



4 May 2023

Natalie Cameron

Lead Ombudsman – Banking and Finance

Australian Financial Complaints Authority

GPO Box 3

Melbourne VIC 3001

By email: consultation@afca.org.au and Natalie.Cameron@afca.org.au

Dear Ms Cameron

AFCA RULES AND OPERATIONAL GUIDELINES – PROPOSED AMENDMENTS CONSULTATION

The Australian Finance Industry Association (AFIA) is the only peak body representing the entire finance industry in Australia.¹ We appreciate the opportunity to respond to the Australian Financial Complaints Authority (AFCA) Rules and Operational Guidelines – Proposed amendments consultation ('the consultation').²

We represent over 150 members, including bank and non-bank lenders, finance companies, fintechs, providers of vehicle and equipment finance, car rental and fleet providers, and service providers in the finance industry. We are the voice for advancing a world-class finance industry and our members are at the forefront of innovation in consumer and business finance in Australia. Our members finance Australia's future.

We collaborate with our members, governments, regulators and customer representatives to promote competition and innovation, deliver better customer outcomes and create a resilient, inclusive and sustainable future. We provide new policy, data and insights to support our advocacy in building a more prosperous Australia.

INTRODUCTORY COMMENTS

AFIA believes that external dispute resolution is an important part of a strong, accessible, competitive, innovative, efficient, and fair financial system. Many AFIA members are subscribers of AFCA because they are

¹ [Australian Finance Industry Association \(afia.asn.au\)](http://afia.asn.au)

² [Australian Financial Complaints Authority \(AFCA\) \(27 March 2023\) Rules and Operational Guidelines – Proposed amendments](#)

required by law because they hold an Australian Financial Services Licence (AFSL) or an Australian Credit Licence (ACL).

AFCA membership is voluntary for a number of our members that operate outside the financial products or consumer credit regulated segments or only in the commercial or small business segments. However, as part of AFIA's self-regulation, membership of AFCA is a mandatory requirement for our members who are signatories to AFIA's Online Small Business Lenders Code of Practice and/or the Buy Now Pay Later Code of Practice.³ We believe AFCA membership for these organisations is the right thing for businesses and customers, reflecting community expectations and enhancing confidence in the industry.

AFIA welcomes AFCA introducing essential changes to strengthen its Rules and Operational Guidelines to further improve its practices and efficiency of processes. We support AFCA introducing these changes to reflect the key recommendations of Treasury's review of AFCA, published in November 2021.⁴ Our comments and recommendations reflects AFIA's purpose and belief in prosperity for all Australians by championing a thriving finance industry, always acting in the interests of customers and communities.

A key theme arising from Treasury's review of AFCA considered if it was meeting its objective to resolve complaints in a way that is fair, efficient, timely and independent.⁵ We believe that the changes proposed are essential for AFCA's processes to be fit for purpose to ensure the timely and fair resolution of complaints, to protect consumer interests, provide confidence in the financial services industry and ensure fair costs to financial firms.

It is important that AFCA can effectively manage the conduct of all parties involved in their processes and that AFCA's expectations are clarified, including managing poor and unreasonable conduct of 'Paid Representatives' and Complainants within its Rules.⁶ It is fundamental to the efficiency and fairness of the process that AFCA is able to close and exclude complaints where appropriate and in a timely manner, such as when appropriate offers of settlement have been made or where a settlement was previously reached on the same matter.

AFIA has previously raised with AFCA on behalf of our members concerns around the poor conduct of some organisations who represent individuals for a fee ('Paid Representatives'). We are encouraged to see progress which aims to help address these concerns and welcome the proposed amendments to progress Treasury's

³ [AFIA Codes of Practice webpage](#)

⁴ [The Treasury \(24 November 2021\) Review of the Australian Financial Complaints Authority - Final Report](#)

⁵ Treasury review of AFCA, 'Delivering against statutory objectives', [page vi](#) (n 4). See also: [Australian Securities and Investments Commission \(ASIC\) Regulatory Guide 267 \(21 September 2021\) Oversight of the Australian Financial Complaints Authority](#), Part D: AFCA Compliance requirements, page 25.

