunications and unsolicited consumer agreements.

LAQ regularly assists and represents clients who have legal and financial problems as a result of inappropriate actions by companies in the banking and finance sector. This submission is informed by that knowledge and experience.

## Questions for discussion

### **1. Are there any other principles that should be included in the guiding principles for AFCA's establishment?**

LAQ supports the guiding principles set out on page 7 of the Consultation paper. These principles are important to ensuring a smooth transition to and establishment of AFCA while maintaining a dispute resolution process that is fair in all the circumstances for vulnerable consumers.

## Issue 1 - Specific monetary limits

### 2. As AFCA will be a new EDR scheme, is it appropriate to maintain specific limits for:

- income stream risk disputes;
- general insurance broking disputes; and
- third-party motor vehicle insurance?

### 3. If these specific limits are to be retained, should there be an increase in the limits?

In LAQ's experience, the jurisdictional limit on third party claims on an Insurance Policy for property loss or damage caused by a motor vehicle of \$5,000 is too low and prevents some consumers from accessing the Ombudsman scheme for this type of dispute. LAQ submits this jurisdictional limit should increase to \$15,000.

LAQ is not aware of any basis for maintaining the existing specific limits for general insurance broking disputes. General insurance brokers and insurers that have caused vulnerable consumers loss should be treated in the same way.

### Impact on Professional Indemnity Insurance

### 4. Are there any anticipated effects on firms that will be disproportionate to any increase in specific increased monetary limits?

LAQ is not aware of any disproportionate effect on firms as a result of increased monetary limits.

## Issue 2 - Enhanced decision making

### 5. What measures may assist in ensuring AFCA's decision making processes promote consistency, while:

- deciding each case on its merits based on the facts and circumstances of the complaint; and
- maintaining the objective of achieving fairness and flexibility to adapt to changed circumstances?

In LAQ's submission, the terms of reference should set out the decision making principles highlighted by the Ramsay Review Final Report that AFCA should make decisions on the basis of fairness. What is fair in all the circumstances involves having regard to:

- a) Legal principles;
- b) Good industry practice;
- c) Applicable industry codes; and
- d) Relevant decisions of earlier Ombudsman schemes (however, earlier decisions of AFCA or an Ombudsman should not be binding on AFCA).

This type of approach will allow AFCA to ensure consistency in the way it applies each decision making test while still taking into account the individual circumstances of each individual complainant.

## **6. Are there any other principles that may assist in ensuring AFCA provides fair, efficient, timely and independent decisions?**

LAQ supports the publication of anonymised AFCA decisions. Publication of decisions will improve the transparency of the scheme.

LAQ also supports:

- a) The development of detailed operational guidelines to support staff and decision makers;
- b) The provision of on-going training and professional development for staff; and
- c) The development of publicly available approach documents which set out in a general way how AFCA will approach different types of common disputes. These approach documents are important because they will provide both industry and consumers with guidance as to the likely outcomes of disputes and may result in some disputes being resolved earlier without the need for AFCA to become involved. These documents will also ensure consistent, timely and efficient decision making.

## **7. To what extent should these principles be reflected in the Terms of Reference, while allowing for operational flexibility?**

It is important that AFCA, industry and consumers be provided with clear guidance about the principles with which AFCA will approach making a decision about each individual case, while still giving AFCA the ability to respond to the individual circumstances of each case.

In LAQ's submission, the terms of reference should set out the decision making principles highlighted by the Ramsay Review Final Report that AFCA should make decisions on the basis of fairness. What is fair in all the circumstances involves having regard to:

- a) Legal principles;
- b) Good industry practice;
- c) Applicable industry codes; and
- d) Relevant decisions of earlier Ombudsman schemes. However, earlier decisions of AFCA or an Ombudsman should not be binding on AFCA.

LAQ supports these decision making principles being adopted and used by AFCA. These principles are currently used by the existing schemes and are working effectively and efficiently to provide consumers with substantive access to justice.

