

Mike D'Argaville
Australian Financial Complaints Authority
Via email: policy.submission@asic.gov.au

29 June 2018

Dear Mr D'Argaville

Consultation of the proposed AFCA Rules

Thank you for the opportunity to provide a submission in respect of the Proposed AFCA Rules.

The Australian Retail Credit Association (ARCA) is the peak industry association for organisations involved in the disclosure, exchange and application of consumer credit reporting data in Australia. We were established in 2006 with the purpose of promoting best practice in credit risk assessment and responsible credit practices.

Our membership is voluntary and drawn from both credit providers and credit reporting bodies. ARCA's membership includes the thirteen largest APRA regulated banks, and a broad range of fintechs, finance companies, and credit union and mutual credit providers. Collectively, ARCA Members account for over 95 percent of all consumer lending by dollar volume, and over 80 percent by number of accounts. Furthermore, the four national credit reporting bodies are all ARCA Members.

We understand that AFCA will seek recognition under the *Privacy Act* from the Australian Information Commissioner in order to consider disputes dealing with an individual's privacy, including those relating to credit reporting. Accordingly, the Proposed Rules will apply to the consideration of disputes relating to the interpretation of Part IIIA of the *Privacy Act* and the associated *Privacy (Credit Reporting) Code*.

We have previously provided feedback on the operation of AFCA, including to the Transition Team led by Dr Malcolm Eady and to ASIC in relation to Consultation Paper 298.

In those submissions we noted the potential for the decisions of AFCA to create novel interpretations of what is otherwise considered established law, industry code, or good industry practice (i.e. 'systemically important decisions'). Such decisions could result in significant disruption to the operations of financial service providers – and, in the case of credit reporting related decisions, businesses in other industries such as telecommunications, gas and electricity providers (which are also 'credit providers' within the meaning of Part IIIA of the *Privacy Act*, which regulates the credit reporting system).

Given those concerns, we made a number of suggestions in our submissions that we believe would assist AFCA to operate in a way that would improve its decision-making process and provide better ways for stakeholders to raise concerns with, or dispute, systemically important decisions that may be incorrect (*without* seeking to overturn the outcome of a particular dispute).

We note, however, that the Proposed Rules (other than those relating to Superannuation complaints) appear to be largely an amalgamation of the two predecessor scheme's rules and do not seek to substantially change the way the new scheme will operate (in comparison to the predecessor schemes).

For your reference, the suggestions made in our previous submissions involved AFCA implementing rules that:

- i. encourage AFCA to identify when it is being asked to make a systemically important decision; and
- ii. require AFCA to implement processes to ensure better decision making in respect of those decisions, such as:
 - a. providing reasons for decisions that explicitly state whether the decision is based on law, an industry code of practice, good industry practice or fairness;
 - b. using a panel when a decision is likely to involve a systemically important interpretation of law or code of conduct; and
 - c. seek the input of relevant stakeholders before making a systemically important decision (which would include industry associations that represent businesses that could be impacted by the decision).

While the Proposed Rules, as with the previous scheme's rules, include some provisions that are consistent with the above suggestions, we believe that additional detail in the Rules would improve the ability of AFCA to deal appropriately with issues of systemic importance.

In the absence of specific Rules, we hope that some of our suggestions could be implemented through the adoption of Guidelines by AFCA.

We provide our detailed feedback in Annexure One.

We would like to highlight our concern in relation to the operation of the Independent Assessor – in particular the fact that the Independent Assessor process may only be engaged by a party to a complaint. The role of the Independent Assessor process is vitally important to ensuring that AFCA has followed the correct process when making a systemically important decision.

It must be recognised that it will often not be in the interests of the particular Financial Firm to invoke the Independent Assessor in cases where AFCA may not have followed the correct process. An individual Financial Firm has little incentive to pursue or defend an issue on behalf of the credit industry, compared to protecting its own reputation. Hence, the individual firm will often simply accept an external dispute resolution scheme's finding (whether through a recommendation or Determination), which the firm believes to be incorrect, simply to avoid further reputational and financial impacts. Alternatively, a Financial Firm may not pursue an issue because it has not recognised the systemic implications of the decision. Some mechanism is needed to have systemically important issues, that are raised through a particular complaint, considered separately to the decision on that complaint.

Accordingly, we recommend that Proposed Rule A.16 be amended to allow the Independent Assessor to accept complaints regarding a failure to follow process from other relevant stakeholders, including industry associations and consumer representatives, where that failure has potentially impacted AFCA's decision in respect of a systemically important issue. This will ensure that the Independent Assessor is able to consider the processes followed by AFCA when making a systemically important decisions, even if a party does not raise a complaint.

