



15 April 2019

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

Dear Mr D'Argaville

AFCA Rules Change Consultation

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

This is an important first step in enabling AFCA to deal with legacy complaints about conduct by financial firms dating back to 1 January 2008 that have not been previously considered and fall outside the period allowed under AFCA's existing jurisdiction. The implementation of this expanded remit will provide expanded access to free, fast and binding redress for consumers and small businesses harmed by misconduct.

The banking industry is committed to working cooperatively with AFCA as it prepares to accept and consider legacy complaints from 1 July this year. The ABA notes that a number of our member banks have already consented to AFCA accepting and dealing with those complaints before this date. As a further step, **the ABA can now confirm that all of our member banks have committed to providing such consent to AFCA on request.**

AFCA's approach

We note that AFCA has proposed that it will insert a new Section F into its Rules and Operational Guidelines to set out how it will deal with legacy complaints. Proposed section F.2 of the Rules establishes the criteria to determine whether AFCA will consider a legacy complaint, including:

- it involves past conduct by a Financial Firm that is currently an AFCA member that occurred after 1 January 2008
- matters have not been subject to a decision or determination by a court, tribunal, EDR predecessor scheme or AFCA and has not previously been settled by the parties.

The ABA supports this proposed approach and believes it strikes an appropriate balance between ensuring eligible customers can access justice and potential redress whilst providing clear timeframes and resource demands for all AFCA participants.

Need for further consultation

The ABA acknowledges and appreciates the ongoing consultative approach undertaken by AFCA with industry on how the proposed changes will operate to ensure appropriate access to justice and redress for customers with eligible complaints. This approach assists to clarify the design and operation of the change and results in a better outcome for customers.

This submission focuses on the proposed Rules change and we note that AFCA has committed to providing further guidance prior to 1 July 2019 on how it will consider these legacy complaints and relevant fees and charges. We believe that it is essential for AFCA to conduct a further round of



consultation upon release of the guidance as there are a number of important issues that need further consideration, including:

- how AFCA will deal with legacy complaints involving conduct by a financial firm often in the context of a different legal framework than currently applies, for example credit disputes that occurred prior to the commencement of the *National Consumer Credit Protection Act 2009* – this approach will need to balance the conduct of the firm at the time and current community expectations
- ensuring that AFCA's treatment of complaints that were finally settled between a customer and a financial firm is in line with the clear intent of the Government's authorisation of the extension of the remit to largely exclude these from further consideration
- the process that AFCA will undertake to consider eligible legacy complaints – e.g., whether the complaints will be processed in the same manner as business-as-usual complaints in being first referred to a financial firm for review (as per Rule A.5.2).

We provide our comments on specific parts of the proposed changes in Appendix One below.

Yours sincerely

Justin Mining
Policy Director



Appendix One – Industry comments on AFCA’s proposed Rules change

The ABA notes that the consultation paper is seeking feedback on the proposed Rules change and we have sought to provide our comments in that context. We acknowledge that AFCA has committed to providing further guidance prior to 1 July 2019 on how it will handle legacy complaints and relevant fees and charges, and we strongly encourage AFCA to consult on that guidance.

Issue	Industry comments
12 month period to accept legacy complaints	Proposed Rule F.2.1(a) will enable AFCA to accept eligible legacy complaints for a period of 12 months from 1 July 2019 until 30 June 2020. The ABA believes that this is an appropriate period of time as it ensures customers have sufficient time to lodge complaints and provides certainty for industry in terms of required resourcing and timeframes.
Excluding complaints subject to previous determination	Proposed Rule F.2.1 (c)-(e) will limit AFCA’s consideration of legacy complaints to those that have not previously been subject to a determination through an EDR process or other means, such as a court judgment. The ABA supports this approach as it is consistent with the findings of the Ramsay Review and the Royal Commission. It ensures appropriate access to redress for past issues but does not undermine the important principle of finality of ombudsman determinations or introduce administrative law issues. In its comprehensive review, the Ramsay Review panel carefully considered the issue of redress for past disputes and recommended against re-examining cases that have already had access to redress: <i>“The Panel also considers that consumers and small businesses who have had access to dispute resolution before an EDR body, court or tribunal, or who have reached a legally binding settlement, have had access to redress. The Panel does not consider that there would be merit in providing further access to redress in these situations, even if it was legally possible.”¹</i>
	The Ramsay Review panel formed this position on several grounds ² : <ul style="list-style-type: none">• a consumer or small business who has received a determination or decision from an EDR body, court or tribunal has already had access to redress• “there are significant legal and other limitations on reopening past disputes with a finalised deed of settlement or a final court judgment (which has no further avenues of appeal)”• “to allow otherwise would undermine certainty in legal process and the meaning of the law”. Commissioner Hayne also considered the issue and agreed with the Ramsay Review’s finding:

¹ Review of the financial system external dispute resolution and complaints framework, 3 April 2017; Professor Ian Ramsay (Ramsay Review), available at: https://static.treasury.gov.au/uploads/sites/1/2017/06/R2016-002_EDR-Review-Final-report.pdf at p 8.

