

Legal and Constitutional Affairs References Committee Inquiry -

**Resolution of disputes with financial
service providers within the justice
system**

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to the Legal and Constitutional Affairs References Committee Inquiry - Resolution of disputes with financial service providers within the justice system.

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 Civil Justice Services Unit lawyers have extensive experience providing specialist advice and representation to vulnerable clients in banking and finance, credit and debt, including farm debt matters, credit reporting and default listings, insurance and consumer law.

The ability of consumers and small businesses to exercise their legal rights through the justice system, and whether there are fair, affordable and appropriate resolution processes to resolve disputes with financial service providers, in particular the big four banks considering:

- 1. *whether the way in which banks and other financial service providers have used the legal system to resolve disputes with consumers and small businesses has reflected fairness and proportionality, including:***
 - 1. *whether banks and other financial service providers have used the legal system to pressure customers into accepting settlements that did not reflect their legal rights,***

Banks and financial service providers (FSP) have used the legal system, including complaints systems, to pressure consumers into accepting settlements. Ways in which they have done this are set out below.

Inappropriate early offers of settlement where a complaint to AFCA has been made and could still proceed

When bank customers make a complaint to the Financial Ombudsman Service FOS (now part of the new Australian Financial Complaints Authority (AFCA)), they are initially referred back to the bank even in circumstances where the customer has already made a complaint. Referral back to the bank is to encourage the bank to resolve the dispute with the customer. It is at this stage that the bank may make an offer of settlement to the customer. LAQ's experience is that these offers of settlement are made by banks before any AFCA investigation has been undertaken and banks routinely encourage customers to accept settlements that do not reflect the customer's legal rights.

Issues with these offers include:

- the bank usually provides the customer with a very short time frame to consider the offer;
- the bank does not routinely encourage or advise customers to seek legal advice regarding the offer;
- the banks do not routinely disclose that the customer can refuse the offer of settlement and still proceed with their AFCA complaint;
- the offer of settlement contains terms that are unrealistic and with which the customer is unlikely to be able to comply, for example, an offer not to repossess for a period of three months to enable the customer to refinance is not helpful or practical when the customer's financial position makes refinancing the debt unlikely; and
- they fail to address underlying legal issues associated with the debt, for example, when the customer complains that they cannot make repayments because the loan was unaffordable but the offer of settlement only addresses issues relating to financial hardship and not the appropriateness of the loan.

Customers have accepted bank offers because they:

- think the offer is the best that they can achieve;
- don't understand they can continue with their complaint to AFCA;
- lack the confidence and capacity to take their AFCA complaint further without the assistance of a lawyer or financial counsellor and are not aware of the free legal services available to assist them; or
- think the offer has the approval of AFCA, because of the earlier referral back to the bank, when in fact AFCA does not have any oversight regarding these early offers (If the customer accepts the offer at this stage AFCA simply closes the complaint).

Where the FSP has obtained a default judgment

If the FSP has obtained a default judgment it is difficult for the customer to negotiate a settlement with the bank that takes into account legal rights the customer may have had because the FSP is aware that:

- it is unlikely that the customer will have access to affordable legal representation to obtain legal advice regarding the judgement;
- the cost of setting aside a judgment is prohibitive for most customers;
- the borrower's right to access AFCA post judgment is limited to where a default judgement has been issued. Access is further limited as AFCA will only consider

financial hardship rights in matters involving a default judgement and will not consider other legal defences such as the fairness of the contract.

Where there is a farm or small business debt

Whilst farm debt mediation is positive for most consumers, the settlements made by FSP's in these matters often reflect their superior bargaining power and the awareness by all parties that if the mediation does not resolve the matter, the farmer:

- is unlikely to be able to afford to litigate the matter further. This is particularly relevant given that the reason the farmer is participating in the farm debt mediation is because they are in financial hardship; and
- that the farmer has limited rights to access AFCA post farm debt mediations.

The situation is worse for small business where they have little access to free advice, legal representation or mediation services and the withdrawal of support for any length of time by the FSP can make it impossible to continue trading.

2. whether banks and other financial service providers have pursued legal claims against customers despite being aware of misconduct by their own officers or employees that may mitigate those claims, and

FSPs rarely accept that there was misconduct by their employees. The culture within most FSPs has always been one in which the FSP's have denied any wrong doing in the assessment of an application for credit or in the way in which they have dealt with a consumer's financial hardship.

3. whether banks and other FSPs generally have behaved in a way that meets community standards when dealing with consumers trying to exercise their legal rights;

Bank customers continue to express disappointment that the FSP, with whom they have been a loyal customer for many years, has not acted with fairness in their dealings with them.

Some farmers have said that bank officers have indicated that if the farmer were to exercise their legal rights through the court process, the bank would strongly defend the action.

