

Australian Securities and Investment Commission - Internal Dispute Resolution: update to RG 165

Submission by Legal Aid Queensland

July 2019



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Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to the Australian Securities and Investment Commission- Internal Dispute Resolution: update to RG 165.

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 provide advice and representation in relation to mortgage stress, housing repossession, banking and financial issues, financial hardship, debt, contracts, insurance, loans, telecommunications and unsolicited consumer agreements, including for clients who have complaints about financial services and credit licensees.

General Comments

Application

The Regulatory Guide applies to Australian Financial Services and Australian Credit Licensees. Organisations which cause significant consumer detriment such as unlicensed lenders providing only business credit, debt management firms and buy now/ pay later schemes and unlicensed rent to own schemes are not required to have an Internal Dispute Resolution (IDR) process or comply with this Guide, even if legislation is required to achieve this.

Enforceability

RG165.11 states that “core IDR requirements” are enforceable. The guide does not appear to set out what are the “core” requirements of the Guide.

If some clauses are specified as “core requirements” does that mean that compliance with non “core IDR requirements” are voluntary? LAQ does not support a two tiered system of enforceability within the Guide.

LAQ's view is that the Guide in its entirety should be enforceable not just "core" requirements.

B1Q1 Do you consider that complaints made through social media channels should be dealt with under IDR processes? If no, please provide reasons. Financial firms should explain:

(a) how you currently deal with complaints made through social media channels; and

(b) whether the treatment of social media complaints differs depending on whether the complainant uses your firm's own social media platform or an external platform.

In responding to feedback, LAQ's Feedback and Complaints policy enables clients and stakeholders to submit feedback to LAQ about:

- legal aid policies and processes;
- a staff member or supplier behaviour or attitude;
- a staff member or supplier performance or professional competence; and
- breaches of confidentiality.

The definition of a complaint in accordance with LAQ's policy is:

"An expression of dissatisfaction with any aspect of LAQ's operations that is not resolved at the point of service".

Any written feedback received by LAQ will be considered and therefore, it is possible to receive complaints through social media platforms.

Complaints made on LAQ's social media platform such as its Facebook page are referred by the web team to the complaints team. They are not treated differently from complaints received through other channels once they are with the complaints team.

If a complaint is made on the social media platform, the web team may ask the person to contact the complaints team directly but if the person does not want to do this, the web team may make the referral to complaints.

Legal Aid does not deal with complaints received on other third party social media platforms for the following reasons:

- Difficulty in monitoring the various social media platforms and Identification of complaints
- Lack of resources and
- Privacy concerns.

LAQ treats social media complaints the same as any other complaints and submits that complaints made to financial firms should be dealt with under the same IDR processes as any other complaint.

B2Q1 Do you consider that the guidance in draft updated RG 165 on the definition of 'complaint' will assist financial firms to accurately identify complaints?

Yes.

B2Q2 Is any additional guidance required about the definition of ‘complaint’? If yes, please provide:

(a) details of any issues that require clarification; and

(b) any other examples of ‘what is’ or ‘what is not’ a complaint that should be included in draft updated RG 165.

In general where there is doubt about whether to classify an interaction with a consumer as a “complaint” the doubt should be resolved in favour of treating the matter as a complaint.

Otherwise LAQ’s general view is that the examples of what is and what is not a complaint are appropriate. LAQ does not agree that an example of what is not a complaint include “*simple requests for information*”. LAQ’s view is that simple requests for information should be treated as complaints.

At LAQ, we require consumers to provide documents prior to providing advice about financial products. If they do not have documents, we ask them to obtain them from the financial firm. If they are unable to obtain the documents themselves we may assist them in obtaining the relevant information.

If requests for documents are not treated as complaints then the provision of information may not be prioritised by the financial firm which means that it is difficult for consumers to receive timely legal advice. It will also mean that IDR timeframes for dealing with the complaint will be extended. The IDR timeframe will not start until requested information has been provided by the Financial Firm and the consumer has made a complaint based on the requested information.

Alternatively, If ‘simple requests for information’ are to remain in the examples of what is not a complaint, then further clarification on the definition of a simple request for information is required.

B3Q1 Do you support the proposed modification to the small business definition in the Corporations Act, which applies for IDR purposes only? If not, you should provide evidence to show that this modification would have a materially negative impact.

We support the approach given that it is broader than the definition in the *Corporations Act* and aligns with the Australian Financial Complaints Authority AFCA definition. If the definition were different:

- it would be difficult to compare data produced by the financial firm and that produced by AFCA, and
- it could result in a situation where a “small business” would not have access to IDR at a financial firm but have access to AFCA.

B4Q1 Do you agree that firms should record all complaints that they receive? If not, please provide reasons.

It is critical that all complaints are recorded whether they are resolved at first contact or at any stage of the complaint process by a financial firm. In our view complaints can identify systemic issue.

For example, if a complainant identifies a fee that appears to have been incorrectly applied and the customer service officer processes a credit; unless the complaint is recorded the organisation may not become aware that this might be a systemic issue. If the complaint is not recorded it is then not reported

to the Australian Securities and Investment Commission (ASIC). ASIC would have no exposure to what could be a serious compliance problem if those complaints aren't recorded.

B5Q1 Do you agree that financial firms should assign a unique identifier, which cannot be reused, to each complaint received? If no, please provide reasons.

LAQ supports assigning unique identifiers for each complaint.

B5Q2 Do you consider that the data set proposed in the data dictionary is appropriate?

LAQ supports the proposed data sets.

In our view the main purpose of this type of data collection is to make it easier to identify systemic issues both in the industry and at an individual financial firm level.

Data sets should be aligned with the data sets AFCA collects so that meaningful comparisons can be made between ASIC and AFCA data and to make it easier to identify non compliance with the Guide. It may also be more cost effective for financial firms because they only have to produce 1 set of data instead of multiple different sets.

Public reporting of data

It is unclear from the guide whether the information contained in the reports will be made publically available and name the financial firms that provided the specific data.

It is important to hold financial firms accountable. Without making the data collected publically available it is difficult to see how financial firms will be held accountable particularly, if not all requirements within the Guide are "core" and therefore enforceable.

For effective competition, consumers should be in position to compare how the financial firm deals with complaints when making choices about which financial firm to obtain services from.

In particular

Do the data elements for 'products and services line, category and type' cover all the products and services that your financial firm offers?

LAQ supports the proposed data elements.

(b) Do the proposed codes for 'complaint issue' and 'financial compensation' provide adequate detail?

LAQ view is that the proposed codes provide adequate detail.

B6 Q1 Do you agree with our proposed requirements for IDR data reporting? In particular:

LAQ supports the proposed IDR data reporting.

See our further comments at B5Q2 as to why it is important that the information contained in the reports should be made publically available.

a) Are the proposed data variables set out in the draft IDR data dictionary appropriate?

In the IDR data dictionary it proposes, under reporting of complaint status that complaints that are withdrawn “include both complaints where the FSP has lost contact with the consumer and those matters where the consumer has actively engaged to withdraw the complaint.”

Where a financial firm has lost contact with the consumer it maybe as a result of complaint fatigue or a myriad of other barriers that the consumer has faced in attempting to resolve the complaint internally. In contrast, consumers who have actively withdrawn their complaint may have been genuinely satisfied with an explanation given by the financial firm.

These are very different circumstances. The danger in using one definition is that it may hide serious systemic barriers to consumers accessing IDR.

LAQ’s view is that for those complaints where the FSP has lost contact, there ought to be separate complaint status category because there is no evidence that these complaints have actually been withdrawn by the consumer.

(b) Is the proposed maximum size of 25 MB for the CSV files adequate?

LAQ has no experience to allow comment on this issue.

(c) When the status of an open complaint has not changed over multiple reporting periods, should the complaint be reported to ASIC for the periods when there has been no change in status?

LAQ’s view is that if an open complaint has not changed over multiple reporting periods they should continue to be reported to ASIC. It is unlikely that there will be a systemic issue in the financial firm’s IDR if there is one such complaint but if there are many this may raise a systemic issue that ASIC could investigate.

B8Q1

Do you agree with our minimum content requirements for IDR responses? If not, why not?”

Consumers seeking advice from LAQ in relation to an IDR response fall generally into two categories:

- (a) those consumers who have not received a response or only received a verbal response from the financial firm; and
- (b) those consumers who have received a written response from the financial firm.

Where consumers have only received a verbal response or no response, the financial firm has generally not made them aware they have an avenue of redress through AFCA.

Where consumers have received a written response, these responses generally include some details about AFCA. However these consumers may still have little awareness of their right to take the complaint to AFCA.

This problem may be as a result of information usually being placed at the end of the letter and consumers being under severe financial, physical and mental stress when engaging with the IDR process. This stress means they do not always take all of the written information that they are provided about the process in.

For this reason we are supportive that all IDR responses are in writing (either email, mail or where appropriate by text) however details about AFCA and how to complain to AFCA if the consumer is unsatisfied should be at the start of the response not at the end.

B9Q1

Do you agree with our proposed approach not to issue a separate legislative instrument about the provision of written reasons for complaint decisions made by superannuation trustees? If not, please provide reasons.

LAQ has no experience to comment on this issue.

B10Q1

Do you consider there is a need for any additional minimum content requirements for IDR responses provided by superannuation trustees? If yes, please explain why you consider additional requirements are necessary.

LAQ has no experience to comment on this issue.

B11Q1

Do you agree with our proposals to reduce the maximum IDR timeframes? If not, please provide: (a) reasons and any proposals for alternative maximum IDR timeframes; and (b) if you are a financial firm, data about your firm's current complaint resolution timeframes by product line.

B11Q2

We consider that there is merit in moving towards a single IDR maximum timeframe for all complaints (other than the exceptions noted at B11(b) above). Is there any evidence for not setting a 30-day maximum IDR timeframe for all complaints now?

From LAQ's perspective, there is no impediment to reducing IDR maximum timeframes to 30 days.

B12Q1 Do you agree with our approach to the treatment of customer advocates under RG 165? If not, please provide reasons and any alternative proposals, including evidence of how customer advocates improve consumer outcomes at IDR.

