

29 June 2018

Australian Financial Complaints Authority Limited
GPO Box 3
Melbourne VIC 3001

By email submissions@afc.org.au

Our ref: BSH

Dear Sir/Madam

Consultation on proposed AFCA Rules | Dentons Australia Submission

Thank you for the opportunity to make submissions on the proposed AFCA Rules (the **Rules**).

Dentons is proud of its long association with banking and financial services, and particularly its recent recognition as Best Law Firm at the Australian Retail Banking Awards.

We hope that these submissions as to consultation question 6 are of assistance. Please do not hesitate to contact us if we can assist further.

1. Rule A.7.2 – restriction on freezing orders

1.1 Proposed amendment

We submit that rule A.7.2 should be amended as follows:

A.7.2 Despite rule A.7.1, the Financial Firm may, with AFCA's consent or where it is impracticable to obtain such consent:

...

c) *exercise any rights it might have to freeze, preserve or sell assets the subject of the complaint where the Financial Firm believes on reasonable grounds that urgent action is required to protect or preserve those assets*

...

1.2 Reasons for amendment

Freezing orders (also known as “Mareva orders” or “asset protection orders”) are almost always obtained urgently and often (by reason of that urgency) without notice to the person in whose custody or control the relevant assets are held. We do not consider the requirement that AFCA provide prior consent to a Financial Firm obtaining such orders workable in circumstances where (as is often the case) freezing orders are obtained very shortly after the relevant risk of dissipation of assets is identified. Sometimes it is necessary for applications for freezing orders to be heard outside of normal business hours.

In our submission the proposed amendments would not unduly prejudice a Complainant because:

1. freezing orders are difficult to obtain and comparatively rare;
2. an applicant for a freezing order must establish the real risk of dissipation of assets; and
3. an undertaking as to damages must be provided.

The greater jurisdiction exercised by AFCA is likely to increase the instances in which freezing orders are contemplated, and in our submission the proposed amendments appropriately balance the interests of the Financial Firm and the Complainant.

2. Rules A.7.6 and E.1.1 – restriction on defamation action

2.1 Proposed amendment

We submit that proposed rule A.7.6 should be amended as follows:

A Financial Firm must not instigate defamation action of any kind against the Complainant in respect of ~~relation to~~ allegations about the Financial Firm made to AFCA by the Complainant, anyone else joined as a party to the complaint or Other Affected Party.

We submit further that subparagraph d) of the definition of “Financial Firm” in rule E.1.1 should be amended by deleting the reference to rule A.7.6.

2.2 Reasons for amendment

The proposed rule as amended is in substantially identical terms to paragraph 13.3 of the Financial Ombudsman Service Terms of Reference (the **FOS ToR**). The key differences between proposed rule A.7.6 and paragraph 13.3 of the FOS ToR are:

1. by reason of the expanded definition of “Financial Firm” in subparagraph d) of rule E.1.1, rule A.7.6 seeks to restrain action by a Financial Firm’s employees, representatives, agents and contractors in respect of allegations made against those persons or entities. Paragraph 13.3 seeks only to restrain a financial services provider (**FSP**) in respect of allegations made about the FSP;
2. rule A.7.6 restricts action “in relation to” allegations made to AFCA, whereas paragraph 13.3 refers to action “in respect of” such allegations; and
3. rule A.7.6 restricts action against anyone, whereas paragraph 13.3 restricts action against an applicant.

We presume that the rationale for paragraph 13.3 of the FOS ToR is to provide comfort that complaints about a FSP to FOS may be made freely and fearlessly. It is unnecessary, in our submission, that immunity from defamation action extend to, for example, a commercial broadcaster who publishes defamatory allegations in respect of an accountant engaged by a Financial Firm which happen to have some connection with those made by a complainant to AFCA. In our submission, rule A.7.6 in its current form is capable of producing such an outcome.

There are likely to be difficulties enforcing rule A.7.6 insofar as it concerns a Financial Firm's employees, representatives, agents or contractors. Unlike a Financial Firm, they are not contractually bound by rule A.7.6.

We do not understand, and the Final Report of the *Review of the financial system external dispute resolution and complaints framework* (the **Ramsay Review**) did not identify, any concerns with the efficacy of paragraph 13.3 the FOS ToR. In our submission, it is adequate.

3. Rule A.10 – Information sharing

3.1 Proposed amendment

We submit that rule A.10 should be amended to add the following:

A.10.4 Despite rule A.10.1:

- a) *AFCA must not disclose to a party to a complaint information provided by another party to the complaint where the party supplying the information has refused consent to this (and, in the absence of a clear statement to the contrary, AFCA is entitled to assume that consent is given to the material in its entirety being provided to the other party to the complaint); and*
- b) *if a party to a complaint refuses consent to provide information to another party to a complaint, AFCA is not entitled to use that information to reach a decision adverse to the party to whom confidential information is denied unless AFCA determines that special circumstances apply.*

3.2 Reasons for amendment

The amendments proposed are in substantially identical terms to subparagraphs 17.4(b)(ii) and 17.4(c) of the FOS ToR. In our submission, the proposed amendments deal more appropriately with AFCA's handling of commercially sensitive information that may be relevant to a complaint.

Information regarding the marketing or valuation of assets which secure amounts owing, and which are or will soon be sold, is an example of commercially sensitive information that may be relevant to a complaint. The dissemination of (for example) valuations in the marketplace has the potential to diminish the sale price of the assets.

As was observed in the Ramsay Review:

11.30 In practice, if a consumer is making a complaint about the conduct of a third party or agent, such as a valuer, accountant or receiver, the EDR scheme will look to the financial firm (commonly a bank that is a member of the EDR scheme) to provide the relevant information.

11.31. It is the Panel's understanding that generally, the contractual relationship between the EDR scheme and the financial firm enables the scheme to obtain information that relates to a third party engaged by the financial firm from the financial firm itself. If this information is not provided, the EDR scheme is able to draw an adverse inference against the financial firm, as discussed in Chapter 5. Where the financial firm has a contractual or agency relationship with the third party — which is generally the case with accountants or valuers it appoints — it is able to obtain the information from the third party.¹

¹ https://static.treasury.gov.au/uploads/sites/1/2017/06/R2016-002_EDR-Review-Final-report.pdf, page 205.

The ASBFEO *Inquiry into small business loans* also observed in a related context:

Information should be provided in a balanced way and recognise legitimate concerns and limitations on the receiver releasing information around certain asset sale activities, especially those that could have an impact on the ability of receivers to perform their appointed role and achieve the best price. In several cases, misunderstanding over the current market value of assets prepared for sale and the sale price achieved against previous valuations contributed to frustration of borrowers and allegations of receivers not fulfilling their obligations under Section 420A of the Corporations Act. This section requires receivers to take reasonable care to sell property for market value or the best price that can be reasonably obtained in the circumstances.²

The protection provided by rule A.11.2 does not, in our submission, adequately balance legitimate concerns as to the consequences of the release of commercially sensitive information against the desirability of complete transparency in AFCA's handling of complaints. Other parties (such as third party guarantors) may be prejudiced by lower sale prices obtained as a result of the release of commercially sensitive information.

4. Rule A.14.2 – Decision making approach

4.1 Proposed amendment

We submit that rule A.14.4 should be amended as follows:

A.14.4 A Determination must be in writing with reasons. If it is necessary to deviate from legal principles to achieve fairness in the circumstances, the AFCA Decision Maker will identify the basis for doing so in the reasons. Any remedy must be within AFCA's scope as set out in Section D.

4.2 Reasons for amendment

The proposed approach to the determination of complaints set out in paragraph A.14.2 is substantially identical to the FOS ToR. It contemplates that a decision maker will have regard to, but is not bound by, legal principle in arriving at an outcome that is fair in the circumstances.

While a fair outcome may in some cases involve some deviation from legal principles, such instances will be rare because:

1. the application of the law will ordinarily produce a fair outcome; and
2. parties will have legitimate expectations that a dispute to which the law applies will be determined according to law, and it is fair that those expectations are met.

As to point 2 above, where the value of the dispute is low, parties will more readily tolerate an approach to decision making in which strict adherence to legal principle gives way to expedience. Parties will be less accepting of such an approach in higher value disputes. The jurisdiction to be exercised by AFCA will include disputes of a value usually determined in the Supreme Courts. This adds weight to the submission that the basis for any departure from legal principles should be clearly articulated in the reasons.

We are aware that a statement similar to the proposed addition to rule A.14.4 appears in FOS's *Operational Guidelines to the Terms of Reference*, and rule A.1.2 of the Rules contemplates the development of Operational Guidelines which might include a similar statement. It is, in our submission, preferable that the amendment proposed have the contractual force conferred by rule A.1.2.

² http://asbfeo.gov.au/sites/default/files/030217-ASBFEO_Report.pdf, page 49.

We thank you once again for the opportunity to make submissions on the Rules. Please contact us should any clarification or elaboration be required.

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized loop that starts on the left, goes up and over to the right, then loops back down and under to the left, ending with a long horizontal stroke extending to the right.

Ben Shaw
Partner
Dentons Australia