⁶ [AFCA webpage, 'Paid representatives information'](#)

recommendations. This will help to minimise inappropriate disruption, unfair costs, avoid poor customer outcomes and enhance confidence in the process.

Appendix A provides our detailed comments and recommendations to a selection of the consultation proposals.

CLOSING COMMENTS

Thank you for providing the opportunity to respond to this consultation. We appreciate all the work that has gone into developing the changes to the Rules and Operational Guidelines and commend AFCA on the clarity of the consultation documents.

Our members look forward to collaboratively and constructively engaging with AFCA as the changes are progressed.

Should you wish to discuss our submission or require additional information, please contact Leisha Watson, Senior Policy Advisor, Leisha.Watson@afia.asn.au.

Yours sincerely

Roza Lozusic
Executive Director, Policy and Public Affairs

APPENDIX A: Detailed Recommendations

This Appendix provides AFIA's detailed comments and recommendations on a selection of the proposals within the consultation.

Expectations and Managing the Conduct of All Parties

- **Paid Representatives**

Recommendation 4 of Treasury's review of AFCA highlighted the need to address poor conduct of paid advocates, recommending that:

'AFCA should address poor conduct by paid advocates affecting the efficiency of the scheme such as by amending its Rules to allow it to exclude certain paid advocates from involvement in the process'⁷

Recommendations 2 and 5 of the review further stated:

'In making its decisions, AFCA should consider what is 'fair in all the circumstances' having primary regard to the four factors identified in its Rules - legal principles, industry codes, good industry practice and previous decisions.' ...

'AFCA should: ...

- *better manage expectations around timeframes in its communication with parties to a complaint*
- *focus on improving the timeliness of complaints that remain unresolved beyond 12 months.'*⁸

AFCA publishes their expectations of parties involved in their processes and currently has the ability to manage the conduct of particular parties including financial firms and representatives with professional obligations.⁹ For example, under Rule A.11.5, AFCA can provide information obtained from parties to a complaint to regulators such as ASIC, the Australian Information Commissioner (AIC), Australian Prudential Regulation Authority (APRA), Australian Taxation Office (ATO), relevant professional standards bodies and/or industry code compliance committees.¹⁰

⁷ [Treasury review of AFCA](#), 'List of recommendations', page xi (n 4).

⁸ *ibid.* page xii (n 4).

⁹ [AFCA webpage](#), 'Expectations for engagement Charter'

¹⁰ [AFCA Approved Rules \(released 13 January 2021\)](#), Rule A.11.5 (page 15). See also AFCA reporting obligations under Rule A.18 (page 24) including reporting serious breaches and non-compliance with their rules to ASIC. See also the [Corporations Act 2001](#) Section 1052E (1)(d) for reporting of failure of a firm to comply with a determination.

To ensure fair outcomes are achieved and to progress Treasury's recommendations set out above, AFIA supports strengthening AFCA's ability to manage poor or unreasonable conduct of Paid Representatives (PRs), including the ability to stop considering complaints and excluding certain PRs on specified grounds, where appropriate. This is in line with recommendations 2, 4 and 5 of the Treasury review and furthers AFCA's aim to ensure a fair and efficient process.¹¹

AFIA supports Proposal 1 and notes in particular that the proposed new definition in AFCA's Rules provides that a PR:

'means a person or service (other than a lawyer with a current practising certificate or an Accountant) who may receive financial remuneration for acting for a Complainant in relation to their complaint lodged with AFCA'.

Recommendation 1: This definition provides welcomed clarity and to ensure appropriate coverage, AFIA recommends that the words 'organisation', or alternatively 'entity', be added.¹²

The proposed new Rules at A.8.4a) and B.6.1 provide that AFCA can stop considering a complaint and exclude a PR at its discretion, on certain grounds.¹³ AFIA supports these grounds as being reasonable and striking an appropriate balance of fairness to the parties involved, progressing the aim of AFCA having in place efficient and streamlined processes which is a key theme of Treasury's review.¹⁴

AFIA welcomes the clarification provided in Rules A.8.4.a) and B.6.5a) that AFCA will not engage with PRs who do not hold a legally required licence, such as an AFSL or AL.¹⁵ We believe it is appropriate in these circumstances as outlined in the Operational Guideline that AFCA contact the Complainant directly to discuss the issue.

