



6 July 2018

Mike D'Argaville
Australian Financial Complaints Authority
GPO Box 3
Melbourne VIC 3001
By email submissions@afc.org.au

Dear Mr D'Argaville

AFCA Consultation Paper – Consultation on proposed AFCA Rules

The Australian Banking Association (**ABA**) welcomes the opportunity to comment on the Australian Financial Complaints Authority (**AFCA**) consultation paper on the proposed AFCA Rules (**draft Rules**).

With the active participation of 24 member banks, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

The ABA has supported the establishment of the AFCA as a "one stop shop" for external resolution of consumer disputes across all areas of retail financial services including banking, insurance and superannuation. The rationalisation of the three existing external dispute resolution bodies – the Financial Ombudsman Service (**FOS**), the Credit and Investments Ombudsman (**CIO**) and the Superannuation Complaints Tribunal will promote consistency for consumers and for ABA members. The ABA acknowledges and appreciates the ongoing consultation with industry on how the scheme will operate to ensure appropriate transition arrangements between the existing and future regimes. This will assist to clarify the design and operation of AFCA resulting in a better outcome for consumers.

In our previous submissions, the ABA has expressed our view that AFCA should be efficient and effective and that decision processes should be transparent and clear as this is in the best interest of customers. Our member banks remain engaged to ensure that:

- AFCA can efficiently review more complex and more diverse complaints;
- customers experience consistent, efficient and appropriate rulings from AFCA;
- that the operation of reporting obligations regarding systemic issues are clear; and
- customers are clear about where their privacy complaints should be directed.

The ABA notes that the purpose of this consultation is to obtain feedback on the AFCA draft Rules, which sets out what complaints AFCA can consider, the procedures it can use to resolve these complaints and related matters.

Scope of consultation

The consultation paper limits the feedback sought on the draft Rules to a set of specific topics and some significant changes are not open for consultation. Further, we understand that important details about the operation of the draft Rules will be included in the Operational Guidelines (**OGs**), which have not been released for consultation.

It is difficult, in the absence of the OGs, to understand how some aspects of the draft Rules will operate. For example, several draft Rules provide exceptions for "special circumstances" but no guidance is



Australian Banking Association

provided about how AFCA will determine how or when these apply. In order to ensure the draft Rules are subject to a full and complete consultation, we suggest that the OGs should also be subject to a separate consultation process.

The ABA is also concerned that the delayed release of the OGs will make it difficult for industry to meet the deadline of 1 November 2018 for commencement of the AFCA scheme. We do appreciate that the AFCA transition team has conducted briefings with a range of stakeholders in relation to the draft Rules and indicated a willingness to remain open to an ongoing consultation process.

We provide our comments on specific parts of the draft Rules in Appendix one below.

Yours sincerely

Justin Mining
Policy Director



Appendix One – Comments on AFCA draft Rules

AFCA Draft Rule	Industry comments
Rules structure	<p>The ABA appreciates the work undertaken by AFCA to ensure the Rules provide a user-friendly and accessible guide for both potential complainants and financial firms. We particularly support the inclusion of a 'quick guide' summarising key aspects of the draft Rules and several summary tables outlining time limits and jurisdictional limits for complaints.</p>
Rule A.10.1 – Information Sharing	<p>Draft Rule A.10.1 states that AFCA will generally share the information provided by a party to a complaint with the other parties. The ABA is concerned that this does not include the qualifications in clause 8.4 of the FOS Terms of Reference.</p> <p>Under clause 8.4 (c) of the FOS Terms of Reference, a party can advise that it does not consent to certain information being shared but avoid an adverse inference being drawn against them provided that special circumstances apply. The ABA is concerned about the lack of a similar qualifier in the draft Rules given the potential for commercially sensitive information being shared among the parties. Therefore, we request that AFCA retain a similar provision to clause 8.4 (c) in the draft Rules.</p> <p>It is unclear why AFCA requires the ability under draft Rule A.10.1 (a) to share information after a complaint has been closed given that all relevant information should be shared prior to a determination being made (unless special circumstances apply such as health and safety issues).</p>
Rule A.15.3 Determinations	<p>The ABA is concerned about changes relating to the effect of determinations under clause A15.3 as compared to current practice under clause 8.8 of the FOS Terms of Reference.</p> <p>Under clause 8.8 of the FOS Terms of Reference an Applicant must provide a binding release to the Financial Services Provider to accept a recommendation or determination. The release must be for the full value of the claim subject to the dispute and be effective from the date on which the provider fulfils all its obligations. Clause 15.3 of the draft Rules, however, stipulates that a financial firm can <i>request</i> a binding release, but it does not <i>require</i> the complainant to provide it.</p> <p>This is a significant change that has the potential to impact on a firm's ability to prevent further legal action in relation to a matter previously dealt with by AFCA. We are particularly concerned about this because AFCA will be dealing with higher value and more complex disputes than FOS. The ABA is not</p>