2. the accessibility and appropriateness of the court system as a forum to resolve these disputes fairly, including:

- 1. the ability of people in conflict with a large financial institution to attain affordable, quality legal advice and representation,***

Access to Legal Advice

Access to quality legal advice in Queensland is available from LAQ and Community Legal Centres, who practice in this area of law. LAQ provides legal advice, minor assistance and, in limited cases, legal representation for clients regarding financial services issues. Advice and minor assistance through LAQ is not means tested. Means tests do apply for consumers seeking legal representation (please note below comments regarding applicable means and merits tests for LAQ's Farm and Rural Legal Service (FRLS)).

Available advice services through LAQ

- **Consumer Protection Unit**

LAQ's Consumer Protection Unit (CPU) lawyers provide advice and representation to vulnerable clients in insurance, banking and finance, credit and debt and consumer law. The unit provides telephone and face to face advice to clients. Additionally advice is provided to lawyers and financial counsellors throughout Queensland in relation to insurance, mortgage stress, housing

repossession, banking and financial issues, financial hardship, debt, contracts, loans, telecommunications and unsolicited consumer agreements. The CPU also provides face to face advice in three Queensland regional offices.

- **The Farm and Rural Legal Service**

Legal Aid Queensland's Farm and Rural Legal Service (FRLS) provides advice and assistance to rural producers and rural based businesses that have severe debt related problems or are in dispute with their lenders, or are otherwise facing financial hardship directly related to their business of primary production. The service is free of charge. No income or assets tests apply.

The Service works closely with rural financial counsellors and professional advisors, such as agribusiness consultants, accountants and private legal advisors and represents rural producers in farm debt mediations as well as other debt negotiations with their financiers. The FRLS does not provide representation in court proceedings.

The service has two lawyers who travel throughout Queensland including to remote locations to give legal advice. The service assists rural producers on the farm, at a venue of the farmer's choice, at the local Legal Aid Queensland office or by telephone.

- **Other Advice services**

LAQ's First Advice Contact Team provides telephone advice, face to face advice (including via video link to prisons) for Queenslanders. Also, in addition the 13 regional offices provide face to face and telephone advice in limited circumstances.

However, the following limitations apply to the accessibility of legal advice through Legal Aid Queensland:

- legal advice is not provided in relation to business disputes unless they involve farm loans.- This restriction is particularly challenging as there is little free legal advice available to small business.
- legal advice is not provided in relation to investment loans unless the advice relates to the purchase of a residential property – eg borrowers who were involved with Storm Financial limited' were unable to access free legal advice.
- face to face legal advice is limited which is challenging for vulnerable consumers who are culturally and linguistically diverse (CALD), are elderly, have intellectual or other impairments and who have issues with their lending institutions about debt.

Access to representation

The CPU takes on class action style complaints involving rogue industry practices in limited circumstances, which have included actions involving debt collectors and payday lenders.

The CPU prioritises matters where representation will result in wide-ranging community benefit.

However, LAQ's CPU and FRLS are currently staffed with less than six full time lawyers who provide advice, minor assistance and legal representation work for consumers across the State of Queensland.

The resources of the CPU and the FRLS are limited and therefore legal representation services are limited. In the case of clients seeking assistance through the CPU, eligibility for legal presentation is means tested. The FRLS does not provide litigation services.

2. *the cost of legal representation and court fees,*

The cost of legal representation can be prohibitive. Unless consumers are eligible for legal assistance, they are unlikely to have legal advice or representation. It is usually better for these consumers to direct available funds towards payment of the debt rather than legal representation.

In addition, this is not an area of law that the private legal profession (unless it is in the nature of a class action) is likely to be involved in, as the likely outcome of any successful action is:

- a reduction in the amount owing to the FSP;
- a waiver of the debt to the FSP; or
- a hardship variation.

and not the payment of any compensation or financial penalty to the consumer and from which a private lawyer could recoup their fees.

3. *costs risks of unsuccessful litigation, and*

The risk of a costs order is a significant barrier to commencing legal action particularly as most FSP have access to substantial resources to defend any action. This is particularly problematic in third party motor vehicle insurance claims where the uninsured driver is seeking to apportion liability for the accident. In those circumstances, the uninsured third party cannot access AFCA, as AFCA only deals with matters where the uninsured third party is alleging that the insured is fully liable for the damage to the uninsured vehicle.

4. *the experience of participants in a court process who appear unrepresented;*

For self-represented litigants:

- the legal process is difficult and confusing to navigate;
- access to legal advice assistance to draft court documents is limited - LawRight provides a self-representative service in limited circumstances;
 - the adversarial nature of court proceedings even where the consumer's claim has merit, means that most consumers struggle to self-represent and identify relevant legal issues and make valid legal arguments.