## **Issue 3 - Use of Panels**

### **8. How should AFCA balance the advantages of using panels in certain circumstances against efficiency and service implications including cost and timeliness of its decision making?**

and

### **9. Are there other factors that should be taken into account when considering whether a panel should be used?**

LAQ supports the considerations set out by the Ramsay review for when it may be appropriate to use a panel. These considerations are:

- a) The complexity of the dispute;
- b) The amount of loss as well as other potential consequences of the dispute;
- c) Whether a dispute raises a systemic issue;

- d) Whether the dispute is likely to result in a new decision that raises novel issues and may set an industry standard.

#### **10. How best can AFCA provide clear guidance about to users about when a panel should be used?**

In LAQ's submission it is appropriate for AFCA to issue a Position Statement or Guidance document about how and when panels may be used by AFCA and the considerations that it will take into account in deciding when it is appropriate to use a Panel.

### **Issue 4 - Independent Reviews**

#### **11. Apart from the review of the impact of the higher compensation cap, are there other aspects of AFCA's operations that should be subject to independent review within the first three years of its commencement?**

In LAQ's submission other issues which are important to review include:

- a) Monetary and jurisdictional limits of AFCA;
- b) Integration of superannuation complaints as part of AFCA;
- c) Effectiveness of the independent assessor;
- d) Effectiveness of panels as part of the dispute resolution process;
- e) Timeliness of dispute resolution provided by AFCA;
- f) Accessibility of dispute resolution for vulnerable Australian consumers;
- g) adequacy of staff and funding arrangements.

### **Issue 5 - Independent Assessor**

#### **12. How and where should the charter of the independent assessor be defined? Who should be able to make a complaint to the independent assessor?**

LAQ supports the role of the independent assessor being defined in a separate terms of reference (TOR). The AFCA TOR should refer to the Independent Assessor TOR.

In LAQ's submission it is important to have two separate TOR's for AFCA and the independent assessor to:

- a) Highlight the separate role of the independent assessor from AFCA;
- b) Ensure there is no appearance of the independent assessor being influenced by AFCA;
- c) Ensure that there is no confusion for consumers about the role of the independent assessor.

#### **13. What safeguards should be put in place to ensure the assessor remains 'independent' (for example, should there be restrictions on early termination of the independent assessor)?**

In LAQ's submission the following safeguards should be put in place to ensure the assessor remains independent:

- a. The assessor should be appointed by the AFCA Board and approved by ASIC; and
- b. Any decision to terminate the employment of the independent assessor should require the approval of ASIC.

#### **14. Should the independent assessor have guaranteed direct access to the AFCA Board?**

LAQ supports the independent assessor being provided with direct access to the AFCA Board.

In LAQ's view, direct access is important because:

- a) It promotes a clear separation of the independent assessor from the operational arms of AFCA.
- b) It allows the independent assessor to voice any concerns that they may have with the operation of AFCA in a quick and efficient manner.
- c) It avoids creating unnecessary bureaucracy that might inhibit the independent assessor's role.

#### **15. What other reporting arrangements should be in place (for example, if there is serious misconduct or a systemic issue)?**

LAQ supports the independent assessor being able to report systemic issues or incidents of serious misconduct to:

- a) The AFCA Board;
- b) ASIC; and
- c) Other authorities as appropriate depending upon the seriousness and nature of the misconduct.

#### **16. Should the independent assessor publish their findings in each case on an anonymised basis?**

LAQ supports the independent assessor publishing their anonymised findings in each case because it will:

- a) Improve the transparency of AFCA and provide consumers with confidence that any concerns that they raise about how AFCA deals with their complaint will be heard.
- b) Provide guidance to industry and consumers about complaint handling and outcomes.
- c) Provide evidence to the public of the independent role being performed by the independent assessor.

#### **17. What should happen if AFCA disagrees with the independent assessor's decision?**

LAQ supports a process where the independent assessor approaches the Chief Ombudsman of AFCA with their decision and recommendations. If the Chief Ombudsman does not agree with the proposal then the matter is referred to the AFCA Board for consideration.