² Ramsay Review at pp 145 -146.



“...the panel accept, and I agree, that there would be no merit in allowing further access to redress in any case where the consumer or small business concerned has already resorted to dispute resolution by a court, tribunal or EDR body or has settled the dispute.”³

Consideration of settled complaints

The ABA notes the intent of the Government’s authorisation of the extension of AFCA’s remit to largely exclude settled cases from further consideration. The *AFCA Scheme (Additional Condition) Amendment Authorisation 2019* states that AFCA “must permit an eligible person to make a complaint depending on a number of conditions, including that it is not an “excluded complaint”. An “excluded complaint” is defined to include a “complaint that has previously been finally settled by the person making the complaint and the compulsory member to whom the complaint relates (other than a complaint which can still be made under the scheme rules)”.

As noted above, both the Ramsay Review and the Royal Commission also recommended against re-examining cases generally where they have been subject to legally binding settlements.

We therefore support AFCA’s reference in proposed Rule F.2.1 e) that it will not consider a legacy complaint that has been previously settled and submit that this aligns with the approach contemplated in the Government’s authorisation instrument.

The ABA submits that generally, settled cases should be excluded from the extended remit and if, on a case by case basis, AFCA considers hearing settled cases, that this consideration should align with its published positions on reopening settled cases. This includes the guidance provided in C.2.1 of the Operational Guidelines stipulating that AFCA may exclude a complaint that is seeking to re-open circumstances involving a settlement that was clearly intended to be a “full and final settlement of all the claims”.

Complaints process

The ABA notes that the consultation on the Rules change does not consider the operational aspects of how AFCA will process legacy complaints in much detail. We acknowledge that this may be because it will be covered in more detail in further guidance to be provided prior to 1 July 2019. We seek clarity on some key issues on the complaints process that industry has identified, including:

- there will be a need for AFCA to provide more detail on how it will process eligible complaints – e.g., it is not clear whether AFCA intends to refer complaints back to the financial firm for processing through its internal dispute resolution (**IDR**) process (if it has not previously been subject to IDR) before it seeks to make a decision on the matter itself
- the ABA submits that referring legacy complaints to a financial firm for processing through its IDR process is an essential first step before AFCA seeks to make a determination and this should be confirmed in its updated guidance
- the ABA suggests that legacy complaints should be flagged separately from ongoing business-as-usual complaints so that financial firms can consider them through a dedicated internal resource – this would ensure that these matters are handled as

³ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, ‘Final Report’, p487, available at: <https://static.treasury.gov.au/uploads/sites/1/2019/02/fsrc-volume1.pdf> (Royal Commission)



effectively and efficiently as possible given the difficulties that may arise due to the lapse of time since the conduct occurred.

Approach to legacy issues

The ABA seeks clarity on how AFCA intends considering legacy matters given they will involve historical issues, which would often have involved different legal frameworks applying at those times. AFCA needs to clearly balance current community expectations and the regulatory framework that was in place at the time of the relevant conduct.

In its proposed operating guidelines, AFCA states that it may “apply particular approaches to legacy complaints, given the unique nature of considering historical misconduct in circumstances where evidentiary issues make establishing a position difficult”. Further, AFCA suggests it may also modify the processes that apply including, “varying the referral back timeframe when we first receive a legacy complaint and refer it to the Financial Firm, conducting a greater number of conciliation conferences and referring legacy complaints more directly to decision, if they cannot be quickly resolved by agreement”.

While the ABA notes that this does not provide a great deal of certainty for all parties in dealing with legacy complaints, we would support an approach that enables more flexibility in terms of negotiation between parties and use of conciliation where appropriate.

Resourcing

The ABA acknowledges that both AFCA and industry will face significant additional resourcing demands in considering legacy complaints. While we acknowledge that these costs will appropriately need to be borne by industry, there are a number of resourcing issues needing further consideration, including:

- while we acknowledge that AFCA has done considerable work in forecasting the potential volume of legacy complaints that it may receive, such forecasting is inherently difficult and actual numbers may vary significantly
- there is potential for an influx of complaints following 1 July 2019 and unless handled carefully, this could potentially result in delays in handling these within usual timeframes
- the nature of legacy complaints will often require deeper investigation into past practices, records and procedures, and often lengthen the time needed to deal with each complaint
- the market for quality complaint handling resources is becoming scarce with all industry players increasing staffing levels.