As outlined by the Treasury review, AFCA is '*designed to be free and accessible for individuals to make complaints without representation*'.¹⁶

¹¹ [Treasury review of AFCA](#), page xi (n 4).

¹² [AFCA Rules and Operational Guidelines – Proposed amendments](#), paragraph 2.1.2 (n 2).

¹³ *ibid.*

¹⁴ [ASIC RG 267](#) (n 5).

¹⁵ [National Consumer Credit Protection Amendment \(Debt Management Services\) Regulations 2021](#). See also [ASIC \(5 May 2021\) 21-094 Media Release: Information Sheet 254, Firms offering debt management services require credit licence to operate.](#)

¹⁶ [Treasury review of AFCA](#), paragraph 4.89 (n 4).

AFIA supports the proposed grounds for exclusion of a PR under Rule B.6.5, and specifically Rule B.6.5(b)(i)-(iii) if the PR:

'did not act in the Complainant's best interests; or (ii) acted in a way that prevented AFCA from achieving a cooperative, fair, efficient and timely resolution of the Complainant's complaint; and (iii) despite AFCA informing the Paid Representative of this, the Paid Representative failed to remedy the matters of concern to AFCA'.

AFIA has regularly engaged with AFCA on behalf of our members to raise concerns about the poor conduct of some PRs. In particular, the Australian Securities and Investments Commission (ASIC) has previously published a report presenting findings of research on firms that promise to help consumers in financial a hardship or with listings on their credit reports in Australia. The report described Debt management firms (DMFs)¹⁷ as *'a range of firms that promise to help consumers in financial hardship or with listings of payment defaults on their credit reports.... These firms operate by challenging credit default listings and making complaints on behalf of consumers to external dispute resolution (EDR) schemes'.*

The report highlighted the following key concerns with DMFs:

- (a) 'charge high fees for services of little value;*
- (b) give poor or inappropriate services that can leave consumers worse off;*
- (c) have mis-sold services on the basis of misleading representations about the nature and effectiveness of the service; and*
- (d) have engaged in unfair and, in some cases, predatory conduct in relation to consumers in financial hardship.'*¹⁸

Following this report, Treasury's review stated that during its first two years in operation, AFCA *'dealt with clear instances of inappropriate conduct by particular paid advocates in relation to how they were engaging and cooperating during IDR and EDR'*.¹⁹

Financial firms and AFCA also found that AFCA's fees for resolving *'some very low-value complaints... are higher than the value of the original claim or service provided – leading to distorted resolution practices*

¹⁷ [ASIC Information Sheet 254](#) (n 15).

¹⁸ [ASIC \(January 2016\) Report 465: Paying to get out of debt or clear your record: The promise of debt management firms](#), page 4.

¹⁹ [Treasury review of AFCA](#), paragraph 4.85 (n 4).

which can be exploited by fee-for-service representatives who pursue their pecuniary interests ahead of their client's best interests'.²⁰

AFIA has concerns that this conduct results in poor outcomes and unfair costs to customers and financial firms. AFIA understands that examples of poor conduct of some PRs can include:

- failing to provide an appropriate letter of authority to act on behalf of the customer.
- sending reminders to firms about communications that were never originally received.
- filing simultaneous complaints through IDR and EDR.
- generalised complaints taking a 'pro forma' approach, without detailing the specific circumstances of the customer they are representing or requesting relevant information.
- failing to provide relevant information to customers such as settlement offers, and
- unprofessional behaviour.²¹

Recommendation 2: The changes under Proposal 1 are essential to help address the concerns raised above and aligns with the objective of AFCA operating in a way that is fair, efficient, and effective, in line with ASIC Regulatory Guide 267.²² We recommend that AFCA provide further guidance in the Operational Guidelines which explains what AFCA's pro-active approach will be in using the discretion under Rule A.8.4a) in practice and how exclusion of a PR will be reported to ASIC, in order to increase transparency and confidence in the process. We recommend additional wording in the Rules that provides AFCA with the ability to report concerning conduct to ASIC for action, as appropriate.

Recommendation 3: We recommend that the publication of excluded PRs by AFCA would be in the public interest to help further protect the interests of consumers seeking representation and to appropriately notify financial firms of the action. This could be done in a similar manner to the publication of financial firms which are AFCA members.²³

Recommendation 4: Upon the exclusion of a PR, we recommend that AFCA consider further ways to ensure that the consumer is aware that the service is free to use, to enhance accessibility and transparency. Consumers may also find it helpful for guidance from AFCA or to be directed by them on the website on their options for any reimbursement of their fees if a PR is excluded.

²⁰ *ibid.* paragraph 4.86 (n 4).

²¹ Examples provided in confidence to AFIA.

²² [ASIC RG 267](#), Part D: AFCA Compliance requirements, page 25 (n 5).

²³ [AFCA webpage, 'Information about finding Financial Firm'](#)

AFIA notes the proposal under Rule B.6.2 that the exclusion of a PR under Rule B.6.1 must be no longer than 12 months.²⁴ AFIA welcomes this introduction and recommends that AFCA provide clarity on the process that sits alongside the 12-month period and, in particular, how complexity in the process will be avoided when the exclusion is reviewed, given the set limit proposed. An increase in costs and resources to review exclusions with the proposed 12-month period limit could risk not achieving the objective of Treasury's recommendation to avoid poor conduct impacting the efficiency of AFCA's processes.

Recommendation 5: AFIA recommends that AFCA consider mechanisms to avoid this risk by setting out further flexibility in the Rules. This can include AFCA:

- having balanced flexibility and discretion to impose a minimum exclusion period before a review can take place, longer initial exclusion periods, continuous exclusion after initial periods are reviewed, and the ability to expedite exclusion processes, where appropriate.
- preventing complaints from excluded PRs flowing to financial firms in the registration phase, and
- placing the onus on the excluded PR for the exclusion to be reviewed and the PR actively providing evidence to justify a review of the decision.

Recommendation 6: We further note that the Treasury review considered options for AFCA dealing with low-value complaints more efficiently, such as having a separate process and team for these complaints and introducing a short-form determination process where the complaint relates solely to removal of credit default listings.²⁵ AFIA supports and urges AFCA progressing with this initiative to further improve the efficiency of their processes, reduce costs, improve consumer outcomes and the timely resolution of complaints.

- **Complainants**

AFIA supports strengthening AFCA's ability in to address unreasonable Complainant conduct and welcomes the new rules and discretions, namely Rules C.2.2h) and B.6.1, proposed within Proposal 2 which remain procedurally fair and balanced.²⁶ This aligns with the key themes in Treasury's review to enhance efficiency of AFCA's processes.²⁷

Recommendation 7: AFIA recommends that further guidance from AFCA be provided on how Rules C.2.2h) and B.6.1 will operate in practice to enhance consistency in their application and provide further

²⁴ [AFCA Rules and Operational Guidelines – Proposed amendments](#), paragraph 2.1.2 (n 2).

²⁵ [Treasury review of AFCA](#), paragraphs 4.87 and 4.94 (n 4).

²⁶ [AFCA Rules and Operational Guidelines – Proposed amendments](#), paragraph 2.2 (n 2).

²⁷ [Treasury review of AFCA](#), 'Delivering against statutory objectives', page vi (n 4).

clarity for relevant parties. AFIA recommends that AFCA provide guidance on the process for exclusion of a Complainant and how exclusion is reviewed (please see the points above in relation to the exclusion of PRs). AFCA should provide guidance on how they will take a pro-active approach in assessing complaints to ensure they do not raise the same subject matter.

Recommendation 8: Proposed Rule B.6.3 states that ‘AFCA may only exercise its power to exclude a Complainant under rule B.6.1a) if AFCA is reasonably satisfied that this action is necessary in view of the person’s misconduct or abuse of AFCA’s process.’²⁸ We welcome the additional guidance provided within the Operational Guidelines, as well as factors that might lead AFCA to exercise this power. We recommend that AFCA also include factors such as unreasonable conduct demonstrated towards the financial firm.

