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Mike D'Argaville
Australian Financial Complaints Authority

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submissions@afc.org.au

Dear Mike

Consultation on the Proposed AFCA Rules

The Australian Finance Industry Association [AFIA] welcomes the opportunity to comment on the proposed Australian Financial Complaints Authority [AFCA] rules [the Rules].

AFIA is well placed to advocate for the finance sector given our broad and diverse membership of over 100 financiers operating in the consumer and commercial markets through the range of distribution channels including digital access. More detail on AFIA is available from: www.afia.asn.au.

Many of AFIA's Members are currently members of FOS or CIO and will be required to join AFCA upon its commencement. As such, our feedback will focus on issues relevant to banking and financial services. We note the proposed Rules have been drafted in accordance with legislative requirements and Ministerial and regulatory guidance. We also note the intention is that there will be no reduction in scope of jurisdiction for AFCA compared to the current schemes.

Our feedback is presented under question 6 of the Consultation Paper. We seek clarification on these issues to assist our Members in their preparations for the commencement of AFCA.

Issues for consideration and clarification:

1. **A.6.2 Joining other parties:** AFIA seeks clarification on when AFCA will decide it is '*appropriate*' to join another Financial Firm as a party to the complaint.
2. **A.7.1(a) Restrictions on Financial Firms during a complaint:** AFIA seeks clarity on what will constitute '*any aspect of the subject matter of the complaint*' that will prevent a Financial Firm from beginning legal proceedings against a complainant or anyone else joined as a party.
3. **A.7.2(e) Restrictions on financial firms during a complaint:** Under this proposed rule, when a complaint has been made, financial firms will need to seek AFCA's consent to continue with legal

proceedings about a small business (including primary producers) involving a credit facility of more than \$5 million. AFIA questions this requirement as complaints regarding credit facilities of more than \$5 million are outside the jurisdiction of AFCA. We recommend this rule be removed.

4. **A9.2 – Gathering relevant information:** Rule A9.2 will require parties to a complaint to provide a statutory declaration when relying on Rule A9.1 when refusing an AFCA request for information. We note that this obligation does not presently exist under either the FOS or CIO schemes. We note the objectives of this rule but also that it will place an additional burden on the parties where there may be little benefit. We seek clarification on when this rule will be applied.
5. **A.9.6 Gathering relevant information:** AFCA can require a financial firm to contribute up to \$5,000 for costs incurred by AFCA on expert advice. We note that FOS's current terms of reference only require financial firms to contribute up to \$3,000 per complaint (see section 8.3(b)). In the absence of evidence to substantiate the proposed increase and in line with the Government's policy around containing the cost components of AFCA we submit the level for AFCA should be a maximum of \$3,000 per complaint.
6. **A.11.4 AFCA must maintain the confidentiality of all information provided to it:** Some Members have requested that AFCA provide further guidance on Rule A.11.4(a). This could include on the types of activities AFCA will considered '*reasonably necessary to carry out AFCA's responsibilities including under these rules or for any incidental purpose*' for the purposes of this rule.
7. **A.11.5(a) Complaints relating to privacy obligations:** AFIA seeks clarification on how this will work practically and the interaction between AFCA and the statutory right for an individual to make a complaint to the OAIC. AFCA should provide Financial Firms adequate time to respond before AFCA engages with the OAIC.
8. **A.12 Preliminary assessment:** Some Members have requested that CIO Rules (20.1-20.3) be considered to form part of the clause A.12 of the AFCA rules. These CIO rules aim to encourage both complainants and financial firms to come to a reasonable offer to settle the complaint. This speeds up settling the complaint for the benefit of both parties.
9. **A.12.2, A.12.3 and A.12.4 both refer to timeframes for a financial firm to respond to AFCA:** These should be amended to a '*reasonable time to respond*'. This will reflect FOS's current Terms of Reference. We suggest a period of 30 days as reasonable.

10. **A.17 – Systemic issues:** AFIA notes that this section exceeds the requirements of the current FOS and CIO EDR schemes. Section A.17.2(b) will now require financial firms to provide information and documents AFCA requires to investigate the dispute. Further, A.17.4 mirrors the role and powers of ASIC (e.g. remediation powers, including through RG 256). AFIA recommends amendment of Section A.17.2(b) to align the powers with those existing under FOS and CIO. AFIA also recommends clarification of how section A.17.4 will operate in respect of existing regulatory obligations.

We also seek that Financial Firms have a reasonable time to respond and provide documents requested by AFCA under A.17.2. We recommend a period of 30 days as reasonable.

11. **A.18 – Serious contraventions and other breaches:**

- a. AFIA recommends that Financial Firms should be given a reasonable period to respond to AFCA before being reported to an external body. AFIA suggests a period of 30 days as reasonable.
- b. AFIA seeks clarification on how this section will interact with ASIC RG 267 under Section C.
- c. AFIA also seeks clarification on A.18.2 on what amounts to '*non-compliance*' of the Rules that is a serious breach and will be reported to ASIC.

12. **B.4.5 Transitional issues - time limits generally:** Some Members have raised concerns regarding the scope of this Rule. As we understand, the current draft would see circumstances that occurred up to six years ago able to be the subject of a complaint to be raised and dealt with by AFCA post-November 2018. Further, that the new higher small business credit facility limit (of \$5 million) and higher monetary compensation caps will apply to these complaints. Some Members note these complaints arose well before AFCA was considered by the Government and will result in many cases that were, at the time, out of scope of EDR now being able to be considered which creates a degree of uncertainty. We also note differing views within our membership. Some Members support customers having access to AFCA in these circumstances as a mechanism for dealing with unresolved matters which have not previously come within FOS's jurisdiction and where the customer has been unable to afford to take Court action. Others would prefer the extended jurisdiction to apply to complaints that arise from circumstances post-AFCA commencement.

13. **D.5.2 Costs 2 of pursuing complaint other than a Superannuation Complaint:** AFIA notes that AFCA can require a financial firm to contribute up to \$5,000 for costs incurred by the complainant for certain types of costs during the complaint. We note that FOS's current terms of reference only require financial firms to contribute up to \$3,000 per complaint (see section 9.4). In the absence of

evidence to substantiate the proposed increase and in line with the Government's policy around containing the cost components of AFCA we submit the level for AFCA should be a maximum of \$3,000 per complaint.

14. **D.6.3 Interest:** AFIA notes that any interest awarded during a dispute will not form part of the maximum value of a remedy under D.4. AFIA seeks clarification on what the maximum award of interest will be in respect of a dispute.

We would welcome an opportunity to comment on proposed Operational Guidelines for AFCA. This will assist Members to better understand AFCA's Terms of Reference as the Guidelines will further explain AFCA's dispute resolution processes.

Next steps

Should you wish to discuss our submission further, or require additional information, please contact me at helen@afia.asn.au or Karl Turner, Associate Director – Policy (Action) at karl@afia.asn.au or both via 02 9231 5877.

Kind regards

A handwritten signature in black ink, appearing to read 'Helen M. Gordon', with a horizontal line underneath.

Helen Gordon
Chief Executive Officer