



**Credit and Investments Ombudsman**

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Mr D'Argaville  
Legal Counsel  
Australian Financial Complaints Authority  
GPO Box 3, Melbourne VIC 3001

**BY EMAIL:** [submissions@afc.org.au](mailto:submissions@afc.org.au)

Dear Mr D'Argaville,

### **Consultation on the proposed AFCA Rules**

The Credit and Investments Ombudsman (**CIO**) welcomes the opportunity to make a submission on the proposed AFCA Rules.

### **Consultation Questions**

#### *Structure and ordering of the AFCA Rules*

1. Do the AFCA Rules achieve a good balance between user friendliness and detail?

The AFCA Rules need to be sufficiently detailed and we consider that this has been appropriately addressed in the proposed Rules. However, the user-friendliness of the Rules could be improved further. We note that the proposed Rules are more legalistic than either the existing FOS Terms of Reference or the CIO Rules. A plain language expert should review the proposed Rules (again, if already done) to improve the user friendliness of the Rules.

Specific comments on the specific Rules are made below.

2. Before the Table of Contents is a "quick guide" summarising the key aspects of the Rules and their location. Is this helpful?

CIO believes that, in principle, a quick guide is very helpful as the proposed Rules are quite long and detailed.

CIO does suggest that some specific improvements are considered:

- The use of the word 'preconditions' is legalistic. It appears in both the quick guide and the proposed Rules. We suggest changing it to simply 'requirements' or another plain language synonym.
- "Relationship giving rise to the complaint" or "certain type of relationship" is not plain language and will not be readily understood by consumers. Our

experience suggests that consumers do not generally think in terms of their relationship with a financial firm. Rather, they simply think of themselves as customer acquiring a product or service. Further, the prerequisite that there is a relationship between the financial firm and the consumer is more appropriately dealt with under 'Preconditions' (or preferably, 'Requirements').

- There would be merit in preparing separate quick guides for super and other complaints.
  - Both FOS and CIO now ask targeted questions when a complaint is lodged to determine whether the complaint is within their respective jurisdictions. We assume this will continue in the AFCA environment. It may be useful for the quick guide to include the jurisdictional exclusions (subject to more detail being set out in the Rules).
3. The Rules contain a number of tables (for example, summary tables of the time limits to submit a complaint to AFCA and of the monetary restrictions on AFCA's jurisdiction and compensation powers). Are the tables helpful in explaining these areas? How could they be improved?

The time limits that apply to the making of complaints and compensation/monetary limits are both very complicated areas. While setting these out in a table rather than just explaining them in a narrative form is likely to assist, anecdotal feedback on the consultation draft suggests that consumers and firms will struggle to understand the tables in their current forms. We understand that the time limits are set by ASIC under RG267 and that some of the compensation limits were set as part of the authorisation process for AFCA<sup>1</sup> - both remain complicated and inaccessible for ordinary people. AFCA should consider negotiating for these to be simplified, and further test the manner in which this information can be best presented.

#### *Superannuation complaints*

4. Are there aspects of the Superannuation Complaints Tribunal jurisdiction that have not been incorporated into the AFCA Rules?

No comment.

#### *Reporting obligations*

5. Do the AFCA Rules adequately provide for AFCA to meet its reporting obligations under the Corporations Act?

Yes.

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<sup>1</sup> Media Release 14 February 2018, Minister for Revenue and Financial Services and Minister for Small and Family Business at <http://www.kellyodwyer.com.au/consumers-win-as-a-one-stop-shop-for-financial-complaints-passes-through-parliament/>

*General*

6. Are there any other issues that require consideration?

Yes. See below.

**Detailed comments on the proposed AFCA Rules**

What's missing?

*Cancellation of membership*

We note that Article 3.4 of AFCA's Constitution deals with membership cancellations. Article 3.4(a)(i) allows the Directors to expel the member if they do not 'comply with the provisions of ... the Applicable Rules or with any *binding* decision (however described) made pursuant to the Applicable Rules'.

It is clear that Determinations will be binding decisions. What is not clear is whether an order to remediate, for example, is binding. The draft Rules provide that 'AFCA can require the Financial Firm to do or refrain from doing any act'. It is not clear whether such a requirement is a binding decision. If it is not, AFCA will not be able to expel the member if it does not comply with an order.

CIO's Rules permit it to cancel a financial firm's membership where, among other things, it has failed to comply with a systemic issues order.

We note that the procedure for expelling members is set out in Article 3.4(b) of AFCA's Constitution and AFCA is, appropriately, required to observe procedural fairness when doing so, similar to CIO's Rule 41.

*Financial hardship*

We note that the AFCA Rules mention financial hardship in relation to exclusions (C.1.3) and time limits. However, financial hardship is such a critical aspect of AFCA's jurisdiction that it should be specifically covered at A.4 as a complaint which AFCA has jurisdiction to deal.

Section A – Complaint resolution processes

A.2 Principles that underpin the scheme

CIO strongly supports the principles that underpin the scheme listed at A.2, and in particular, the inclusion of A.2.1. (a) and (b) to promote accessibility of AFCA for all consumers, and particularly consumers who may be vulnerable and/or disadvantaged.