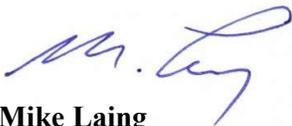
Such complaints could relate to matters such as whether AFCA has:

- failed, in relevant circumstances, to seek advice from suitably qualified legal or industry expert prior to making a decision – Proposed Rule A.9.6
- allocated a decision maker to a complaint that is not appropriate, e.g. where AFCA has failed to recognise that the complaint raises new issues for AFCA of law or good industry practice – Proposed Rule A.13
- not given proper regard to legal principles, applicable industry codes or guidance, good industry practice or previous relevant Determinations – Proposed Rule A.14.1
- not given proper written reasons for a Determination – Proposed Rule A.14.4

Such complaints are less likely to be raised by the Financial Firm, particularly where the result of the Determination directly impacts only the account of the particular customer who complained – so that, for example, the Financial Firm has to correct the credit report of that customer only. However, Determinations of external dispute resolution services do provide a form of precedent to industry and it is important that a stakeholder with sufficient interest in the Determination – such as an industry association or a consumer advocate organisation – can raise concerns with the process that was followed in making the Determination. This will help to avoid the significant disruption to industry, and reduce the uncertainty and potential inconsistency, that would result from a potentially misconceived Determination. Of course, if the Independent Assessor finds that AFCA followed the correct process in coming to the Determination, this would improve stakeholder's acceptance of the Determination and encourage other industry participants to adopt the findings.

If you have any questions about this submission, please feel free to contact me on 0414 446 240 or at mlaing@arca.asn.au or Michael Blyth on 0409 435 830 or mblyth@arca.asn.au

Yours sincerely,



Mike Laing
Executive Chairman

ANNEXURE ONE:

ARCA’s Submission on Proposed AFCA Rules

	Proposed AFCA Rules	ARCA Comments	ARCA Recommendation
1.	A.9.6	<p>We note that, unlike the current FOS Terms of Reference (see 8.2), the Proposed Rules do not contemplate AFCA consulting with industry or consumer advisors. Rather, the Proposed Rules only provide for AFCA seeking advice from appointed experts. We believe that the FOS rule should be retained.</p> <p>Consulting with industry or consumer advisors – usually on a more informal basis compared to paid experts – is an important step in AFCA understanding the context of the complain under consideration. This is particularly important to the fundamental issue of appointing an appropriate decision maker under A.13.1, given that that decision depends on forming an understanding of the complexity of the complaint and whether the complaint raises new issues for AFCA of law or good industry practice. AFCA cannot always rely on the parties to the complaint to understand the broader implications of the matters under consideration, and so cannot simply rely on the parties’ feedback.</p> <p>For completeness, we note that if such a provision is not included in the Rules, noting our comments below, the</p>	<p>Include a Rule that provides for AFCA to consult with industry and consumer groups as appropriate, in particular when forming an understanding of whether the complaint raises new issues for AFCA of law or good industry practice.</p>

		confidentiality provisions in A.11 may restrict AFCA informally consulting with industry or consumer groups.	
2.	A.11.2 Confidentiality	<p>The Proposed Rules appear to have adopted the CIO’s rule in relation to confidentiality. While we agree with the need to maintain the confidentiality of information provided by parties to the complaint, we are concerned that the Proposed Rule could be misapplied.</p> <p>For instance, as there is no guidance as to the meaning of ‘confidentiality of all information’ in A.11.2, this could be viewed as applying to a wide range of information arising out of the complaint – including, for example, a recommendation of AFCA. If this was the case, this could limit the ability of either party to discuss such matters with third parties (outside of the stated exemptions). In the case of the Financial Firm, the rule could potentially prohibit them from seeking the input of a relevant industry association. A Complainant may be prevented from discussing the complaint with their family members.</p> <p>We note that the contractual nature of the Proposed Rules, which creates a contract between the parties and AFCA, would appear to give either party the ability, subject to Proposed Rule A.7, to take action in respect of an alleged breach of the confidentiality rule. Given this, we recommend that the extent of Proposed Rule A.11.2 be clarified.</p>	Include a definition of ‘confidential information’ that limits the types of information that are subject to the restriction in A.11.2, such as would be included in most standard commercial confidentiality agreements.
3.	A.13 Decision makers	We note that A.13 contemplates the use of a panel based on an assessment of the complaint, including the complexity and whether the complaint raises new issues for AFCA of law or good industry practice.	We recommend that the Rules include further detail on the process for allocating complaints to AFCA Decision Makers.