In order to preserve and support the independence of the AFCA Board concerning operational matters within AFCA, it is important that the Board retain the final decision making power about whether to implement any recommendations made by the independent assessor.

The AFCA Board's powers should remain subject to ASIC's power to give AFCA directions about the operation of the scheme.

#### **18. When should a review of the functions and operation of the independent assessor be undertaken?**

In LAQ's submission, a review of the functions and operations of the independent assessor should occur at the same time as the first independent review of AFCA. It makes sense to review all of the important bodies that form a part of the new financial EDR process at the same time.

## Issue 6 - Exclusions from AFCA's jurisdiction

### 19. Do existing exclusions from FOS and CIO jurisdictions present any unreasonable barriers to accessing the schemes?

In LAQ's submission the existing exclusions do not place an unreasonable barrier to accessing EDR schemes.

However, LAQ notes that many farmers are unable to access EDR schemes because of the way their businesses are structured and the monetary limits that have been placed on these schemes. Often these businesses do not fall within the definition of a small business because of the scheme monetary limits are too low. In LAQ's view, consideration should be given to how AFCA can improve the accessibility of the process for farming and rural businesses.

### 20. Is there more that could be done so that complaints lacking substance are excluded from being dealt with by AFCA?

In LAQ's experience the number of complaints made to the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO) that are lacking in substance is very small when compared to the total number of complaints made to the current Ombudsman schemes.

Currently, there is no problem with inappropriate complaints or complaints lacking in substance being made to FOS or the CIO being lodged by consumers.

Notwithstanding that there exists no major issue with complaints lacking in substance, both FOS and the CIO have expedited procedures in place for identifying and dealing with complaints that fall outside their jurisdiction and those disputes which are being inappropriately lodged by credit repair agencies. In LAQ's experience this process works effectively. AFCA should adopt a similar process for dealing with the minor number of complaints that are lacking in substance.

In addition, in LAQ's submission, the problem of inappropriate complaints being lodged by credit repair agencies can be addressed by improved licensing and regulation of credit repair agencies that requires credit repair agencies to also be a member of AFCA.

### 21. What, if any, further practices should be adopted to ensure the correct balance between accessibility to the scheme and ensuring that complaints not appropriate for consideration by an EDR scheme are excluded?

The correct balance between ensuring accessibility to the schemes and ensuring that complaints which are inappropriate to be heard by the scheme are excluded currently exists in FOS and CIO. This view is supported by the small number of complaints lacking in substance lodged by consumers and consumer advocates that are received and dealt with by the existing schemes.

## Issue 7 - Other issues to be addressed in the terms of reference

### 22. What requirements relating to accessibility should be included in AFCA's terms of reference?

In LAQ's submission, the requirements relating to accessibility that should be included in AFCA's terms of reference are those set out in the DIST Benchmarks definition of accessibility (which is also reproduced in RG139) and is included on page 15 in the consultation paper.

In LAQ's submission, one of the key roles for AFCA ensuring accessibility is to:

- a) Promote knowledge of the scheme and consumer rights, particularly in communities with members who are vulnerable and/or in disadvantaged circumstances.

- b) Enable consumers in vulnerable and disadvantaged circumstances to make and then follow through on their complaints by providing a wide range of options for accessing the schemes. For example multiple ways to make a complaint (eg application by paper, online, telephone) and the provision of interpreter and translation services.

This role is effectively performed currently by FOS and the CIO and in LAQ's experience has seen the following benefits:

- a) A greater awareness among people of their legal rights when they are dealing with banking, finance, insurance and other businesses.
- b) A greater faith by consumers in the ability of the current Ombudsman schemes to consider and fairly deal with their complaints about finance companies and other financial businesses.
- c) More consumers lodging complaints with the Ombudsman schemes.
- d) Improved IDR processes within companies;
- e) Improved industry wide approaches for dealing with consumers.

### **23. Having regard to the current FOS terms of reference and CIO rules, what principles and topics are of sufficient ongoing significance that they should be addressed in the AFCA terms of reference?**

In LAQ's submission, the following issues that are covered by the existing FOS TOR and CIO Rules are of ongoing significance and should be addressed in the AFCA terms of Reference:

- a) Legal proceedings and other matters - The CIO Rules give it a wider jurisdiction than the FOS TOR for dealing with complaints where legal proceedings have commenced. LAQ supports the approach where AFCA can deal with financial hardship and irresponsible lending after legal proceedings have commenced. These matters are often resolved through Ombudsman intervention which results in costs savings for both industry and consumers.
- b) The timeframes around the resolution of disputes.
- c) The time limits on making complaints to the scheme.
- d) The potential remedies available to a consumer who brings a successful dispute before AFCA.
- e) Expedited processes for deciding disputes.
- f) The roles of adjudicators in resolving less complex disputes in an expedited timeframe.
- g) The reporting of systemic issues to ASIC including improved public reporting around systemic issues to increase the transparency of AFCA.
- h) The process for reopening complaints closed because a consumer did not respond to a request for information from AFCA within the required timeframe.
- i) Third party rights under insurance claims.
- j) The role of AFCA in resolving financial hardship disputes.
- k) The community education role performed by AFCA.
- l) The ability of AFCA to obtain specialist or expert reports as needed to resolve complex disputes effectively.

### **24. Are there any matters not currently included in the FOS terms of reference/CIO rules that warrant inclusion in AFCA's terms of reference?**

In LAQ's submission, the following issues are not currently included in the FOS terms of reference/CIO rules but should be included in AFCA's terms of reference:

- a) Disputes involving credit repair agencies;

- b) Linked credit disputes involving Australian Consumer Law disputes;
- c) Disputes involving debt management firms;
- d) Dispute involving Debt Agreement Administrators;
- e) Disputes involving dealer issued warranties.

## **Issue 10 - Directors with appropriate skills and experience not representing sectional interest**

**28. What measures could be put in place to secure sufficient knowledge of how different parts of the industry operate, while avoiding the representative tag for directors?**

and

**29. What measures should be put in place to ensure the AFCA Board appropriately balances the considerations of currency of director knowledge of particular industry sectors, conflict of interests, and breadth of competencies required?**

LAQ supports a director with experience in the industry being appointed as Board Members of AFCA. LAQ does not consider that current managerial or executive office in a financial services business or being a representative of any professional association, or association representing financial services will necessarily result in a conflict of interest.

LAQ has had experience dealing with the schemes:

- a) as a result of providing legal advice and representation to consumers; and
- b) by staff taking external positions as consumer representatives on the boards of the Credit and Investment Ombudsman, the Telecommunication Industry Ombudsman Council (before the council and board merged in 2013) and the Financial Co-operative Dispute Resolution Scheme (whose members once the scheme ceased to operate joined either the Credit and Investment Ombudsman or the Financial Ombudsman Service), as well being members of advisory bodies to the Credit and Investment Ombudsman and the Financial Ombudsman Service.

This experience has shown LAQ that industry directors on schemes should be drawn from current members of the scheme with who have the relevant experience and gravitas to maintain industry confidence and buy in to the scheme.

In LAQ's submission, it is important to remember that the primary objective of the AFCA is not to make a profit. Government regulation provides that as a condition of holding a licence financial service providers must be members of AFCA, and the constitution of the Board has equal representation of industry and consumer directors, conflict of interests are reduced.

We acknowledge there is a risk of a potential perceived or actual conflict of interest if an industry director, who holds a managerial or executive office in a financial service provider, is appointed. However those risks could be further managed by:

- a) Robust disclosure requirements : and
- b) Requirements in relation to decision making at the board level to ensure that decisions made are made unanimously and/or cannot be made purely on the majority of either the consumer or industry representatives on the board.