A.4 Complaints that AFCA handles

CIO is concerned that the AFCA Rules give the impression that there are a number of hurdles that must be overcome before a consumer can get access to AFCA. Any such hurdles should be few and minor so that the vast majority of consumers have access to AFCA.

For example, the use of the expression “Eligible Person” gives the misleading impression that access to AFCA is very restricted when in fact individuals, as well as a wide range of business structures, will have access to AFCA. CIO suggests changing the expression “Eligible Person” to “Consumer” (as in the CIO Rules), or redrafting the definition to focus on the exclusions rather than the inclusions.

#### A.7. Restrictions on Financial Firms during a complaint

A.7.2 sets out the circumstances in which a financial firm may take further legal action with AFCA’s consent. CIO agrees this is reasonable and fair, but suggests that AFCA be required to consult both parties before doing so in order to demonstrate that it is being procedurally fair when considering whether to give its consent under A.7.2. Furthermore, it can also be expedient to do so, particularly when dealing with a depreciating asset in relation to which interest continues to be charged. For example, in our experience, where a vehicle is held as security for a car loan, the debtor will often agree to the repossession of the vehicle on the basis that they can no longer afford the loan.

CIO supports A.7.5 but notes that there is insufficient detail on how it will work in practice. We expect that more detailed guidance will be issued by AFCA on this point.

#### A.8. Complaint resolution approach

CIO supports in principle the complaint resolution approach at A.8. However, we do have a concern about A.8.3 given the feedback received by CIO from consumer groups. It suggests that AFCA should investigate a complaint before excluding it (because it lacks merit, there is no loss or the loss has already been appropriately compensated or there is no error). It would be appropriate for such a complaint to be first referred to a preliminary assessment or perhaps a fast-tracked preliminary assessment.

This would ensure procedural fairness is observed and there is transparency in the decision-making process. Consumers struggle to differentiate between a preliminary assessment which does not find in their favour and a decision to exclude a complaint on specified grounds. Although in substance there is no real difference, consumers are likely to view the latter as being unfair given no investigation was conducted to support the finding.

#### A.9. Gathering relevant information

CIO is concerned about the requirement for a consumer to provide a statutory declaration under A.9.2. Individuals and small businesses find it difficult to locate a Justice of the Peace (or other approved witness) to witness their declaration. Further, statutory declarations have little probative value in the EDR context given they can’t be enforced by the scheme. CIO suggests deleting the requirement for a statutory declaration but retaining the requirement for steps and reasons.

#### A.11. Confidentiality

It is quite common for consumers to request, as part of their complaint, documents that are required to be provided by law. For example, the National Credit Act provides

that a debtor must be provided with a copy of the loan contract and may request a copy of the loan contract. For the sake of clarity, A.11.2 should be amended to specifically cover documents that the consumer would otherwise be entitled to at law – these do not need to remain confidential.

#### A.17 Systemic issues

CIO strongly supports the inclusion of the powers at A.17.4. It is critical that AFCA can effectively investigate systemic issues and provide redress and/or prevent loss to affected people.

#### Section B - Preconditions

##### B.2. Relationship giving rise to the complaint

It does not appear that privacy complaints relating to open banking are covered by this section. A key promise by the Government was to provide consumers access to EDR when using open banking (see recommendation 2.10 *Open Banking December 2017*).

Both FOS and CIO have jurisdiction to deal with privacy complaints under their respective terms of reference. CIO recommends that B.2.1 specifically allows AFCA to consider privacy disputes.

##### B.4 Time limits for complaints

There are five pages of information about time limits, including a summary table. We appreciate that these have been prescribed by ASIC, however we are concerned that consumers will find it difficult to understand. For example, it is particularly tricky to have one credit time limit where the later time limit applies (B.4.2.1.) and another where the earlier time limit applies (B.4.3.1.).

We suggest:

- AFCA staff will need to be well trained in the time limits that apply in particular cases and must consider these time limits when responding to enquiries from consumers,
- consumers should be referred to a solicitor (preferably one that does not charge a fee; eg. a community legal centre), and
- AFCA work to simplify time limits at the next review.

#### Section C – Exclusions

##### C.1 Mandatory exclusions

CIO agrees with the exclusions listed. However, we are concerned about the wording of the exclusions as “mandatory”. These exclusions have not been mandated by law or ASIC. It is inaccurate to describe the exclusions as mandatory except in the sense that AFCA has mandated its own exclusions. We would suggest a return to similar language to that was used in the CIO Rules or FOS Terms of Reference.

### C.1.2 Exclusions applying generally

C.1.2(d) permits AFCA to deal with a complaint after farm debt mediation. This is strongly supported. However, it would be useful for AFCA to include a process in the Rules to encourage early engagement and mediation in farm debt complaints specifically. As a general rule, the earlier the intervention with assisted dispute resolution the more likely the parties can come to a workable solution. AFCA can play an important role and the proposed Rules should reflect this.

### C.1.3 Exclusion applying specifically to credit complaints

CIO suggests that C.1.3(a)(i) should specifically mention responsible lending in addition to maladministration in lending. Maladministration is a wider concept but responsible lending specifically applies to credit covered under the National Credit Act.

### Section D – Remedies

CIO supports the drafting of this section.

If you have any questions regarding this submission please do not hesitate to contact me on 02 9273 8480.

Sincerely,



Raj Venga  
Chief Executive Officer and Ombudsman