		We note that the Ramsay Review recommended improving transparency in relation to the circumstances under which a panel will be used. The Proposed Rules include a list of criteria to be considered, however they do not provide any further detail. For example, the Proposed Rules do not specify how AFCA is to gather information in order to assess those criteria (see our comments in relation to A.9.6) or to prioritise the criteria.	If this detail is not included in the Rules, we recommend that it be provided for in Guidelines to be produced by AFCA.
4.	A.16 Complaints about AFCA's service	See our comments in the main document.	We recommend that the Rules permit a stakeholder with sufficient interest in a Determination – such as an industry association or consumer advocate organisation – be able to trigger the Independent Assessor process.
5.	C.2.2 AFCA's discretion not to handle complaints	<p>In our previous submissions we noted the unique situation in respect of credit reporting under which the Australian Information Commission has explicit guidance and determination-making functions. On this basis, we recommended that AFCA's rules recognise that a test case could include referral to the Commissioner. In appropriate circumstances, this would result in a cheaper and more efficient way for parties to obtain certainty on the proper interpretation of the credit reporting laws.</p> <p>Further, we note that C.2.2(a) contemplates AFCA excluding a complaint on the basis that the OAIC is a more appropriate place to deal with the complaint. We note that, instead of excluding the complaint, it may be more appropriate to defer making a Determination pending the provision of guidance or a determination by the Commissioner.</p>	<p>We recommend that the Rules recognise that:</p> <ul style="list-style-type: none"> • AFCA may defer making a Determination pending the provision of guidance or a determination by the Australian Information Commissioner • A Financial Firm may engage the test case process by requesting the Australian Information Commissioner to provide guidance or a determination.

6.	C.1.2(i); Definition of <i>Privacy Act Participant</i>	<p>We note that the definition of ‘Privacy Act Participant’ refers only to the expanded definition of ‘credit provider’ under Part IIIA of the <i>Privacy Act</i>. It does not extend to credit reporting bodies which are required to be a member of a recognised external dispute resolution scheme.</p> <p>We understand that some credit reporting bodies are currently members of CIO and, we expect, would become members of AFCA. We are unsure why such members would not be covered by the definition of ‘Privacy Act Participant’.</p> <p>Further, as the credit reporting bodies are not defined as Privacy Act Participants, the jurisdictional exclusion in C.1.2 would not apply to credit reporting bodies.</p>	Extend the definition of Privacy Act Participant to include credit reporting bodies under Part IIIA of the <i>Privacy Act</i> .
7.	D.4 Monetary limits for complaints other than Superannuation Complaints	<p>While we understand that the jurisdictional and compensation limits are not subject to consultation, we note that the description of those limits are unclear and do not appear to meet the design principle of “plain English and accessible”. This is particularly the case in respect of Rows 5 and 6 in the table on page 38.</p> <p>We are concerned that a Complainant would have difficulty understanding the description of the jurisdictional and compensation limits in this section.</p>	Clarification of the jurisdictional and compensation limits in D.4 with the view to make them more accessible to a Complainant. This may done by including examples of the application of the limits – particularly in respect of the difference between the ‘Monetary restriction on AFCA’s jurisdiction’ and ‘Compensation amount limit per claim’ in Rows 5 and 6.
8.	D.14.4 Reasons for a Determination	<p>In our previous submissions, we noted the need for Determinations to adequately identify the basis for the decision – that is legal principles, applicable industry code or guidance or good industry practice.</p> <p>Given the fact that the Determinations of AFCA will have some precedent value to industry, it is imperative that</p>	<p>Include a requirement in the Rules that the written reasons under A.14.3:</p> <ul style="list-style-type: none"> - expressly state whether the Determination is based on (as applicable) legal principles, applicable industry code or guidance or good industry practice

	<p>industry clearly understand the basis for the Determination as it will dictate whether or not industry is compelled to make changes to how it operates. For example, a Determination that is not based on an application of law, code or even good industry practice may not require other industry participants to change their practices. The absence of such clarity risks causing further uncertainty and inconsistency in the way Financial Firms operate.</p> <p>Further, we note that such information would also be valuable if included as part of a preliminary assessment given under A.12 as it will help the Financial Firm to decide whether to accept the recommendation.</p>	<ul style="list-style-type: none"> - explain the reasons for departing from previous AFCA or Predecessor Scheme decisions. <p>If this recommendation is not accepted, we suggest that the Guidelines to be produced by AFCA include an expectation that such information be provided in the written reasons – particularly where the parties request such information to be provided.</p> <p>In addition, we suggest that such information also be provided to Financial Firms as part of a preliminary assessment.</p>
--	---	--

AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION