

CONSULTATION ON PROPOSED AUSTRALIAN FINANCIAL
COMPLAINTS AUTHORITY (**AFCA**) RULES

SUBMISSION TO AFCA

JULY 2018

EXECUTIVE SUMMARY

1. Thank you for the opportunity to comment on the draft AFCA Rules of Complaint Resolution Scheme - June 2018 (**the Rules**).
2. ANZ supports the introduction of AFCA. ANZ believes it is important that consumers and small businesses can access free and effective dispute resolution for financial services disputes. We look forward to working with AFCA to resolve customer disputes in an efficient and timely manner.
3. ANZ believes that, in large part, the Rules accord with the principles in the Consultation on Proposed AFCA Rules¹ (**Consultation Paper**).
4. However, we believe some adjustments are necessary to fully achieve that accord:
 - (a) Chapter A.17, in relation to systemic issues: in order to meet the first principle that the Rules are consistent with legislation, and the seventh principle that well established 'tried and tested' provisions from the Financial Ombudsman Services' (**FOS'**) Terms of Reference (**TOR**) be maintained, we suggest that AFCA reconsider Rule A.17.4; and
 - (b) Rule A.10.1, in relation to confidential information: in order to meet the requirement of the fourth principle that there be no material reduction in scope from the existing FOS TOR, we recommend that aspects of the existing FOS TOR are reinstated as outlined below.

Systemic Issues

5. We recognise AFCA's important role in identifying and referring systemic issues to the relevant regulator. We support AFCA continuing the work of existing dispute resolution schemes in this regard. However, we are concerned that the power set out in Rule A.17.4 is one more appropriately exercised by a regulator. Unlike AFCA, a regulator is in a position to ensure other regulatory objectives are considered when a direction is made and is subject to public scrutiny and avenues of review. We suggest that AFCA consider removing Rule A.17.4 and instead rely on Rule A.17.3 which is sufficient to meet its systemic issues obligations under section 1052E of the *Corporations Act*.

Confidential Information

6. We are concerned that firms will no longer have the right to request that commercially sensitive information not be shared with a complainant. This is an important right which we believe ought to be preserved to ensure firms can openly share information with AFCA without risking the disclosure of confidential internal material (such as credit risk policies).

¹ Pg 6 consultation paper

SYSTEMIC ISSUES

7. While resolution of disputes is AFCA's primary function, it is well placed to identify broader matters of concern which ought to be brought to the attention of the relevant regulator. This is reflected in section 1052E of the Corporations Act which requires AFCA to report specified information, acquired in connection with a complaint, to the appropriate authority.
8. ANZ supports AFCA's important role in identifying, investigating and reporting systemic issues². In our experience, the existing FOS framework has worked well as a mechanism for FOS to work with financial firms to remediate systemic issues in a manner which meets FOS' expectations. This mechanism is based on the following paragraph of the FOS TOR:

*FOS must identify systemic issues and refer these to the relevant Financial Services Provider for remedial action. In each case, FOS must obtain a report from the Financial Services Provider as to the remedial action undertaken and continue to monitor the matter until a resolution has been achieved that is acceptable to FOS.*³

In our view, this paragraph aligns with the legislative requirements and is 'tried and tested' in the sense that it has worked well for FOS to date. We suggest that this provision, which is replicated in Rule A.17.3, is sufficient for AFCA to meet its systemic issue obligations.

9. As currently expressed, Rule A.17.4 which permits AFCA to direct financial firms to take "any act which AFCA considers necessary"⁴ to remediate systemic issues in order to achieve broadly expressed objectives goes beyond section 1052E of the *Corporations Act*.
10. We suggest this alternative because of potential impacts that may arise if the proposed drafting were adopted:
 - (a) **First**, there may be impacts on financial firms which ought to be considered in conjunction with broader regulatory implications. For example, many AFCA members are also Authorised Deposit Taking Institutions (**ADIs**) which are separately subject to regulation by the Australian Prudential Regulation Authority (**APRA**). When a direction is made to remediate a systemic issue, consideration should be given to whether a prudential risk may arise, for the firm or the sector⁵. We suggest that, as part of this consultation paper, the Rules are submitted to AFCA for its consideration.
 - (b) **Second**, directions of this nature are ordinarily subject to administrative review⁶. However, unlike decisions made by Australian Securities & Investments Commission

² Rule A.17 and s1052E(4) of the *Corporations Act*

³ Paragraph 11.2(b) of the FOS TOR

⁴ Rule A.17.4

⁵ Akin to the process to consult APRA in section 915I of the *Corporations Act*

⁶ See section 1317B *Corporations Act 2001*

(ASIC) or other regulators, a financial firm has no clear right to seek review of AFCA decision to determine an issue to be systemic, or determine appropriate remediation.

(c) **Third**, regulators are subject to scrutiny of parliament and are held accountable for their activities. In the financial services sector, for example, the Parliamentary Joint Committee on Corporations and Financial Services is empowered under the *Australian and Securities and Investments Commission Act 2001* to inquire into and report on the activities of ASIC⁷. This is an important public safeguard on the manner in which ASIC exercises its powers.

11. In terms of the specific drafting of Rule A.17, we would also like to note the following concerns:

- (a) The definition of a systemic issue does not make it clear, in the way that the legislation⁸ and RG 276⁹ do, that a systemic issue is one which comes to light as a result of a complaint. Given AFCA's primary role is to resolve complaints, we think it important that its systemic issues power is linked to the receipt and investigation of a complaint consistent with the legislation;
- (b) There is no period of time specified in A.17.2(a) for a financial firm to respond to potential systemic issues raised by AFCA. In order to allow the firm sufficient time to properly respond, our view is that 30 days should be provided. This timeline is consistent with the Australian Government response to the *ASIC Enforcement Review Taskforce Report* which recommended a 30 day period for reporting significant breaches and suspected breach investigations that are ongoing within 30 days.¹⁰ This time is important to enable the financial firm to consider the situation, make an informed response to AFCA and also determine whether the issue should be self-reported to ASIC under section 912D of the Corporations Act; and
- (c) Rule A.17.5, states that "in accordance with the Corporations Act, the Privacy Act and any other relevant obligations, after identifying a systemic issue AFCA must report the issue to **any body**..."(emphasis added). Section 18.1 in respect of serious contraventions also makes reference to referring matters to "any body". For the avoidance of doubt, and to clarify the type of body to which reports will be made, we suggest these references are amended to state "APRA, ASIC or the Commissioner of Taxation" consistent with section 1052E of the *Corporations Act*.

⁷ Section 243 of the *Australian Securities and Investments Commission Act 2001*.

⁸ Section 1052E(4) of the *Corporations Act*: "If AFCA considers that there is a systemic issue arising **from the consideration of complaints**..."

⁹ RG267.198: "In **resolving an individual complaint, or series of complaints**, AFCA may identify a systemic issue..."

¹⁰ See Recommendation 4 of the *Australian Government response to the ASIC Enforcement Review Taskforce Report* which the Government has indicated it will adopt: <https://static.treasury.gov.au/uploads/sites/1/2018/04/Aus-Gov-response-ASIC-Enforcement-Review-Taskforce-Report.pdf> .

CONFIDENTIAL INFORMATION

12. AFCA Rule A.10.1 states that “AFCA will generally share information provided by a party to a complaint with the other parties to the complaint, even after the complaint has been closed”¹¹.
13. In contrast, FOS’ existing TOR provide that:
- (a) “FOS must not disclose to a party to a Dispute information provided by another party to the Dispute where the party supplying the information has refused consent to this...”¹²; and
 - (b) “If a party to a Dispute refuses consent to provide information to another party to the Dispute, FOS is not entitled to use that information to reach a decision adverse to the party to whom confidential information is denied unless FOS determines that special circumstances apply”¹³.
14. The fourth principle in the Consultation Paper is that “there must be no material reduction in the scope of the Rules, when compared with coverage under the Terms of Reference/Rules/legislative provisions of the existing three schemes. Where there is a difference in existing coverage, the higher standard should prevail.”
15. However, there is a material reduction in the scope of Paragraph 8.4 of the FOS TOR when compared to Rule A.10.1 because there is no option to establish that ‘special circumstances’ exist such that a financial firm, or complainant, can request that information is not shared with the other party to the dispute without an adverse inference being drawn.
16. ANZ has, from time to time, sought to rely on paragraph 8.4, particularly in respect of information which is commercially sensitive. We believe this provision encourages open and full disclosure because confidential material can be withheld from the complainant to minimise the risk of disclosure. We suggest that AFCA amend the Rule to reflect the existing scope of the FOS TOR.

OTHER MATTERS

Restrictions on enforcement proceedings

17. Chapter A.7 of the Rules, places a restriction on a financial firm taking enforcement action against a complainant once a complaint has been lodged with AFCA. The chapter extends to all the facilities held by a complainant including those which do not fall within AFCA’s

¹¹ Rule A.10.1

¹² FOS TOR 8.4

¹³ FOS TOR 8.4

jurisdiction (for example, because they are Small Business credit facilities in excess of \$5 million).

18. Rule A.7.2 provides limited exceptions to the restrictions on taking enforcement action subject to AFCA providing its consent. The Rule does not specify, however, how AFCA will determine whether consent will be granted and the time frame for doing so.
19. Given the time critical nature of freezing orders and orders to secure property, we ask that AFCA specify how it will determine whether consent will be provided and the timeframe for providing a response to a consent request.
20. There is reason for AFCA's Rules to go beyond the provisions in the current FOS TOR on this point. AFCA's increased Small Business jurisdiction will mean that legal proceedings to freeze, or otherwise secure, property are more likely to arise. Similarly, there is likely to be an increase in the frequency and urgency of requests for AFCA to consent to the institution, or continuation, of legal proceedings.

Extension of time limits

21. Rule B.4.4.2 provides that AFCA may extend the time limits in Chapter B.4 in 'special circumstances'. We ask that AFCA provide guidance about when special circumstances will arise and whether the financial firm will be consulted (particularly where, because of the age of the complaint, the firm no longer holds relevant documentation).

Ends