LAQ's experience is that customer advocates are an excellent resource for consumers in urgent matters, particularly where the consumer does not have access to AFCA.

LAQ often refers consumers directly to customer advocates where the bank has sold a credit card debt but still retains the home loan. The purchaser of the credit debt has taken legal action and obtained a judgment and is seeking to sell the property over which the bank still holds the mortgage for the home loan. Whilst the consumer has very limited rights to access AFCA post judgment, customer advocates have intervened with the new owner of the debt ensuring that the home is saved.

Even where the outcome has not resulted in the home being saved it is positive that the customer advocate was able to contact the bank and arrange for the matter to be reconsidered on an urgent basis.

LAQ's Farm and Rural Legal Service has also successfully utilised the customer advocates particularly in matters where AFCA was not available because of jurisdictional issues and where it may be more efficient and effective to do so compared to other options (e.g. mediation under the *Farm Business Debt Mediation Act 2017* (Qld)).

In one matter in particular, the customer had already received a determination from the previous Ombudsman scheme, but the customer advocate reconsidered the matter and found in favour of the consumer.

However, we have also had experiences where the customer advocates did not significantly improve the customer's outcomes at IDR. In one case where we shadowed a consumer making a complaint to an FSP, we suggested accessing the customer advocate when the matter was not resolved at IDR. The consumer, who was a very competent self advocate, was, after dealing with the customer advocate:

- left with the impression they did not have a legitimate complaint,
- that the customer advocate did not understand their issues, and
- that the whole process was a waste of time.

The consumer did not think that the IDR team had understood her issues. The written response to the consumer from the customer advocate appeared to mirror the IDR response.

In addition, if the matter is escalated to AFCA, the complaint is usually referred back to the financial firm for a final attempt at resolution between the parties. This creates a further opportunity for the customer advocate to consider the complaint, if required.

For these reasons we have mixed views as to whether the financial firm should or should be required to comply with RG165 when a customer advocate is involved even in circumstances where the consumer requests the referral.

If the customer advocate process needs to occur within the IDR timeframes it is difficult to see how they could undertake a separate and thorough investigation of the matter to provide a better outcome for consumers.

This is especially true where the consumer does not have access to AFCA, if the financial firm does not resolve the complaint.

However, if customer advocates are able to operate outside of the IDR timeframes;

- there is a risk that a two tiered system of IDR could be created;
- timeframes for the resolution of complaints could be significantly extended as there are no current timeframes in which the customer advocate needs to consider and determine the complaint;

- consumers may become fatigued as another layer of dispute resolution is added and discontinue with the complaint;
- there is a risk that more financial firms may opt for creating a “customer advocate” position to allow them to operate outside of the IDR timeframes.

In LAQ’s view, if customer advocates were able to operate outside of IDR timeframes:

- the referral to the customer advocate needs to be voluntary;
- when advising the consumer of the option of accessing the customer advocate set out the advantages and disadvantages of taking the complaint to it rather than immediately accessing AFCA;
- the financial firm must advise the consumer on a regular basis that they can at any time discontinue with the customer advocate process and take the matter directly to AFCA.

B12Q2 Please consider the customer advocate model set out in paragraph 100. Is this model likely to improve consumer outcomes? Please provide evidence to support your position.

In our view the customer advocate model is likely to improve the customer experience where the customer advocate takes the approach of someone advocating on behalf of the consumer to resolve the consumer’s complaint. Unlike external advocates, the customer advocate would have access to all of the internal documents and be able to interrogate the relevant staff. In those circumstances the customer advocate would be in a better position to identify the relevant issues and respond appropriately.

Otherwise the name “customer advocate” is a misnomer. If the customer advocates role is primarily to review the decisions of IDR then it can lead to improvement in processes and in some cases provide a resolution for consumers. However, that is more a compliance process and does not need to form part of the IDR process.

Please see the comments above at B12Q1as to how the customer advocate has in practice produced some positive outcomes for consumers.

B13Q1 Do you consider that our proposals for strengthening the accountability framework and the identification, escalation and reporting of systemic issues by financial firms are appropriate? If not, why not? Please provide reasons

LAQ supports strengthening the accountability framework for consumer complaints. We agree that individual consumer complaints can highlight potential systemic issues within the financial firm. If boards and management are required to have processes around identifying systemic issues and obligations for reporting systemic issues to the boards, systemic issues could be identified at a much earlier time than is the case with the current process where many systemic issues were only identified by the external dispute resolution scheme or more concerningly through the Banking Royal Commission.

B14Q1 Do you agree with our approach to the application of AS/NZS 10002:2014 in draft updated RG 165? If not, why not? Please provide reasons.

LAQ supports the approach.

B15Q1 Do the transition periods in Table 2 provide appropriate time for financial firms to prepare their internal processes, staff and systems for the IDR reforms? If not, why not? Please provide specific detail in your response, including your proposals for alternative implementation periods.

LAQ has no experience to comment on this issue.

B15Q2 Should any further transitional periods be provided for other requirements in draft updated RG164?

LAQ has no experience to allow comment on this issue.