AFCA Draft Rule	Industry comments
	<p>aware of the policy basis to support this shift in approach. We ask that the draft Rule 15.3 be amended to be in line with existing practice under the FOS Terms of Reference.</p>
Rule A.17.2 (a) – Opportunity to respond	<p>Draft Rule A.17.2 (a) requires AFCA to raise a potential systemic issue with a financial firm and give it an opportunity to respond but there is no reference to the period that will be afforded to the firm to conduct an appropriate internal investigation.</p> <p>Given the complex nature of systemic issues, the ABA recommends that the draft Rules stipulate that a financial firm be given a reasonable amount of time to respond. At a minimum, we suggest that a period of 30 days should apply as this aligns with the period recommended in the ASIC Enforcement Review Taskforce Report for firms to report significant breaches and suspected breach investigations that are ongoing. In its response to the Report, the Government indicated that it agreed in principle with this recommendation.</p> <p>If AFCA does not stipulate a period in Draft Rule A.17.2 (a), the ABA requests that it provide further information on timing and scale of its processes in relation to systemic issues in its OGs.</p>
Rule A.17.2 (b) – Information and documents	<p>Draft Rule A.17.2 (b) enables AFCA to require a financial firm to provide any information and documents it considers necessary to investigate a systemic issue. The ABA notes that this is a new development as there is no equivalent provision in the FOS Terms of Reference.</p> <p>It is not clear how AFCA intends to use these powers and there is no further guidance in the draft Rules. Given the significant resources that may be required to respond to such a request, the industry would be concerned if this was considered a ‘first resort’ power.</p> <p>The ABA believes that this provision should impose similar exclusions to those that apply to AFCA’s general right to request documents and information when investigating a complaint under draft Rule A.9.1 (for example, when providing “the information would breach a Court order or prejudice a current investigation by the police or law enforcement agency”). The ABA considers that such exclusions – as well as those in draft Rule A.9.1 - should also extend to documents covered by a claim of legal professional privilege.</p> <p>The ABA suggests that the draft Rule A.17.2 (b) be amended as follows:</p> <p><i>A.17.2 (b) can require the Financial Firm to provide any information and documents AFCA considers necessary and relevant to an investigation into the issue, unless they satisfy AFCA that:</i></p>