3. *the accessibility and appropriateness of the Australian Financial Complaints Authority (AFCA) as an alternative forum for resolving disputes including:*

1. *whether the eligibility criteria and compensation thresholds for AFCA warrant change,*

The current eligibility criteria for accessing AFCA is an improvement to the criteria that existed prior to the formation of AFCA. Under the new jurisdictional and compensation caps at AFCA, the typical borrower, who would be expected to access to legal assistance services, is able to access AFCA to have their dispute heard. The only exception is for farming disputes which can often involve millions of dollars. However, there are a number of areas where the jurisdiction of the scheme could be improved, for example, the current AFCA jurisdictional caps may exclude many farmers.

Post judgment disputes

AFCA can ask the FSP not to enforce a default judgment to enable the party's time to negotiate and possibly reach a settlement in relation to financial hardship. However, AFCA cannot interfere once a judgment has been obtained.

Many consumers first approach LAQ only after:

- a default judgment has been obtained;
- an enforcement warrant has issued for the eviction of the borrowers from their home;
- a bankruptcy notice has issued; or
- a creditor's petition has been filed.

In some cases the consumers may have had a defence to the original claim either based on hardship or some underlying unconscionability. However, these disputes can only be looked at if the consumer commences a costly court application to stay enforcement of a default judgement and argue that it should be set aside.

The reasons consumers are often late in seeking legal advice, particularly in relation to repossession of their home, include:

- ability to communicate in English;
- belief the creditor was negotiating with them;
- belief hardship relief meant that they did not have to pay whilst they were in hardship;

The current jurisdiction of AFCA does not address the situation of consumers in these circumstances.

2. whether AFCA has the powers and resources it needs,

Powers

There has been a significant change in the jurisdiction of AFCA to the jurisdiction of the predecessor ombudsman schemes. For example, whilst the Credit and Investment Ombudsman (CIO) had similar powers to AFCA in relation to post judgment disputes, the Financial Ombudsman's Service (FOS) did not. It is positive that all consumers are now treated in the same way in relation to post judgment disputes.

AFCA's powers in relation to individual disputes should be actively monitored to establish whether AFCA is delivering fair outcomes to consumers. Also, if AFCA issues a recommendation or determination, and the consumer agrees, the FSP to the dispute ought to be named. This proposal would provide extra pressure on FSP's to resolve disputes early and fairly whilst also providing some transparency to the Australian public about how each FSP handles disputes with their customers.

Resources

A significant issue for the predecessor schemes was complaint times. It is critical that AFCA has access to adequate resources to deal with the complaints it receives. LAQ cannot comment further as to whether AFCA has access to adequate resources to reduce complaint times.

3. whether AFCA faces proper accountability measures, and

LAQ is unaware as to how AFCA will respond to requests to change its own processes or increase its jurisdiction beyond AFCA considering submissions about these issues during the regular reviews. Two historical examples are set out below .

Selling customers credit card debt to a third party whilst the customer continues to pay the mortgage debt

There have been a number of occasions where LAQ has raised the issue of a bank selling a credit card debt to a third party but the borrower's home loan remains with the bank. The new owner of the credit card debt has then taken legal action to recover the debt, ultimately obtaining a judgement and then seeking to enforce that judgement by selling the home or making the borrower bankrupt. The borrower continues to pay the mortgage debt ultimately loses their home because the bank sold the credit card debt.

LAQ submits that in such cases the debt should be returned to the bank so that an appropriate solution can be negotiated between the bank and its customer, covering all of the customer's debts and financial circumstances.

Old Judgments

Some FSPs agree to repayment arrangements post judgment and when borrowers default, on some occasions many years later, the lender relies on the original judgement to seek possession of the property. In such cases the FSP is not required to consider hardship and the bank can proceed to evict the borrower from the home. LAQ submits that the FOS should have been able to intervene in such cases, given that there would be little or no possibility of the borrower having the judgement set aside. No change was made to FOS's jurisdiction to allow these complaints to be heard. However, AFCA's increased jurisdiction to consider hardship complaints post judgement may present an opportunity to address this issue.

4. whether enhancement to their test case procedures, or other expansions to AFCA's role in law reform, is warranted;

LAQ has no comment to make on this issue.

4. the accessibility of community legal centre advice relating to financial matters; and

Other than the services provided by LAQ, there is no other legal assistance service provider in Queensland that specialises in financial services legal advice and assistance. Caxton Legal Centre and Townsville Community Legal Centre provides some advice services only in this area and Cairns Community Legal Centre has a lawyer who provides specialist credit and debt.

5. any other related matters.

LAQ has no comment to make on this issue.