Some of the benefits of having current managerial or executive office in a financial service provider on the board include:

- a) Relevant understanding of industry;

- b) Industry confidence; and
- c) Interplay between industry and consumer directors

**a. Relevant understanding of industry**

- c. They understand the problems faced by consumers accessing FSP products and the breadth of complaints made.
- d. They have some awareness of the impact of new technologies on the consumer experience.
- e. They can advise the Board as to potential disrupters in the industry and the impact that this might have on complaints (for example account aggregation services such as Yodlee and their impact were first raised by industry)
- f. They often possess much better data as to complaints in the industry as a whole.
- g. They are able to provide practical advice as to the impact of decisions by AFCA on industry.

**b. Industry confidence.**

It is difficult to see how industry confidence in the governance structure of AFCA could be maintained without industry directors who themselves have an interest in the outcomes of the decisions made by AFCA at the board level.

Industry participants may not necessarily like the decisions made by AFCA but if they have confidence in the industry directors they are more likely to acknowledge that their views have been taken into account in board decisions.

Additionally it is the industry director's current networks that are extremely valuable in terms of selling key messages of AFCA but also for feedback, obtaining knowledge of current trends and financial service providers perceiving that they have a conduit by which they can feed industry concerns to the board.

**c. Interplay between industry and consumer directors**

Interaction between industry and consumer directors on all schemes has been an important part of arriving at high quality consensus positions. Indeed, interaction between consumer directors and industry directors has enlightened both sides of the argument, is mostly positive, and has strengthened the relationship between consumers and the industry.

In our view such initiatives as the joint communiqué released in relation to debt management firms<sup>1</sup> (that included industry associations, consumer organisations, National Legal Aid, the Credit and Investment Ombudsman and the Financial Ombudsman) would have been more difficult without the capacity building and relationships developed between industry, consumer organisation and the Ombudsman schemes through their governance structures including high caliber industry members.

The capacity for this valuable interaction between industry and consumers is significantly reduced if the industry participant does not have the confidence or knowledge of the industry with the opportunity to see multiple points of view, and less likelihood of good decision-making that finds the best solutions for both consumers and industry. In our view this is a significant risk to AFCA.

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<sup>1</sup><http://consumeraction.org.au/wp-content/uploads/2016/03/Debt-Management-Communique.pdf>

## Consumer Directors

LAQ acknowledges that the above benefits apply equally to consumer directors and that it is equally important that consumer directors have relevant and current experience and have the confidence of the consumer sector.

In addition both consumer and industry directors have the ability to check the power of AFCA and its Ombudsman so that the Ombudsman can be independent but also accountable to his/her stakeholders. Without high calibre industry and consumer directors this accountability is more difficult to achieve.

### **30. What needs to be addressed at a Board/constitution level and what can be addressed through additional governance arrangements established by AFCA such as industry sector advisory panel(s) for transition?**

Advisory panels can provide valuable input but only if their advice is acted on and communicated to the panel. If recommendations of the advisory panel are not accepted or actioned then AFCA needs to be able to justify its position in relation to those recommendations. If this process does not work effectively advisory panels become disillusioned and disenfranchised and would not meet any of the participant's stated desired outcomes.

This applies equally to any consumer advisory panels.

## Issue 11 - Board Responsibilities

### **31. Are there additional functions or responsibilities of the AFCA board that are not reflected in the constitutions of the existing schemes?**

LAQ is not aware of any additional functions or responsibilities that the AFCA board should have.

### **32. What benchmarks should AFCA have in relation to matters addressed in the ASX corporate governance principles, including:**

- board renewal;
- diversity;
- procedures for assessing board performance;
- management of conflicts of interest or of duty on the part of directors and executive staff;  
and
- remuneration policy?

In LAQ's view these benchmarks should also apply to AFCA except that the benchmarks should be modified to reflect:

- d. The role of AFCA,
- e. Its funding arrangements,
- f. Its membership (which does not include consumers),
- g. The compulsory nature of the membership,

- h. The need for AFCA to meet the external dispute resolution benchmarks<sup>2</sup> contained in Regulatory Guide 139 of the Australian Securities and Investment Commission; and
- i. The need of the board to have equal numbers of consumer and industry directors on the AFCA Board. These needs should not be diluted by ASX governance principles that are looking to address governance failures in other sectors of the economy.