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	<ul style="list-style-type: none"> <i>i. to provide information would breach a duty of confidentiality to a third party, other than an agent or contractor, and despite best endeavours, the third party's consent to the disclosure of the information has not been obtained;</i> <i>ii. to provide the information would breach a Court order or prejudice a current investigation by the police or other law enforcement agency; or,</i> <i>iii. the information does not or no longer exists or cannot reasonably be obtained.</i>
Rule A.17.3 (a) and (b)	<p>AFCA's Rules should consider how systemic issues will be dealt with in situations where action is being taken by the regulator. We are concerned about possible duplication or inconsistency if both AFCA and a regulator act in relation to the same systemic issue. Accordingly, the ABA recommends that the Rules should stipulate what AFCA's role is in circumstances where a regulator is also responding to a systemic issue.</p>
Rule A.17.4 – AFCA requiring firm to take / refrain from taking certain actions	<p>Draft Rule A.17.4 enables AFCA to require a financial firm to do or refrain from doing any act which it considers necessary to investigate and/or refer systemic issues for remediation. The ABA notes that this represents a significant new development as there is no equivalent provision in the FOS Terms of Reference.</p> <p>Such broad powers go beyond AFCA's primary purpose, to resolve individual disputes, and are more appropriately the domain of regulators such as ASIC, which already provides comprehensive guidance on completing remediations in RG 256.</p> <p>The ABA believes that this power is inappropriate given AFCA's decisions about what constitutes a systemic issue, and appropriate remediation action, are unlikely to be subject to judicial review. This contrasts with decisions made by regulators, such as ASIC, who are subject to review pursuant to the <i>Corporations Act</i> and are also closely scrutinised by parliament. The ABA requests that AFCA consider removal of this provision.</p> <p>We also ask that the Australian Prudential Regulation Authority is consulted about the scope of the Rule which may have prudential implications for financial firms (for example, where a direction by AFCA will cause the firm significant financial loss).</p> <p>Some ABA member banks have raised the concern that this draft Rule would also potentially undermine the impartiality of AFCA. It must be able to receive and handle complaints regarding remediation projects without a conflict of interests, for example, arising because the customer complains about an action taken as required by AFCA. In such circumstances, questions arise as to whether AFCA can</p>



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	<p>provide an impartial review service in relation to remediation projects it has itself directed. The following alternate wording could be used for Rule A.17.4:</p> <p><i>Rule A.17.4: “As part of investigating and referring a systemic issue to the Financial Firm for remedial action, AFCA may, where appropriate, consult with the Financial Firm on remediation, in order to achieve any one or more of the following objectives [same objectives (a) to (f) as per current draft Rule A.17.4]”.</i></p>
Rule A.18 – ‘Serious contraventions’ and ‘serious breaches’	<p>Draft Rule 18.1 requires AFCA to refer certain matters – such as those considered ‘serious contraventions’ by financial firms – to any body (including ASIC, APRA or the Commissioner of Taxation). This goes beyond section 1052E of the <i>Corporations Act</i>, which requires AFCA to report serious contraventions to ASIC, APRA or the Commission of Taxation only. Draft Rule 18.2 empowers AFCA to report to ASIC ‘other serious breaches’ including non-compliance with the draft Rules.</p> <p>As we outlined in our previous submission in response to ASIC consultation paper 298, the ABA is concerned about the proposed definition of ‘serious’ contained within draft Rule A.18. It is highly subjective and does not provide sufficient certainty for financial firms to understand the parameters of what will constitute a ‘serious contravention’.</p> <p>Further, it is also unclear what role draft Rule 18.2 plays given the broad scope of the reporting requirement in draft Rule 18.1. There is no clarity as to the distinction between a ‘serious contravention’ and a ‘serious breach’ or whether a ‘serious breach’ will extend beyond non-compliance with the draft Rules. If this rule is to be retained, we think that guidance is required as to what AFCA will consider to be a ‘serious breach’ and how this is different from a ‘serious contravention.’</p> <p>As with potential systemic issues, the ABA is of the view that the draft Rules should also stipulate that a financial firm be given a reasonable amount of time to respond before serious contraventions and other serious breaches are referred elsewhere.</p>
Rule D.2.1	<p>Draft Rule D.2.1 allows AFCA, in relation to privacy-related complaints, to make an order that is generally consistent with the declarations available to the Information Commissioner when he or she makes a decision under section 52 of the <i>Privacy Act</i>. However, this power was not delegated to AFCA under its originating legislation nor the <i>Australian Information Commissioner Act 2010</i>.</p> <p>The ABA seeks further clarity on how privacy-related complaints will be managed by AFCA as we are concerned that the operation of two parallel schemes that overlap would not produce optimal consumer outcomes.</p>