Settlement Offers and Agreements

AFIA supports the proposed change under Proposal 3 to amend Rule A.8.3b) and agrees it would assist in delivering a timely and fair process, balancing the needs of the parties involved.²⁹ We note that this reflects Rule 20 of the previous *Credit and Investments Ombudsman Rules* related to reasonable offers.³⁰

AFIA welcomes clarity in the Operational Guidelines that AFCA will work with all parties when determining if an offer is appropriate to resolve matters.³¹

Recommendation 9: We recommend that AFCA provide further guidance on appropriate settlement offers, where possible, to increase consistency in use of the discretion and enhance expectations of the parties involved. This would assist financial firms to ensure they have in place appropriate processes and procedures relating to settlements. For example, AFCA can provide a non-exhaustive list of examples of unreasonable conduct that they would deem to be an unreasonable refusal of an offer, while recognising that flexibility is required to determine matters on a case-by-case basis. AFCA could consider similar guidance as their proposed approach to claims for non-financial loss which provides guidance on the principles to be applied when awarding compensation.³²

Recommendation 10: In line with the objective of the consultation to enhance efficiency and timeliness of AFCA’s processes, we believe that AFCA should have the ability in Rule C.2.2h) to close a complaint at

²⁸ *ibid.* paragraph 2.2.2 (n 2).

²⁹ [AFCA Rules and Operational Guidelines – Proposed amendments](#), paragraph 3.1 (n 2).

³⁰ *Credit and Investments Ombudsman Rules (10th Edition)*, Rule 20.

³¹ [AFCA Rules and Operational Guidelines – Proposed amendments](#), paragraph 3.1.2 (n 2).

³² [AFCA \(March 2023\) Approach to claims for non-financial loss](#)

as early a stage as possible to avoid the complaint unnecessarily going through to the case management process. This will help to ensure cost effective, fair, and efficient outcomes.

Recommendation 11: AFIA welcomes the proposed amendment to Rule C.2.2 to include previously settled disputes as a ground for AFCA to consider excluding a complaint.³³ We welcome further guidance from AFCA on how they will determine what is a full and final settlement, including the effect of verbal settlements and previous agreements which are settled in part. It would be helpful for AFCA to communicate what training staff will undertake to determine this and in particular, steps they will take to determine if a settlement was obtained by fraud, duress, or misleading and deceptive or unconscionable conduct.

Complainant Non-acceptance of Determination

We welcome clarity under Proposal 7 to introduce Rule A.15.4 to address the current confusion which specifies if a Complainant does not accept a Determination made by AFCA, that neither party is bound by it.³⁴

Recommendation 12: AFIA recommends that the last sentence of the additional wording be removed from the Rules which states *'The Complainant may bring an action in the courts or take any other available action against the Financial Firm'*. AFIA's view is that this provides guidance and interpretation of the Rule which is not appropriate.

Accidental Error in a Determination

AFIA welcomes the proposed new Rule A14.6 under Proposal 8 to mirror current wording in the Operational Guidelines.³⁵ AFCA may wish to remove the wording *'for substantive revision'* to avoid any potential confusion that this rule would re-open the outcome or terms of the Determination.³⁶

AFCA Banking and Finance Panels

AFIA supports examples of banking and finance, and small business complaints that might be decided by an AFCA Panel, being included in the Operational Guidelines under Proposal 11.³⁷ We note the proposed example of *'raises new issues of good industry practice'* which also comes under the current wording for examples of life insurance complaints.³⁸

³³ *ibid.* paragraph 3.2.

³⁴ [AFCA Rules and Operational Guidelines – Proposed amendments](#), paragraph 6.1.

³⁵ *ibid.* paragraph 6.2.

³⁶ *ibid.* paragraph 6.2.2.

³⁷ *ibid.* paragraph 7.3.

³⁸ [AFCA Operational Guidelines \(1 April 2022\)](#), Section A.13 Decision Makers, 'When is it appropriate to refer a complaint to a Panel?', page 67.

Recommendation 13: AFCA should consider if this wording is too broad and if this in practice helps to clarify why this would fall into the scope of the Panel. Further specific examples may be more helpful to enhance consistency in the application of this Rule. We would welcome further clarification for example if Buy Now Pay Later (BNPL) and other credit providers are included within the scope of the banking and finance panels.