**33. Should the Constitution or governing rules provide that neither the board nor individual directors can direct a decision-maker with regard to the outcomes of a particular dispute or class of disputes?**

It's important that the board does not have power to direct a decision maker in relation to the outcomes of a particular dispute or class of dispute. To do otherwise, would affect the Ombudsman's ability to act independently and fail the benchmark of Independence.<sup>3</sup>

## Issue 12 - Funding matters for consideration as part of Authorisation

**34. In addition to matters identified in paragraphs 1-3 above, what other material should a company seeking authorisation to operate the AFCA scheme provide to demonstrate that it has satisfied the requirements of adequate funding and sufficient funding flexibility?**

LAQ supports the matters outlined in paragraphs 1-3 on page 26 of the Consultation Paper.

**35. Are there any principles beyond those identified in paragraph 2 above that should underpin AFCA's funding model?**

LAQ supports the principles identified in paragraph 2 as appropriate to underpin AFCA's funding model.

**36. Should the funding arrangements for superannuation and non-superannuation disputes be separate and distinct, given the very different nature of these disputes?**

LAQ has no relevant experience with superannuation disputes.

## Issue 13 - Interim Funding Arrangements

**37. If an interim funding arrangement were put in place, what features should it have and when would it be appropriate to transition to a long-run funding model?**

and

**38. What special considerations might need to be factored into an interim funding model to balance the need for adequate resources (certainty) with the principles (accuracy)?**

In LAQ's submission it is important that any interim funding arrangements take into account:

- a. The importance of providing AFCA with adequate resources to allow disputes to be resolved in a timely and efficient manner;

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<sup>2</sup> <http://download.asic.gov.au/media/1240742/rg139-published-13-june-2013.pdf>

<sup>3</sup> *Ibid* page 49

- b. The expanded monetary and jurisdictional limits of AFCA when compared to FOS and CIO, which will see AFCA, receive more disputes than the existing schemes. This expansion will require additional resources beyond those within the current schemes;
- c. The features of the existing funding arrangements that provide a tiered cost structure that incentivises early dispute resolution should be maintained.

## Issue 14 - Transparency and Accountability

### 39. Who are the key stakeholders AFCA is accountable to? What is the key objective and measure of importance to each stakeholder?

In LAQ's submission the key stakeholders that AFCA is accountable to are:

- a. Consumers and their representatives;
- b. Industry;
- c. ASIC.

As an organisation that currently represents and refers consumers in vulnerable and disadvantaged circumstances to existing Ombudsman schemes, LAQ places high importance on:

- a. AFCA engaging in regular consultation with LAQ and similar organisations about matters including
- b. Dispute resolution processes and their accessibility for consumers in vulnerable and disadvantaged circumstances;
- c. How and the means by which AFCA communicates with consumers in vulnerable and disadvantaged circumstances;
- d. AFCA's approach to resolving particular types of disputes and how that impacts on consumers in vulnerable and disadvantaged circumstances;
- e. Emerging consumer issues;
- f. Identifying consumers in vulnerable and disadvantaged circumstances and providing those consumers with assistance to ensure that they can have their dispute heard.
- g. The treatment of systemic issues. It is important that in addition to regulators, consumers are made aware of systemic issues affecting them and how they can obtain a remedy for the impact that the systemic issue has had on them.
- h. The existence of a board that consists of an independent chair and equal numbers of directors with industry and consumer experience.

### 40. In addition to the accountability measures in the Bill, are there additional measures that should be embedded in AFCA's Constitution and/or terms of reference or reflected in ASIC guidance to ensure accountability to stakeholders?

LAQ has no further measures to add.

### 41. Are there other conditions that could be put in place to ensure the scheme is accountable to members in relation to fees?

LAQ has no submissions to make on this question.