Based upon the above factors, the ABA is concerned that there is not much information in the proposed operational guidelines that acknowledges these specific challenges specifically and how they could be managed within the complaint handling process.

We again note that this may be covered in the next tranche of guidance but the ABA would suggest in the interim that AFCA consider developing some principles and options to appropriately manage an influx of complaints by way of a planned program of work (e.g., spreading volume over a number of specific time periods, segregating non-legacy complaints, dealing with backlogs). The ABA and our member banks are willing to work cooperatively with AFCA and ASIC on the development of such an approach.



Rules term

The ABA seeks clarity on the status of Section F in the Rules beyond the 12 month term for AFCA to accept eligible legacy complaints.

On page four of the “Draft amendments to the Operational Guidelines”, AFCA states:

“Although we will retain Section F in the Rules after this one-year period expires, until all legacy complaints have been dealt with, we will only apply Section F to legacy complaints received during that period.”

However, on page four of the “Consultation Paper” and in the header of the “Draft amendments to the Rules”, AFCA states:

“Section F will only apply for the period 1 July 2019 to 30 June 2020 (inclusive), after which time it will automatically be removed from the AFCA Rules.”

The ABA submits that the automatic removal of Section F from the Rules would be the preferred approach.

Reporting

The ABA suggests that AFCA develop a specific reporting process for legacy complaints. For example, it would assist financial firms if legacy complaints are reported separately from business-as-usual complaints in AFCA member reports.

Our member banks find that the monthly reporting is an important means of monitoring progress in their complaint management practices, including complaint volumes, points of resolution and complaint outcomes. The inclusion of the added cohort of legacy complaints could distort the data and not easily allow financial firms to consider trends.

Documentation

The proposed Operating Guidance acknowledges the challenge that may be faced by complainants and financial firms in dealing with legacy complaints due to the passage of time, such as relevant documents no longer being available.

The ABA supports AFCA’s intention to not generally draw adverse inferences, as provided in Rule A.9.5, where a party cannot provide information such as documents where it was no longer required to hold them (e.g., outside of the section 268 requirement in the *Corporations Act* to hold financial records for seven years after a transaction is completed).

We acknowledge AFCA’s commitment to do what it can to resolve these complaints fairly in accordance with the requirements of the Rules. However, there is very little detail in how this would work in practice. The ABA submits that AFCA should adopt a pragmatic approach in determining what actions a party is required to take to confirm that documents cannot be located. AFCA should limit circumstances where it requires financial firms to take steps imposing a significant administrative burden, such as locating and interviewing ex-staff members or third parties who may have had some dealings with the transactions and asking them to produce records as well.

Statutory declarations

The ABA suggests a qualification be made to the proposed section F.1.3 that allows AFCA to require financial firms to provide a statutory declaration setting out they have done to try to comply with a request for information and detailing the reasons they were unable to do so for legacy complaints. This effectively mirrors the existing requirement under Rule A.9.2 for business-as-usual complaints.



We propose that in matters where a financial firm cannot comply with a request for information because it has destroyed documents in accordance with the *Privacy Act 1988* and the privacy obligations in APP 11.2, it would not need to provide a statutory declaration but would affirm that it has done so to AFCA.

The ABA is concerned at the prospect of financial firm representatives needing to spend considerable time and effort in preparing statutory declarations in circumstances where the firm has acted in accordance with its privacy obligations. Further, this may also involve those representatives having to provide declarations for actions taken by former staff within financial firms and prior to their involvement in matters.

Remediation programs

At the Credit Law Conference in September 2018, AFCA's Chair, the Hon. Helen Coonan outlined that AFCA will have specialised remediation resources to help providers with guidance on remediation processes and principles (primarily remediation of 'systemic' issues). Ms Coonan also noted that while not mandatory or requiring AFCA endorsement, providers are "strongly encouraged to seek guidance from AFCA on remediation programs".

In this context, there are risks for ABA member banks if a legacy complaint is reviewed by AFCA and it seeks to reopen remediations of past systemic issues, which have been previously agreed with ASIC. The ABA seeks clarity on how AFCA can ensure that there is consistent treatment of customers in matters already 'settled' with ASIC. The ABA is willing to work with AFCA and ASIC to develop some operating principles in this area.