Your Choice, Your Voice

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Consultation on Proposed AFCA Rules

The FBAA as the leading professional association to finance and mortgage brokers across Australia, welcomes the opportunity to make a submission relating to the new rules of AFCA.

As the representative body of thousands of small businesses and individuals impacted by EDR we are passionate about supporting an EDR scheme that is fair for all parties.

The costs of complaints handling for licensees is significant in terms of both time and financial cost, even before EDR becomes involved. The FBAA in previous submissions has stated that its priority is to ensure licensees are not unfairly disadvantaged by the rules of EDR schemes particularly in relation to being able to defend baseless or vexatious complaints without incurring significant cost penalties regardless of the outcome. We refer to our November 2017 submission on the Establishment of AFCA in particular.

The consultation paper poses 6 questions. The bulk of our submission is made against Question 6. In relation to Questions 1 through 5, the Rules are drafted in clear language and strike a good balance between user-friendliness and detail. We have nothing further to submit against Questions 1 to 5.

Structure and ordering of the AFCA Rules

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

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

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?

Superannuation complaints

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

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Reporting obligations

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

General

6. Are there any other issues that require consideration?

We have comments against some of the Rules. The order of our submission follows the sequence of the Rules.

A7.1 Restrictions on Financial Firms during a complaint

We are aware of instances where members have obtained judgments and court orders and been in the process of having those orders executed when a complaint is made to EDR. EDR schemes should not intervene when enforcement action is so significantly advanced and should instead allow the action to be completed and hear the complaint post event. In many cases Financial Firms need to secure the asset to preserve it. Delaying recovery frequently erodes any equity the consumer may have in it. Members incur significant time delays and financial cost to obtain a court order or default judgment and consumers will have been furnished with a significant amount of paperwork prior to the order being obtained.

We recognise Rule 7.2 allows Financial Firms to proceed with enforcement with AFCA's permission. We would prefer to see the onus reversed in the drafting of this Rule– that is that AFCA must direct a Financial Firm to cease or suspend enforcement activity only where it has compelling grounds to do so. We encourage AFCA to adopt a pragmatic approach to these Rules by not unreasonably frustrating a Financial Firm's enforcement action once orders have been obtained.

A.16 Complaints about AFCA's service

We are disappointed to see that the Rules do not allow for the Independent Assessor to make a recommendation that AFCA give consideration to re-opening, changing or correcting a determination (rule A 16.3) and that the Independent Assessor's recommendation is not binding on AFCA.

The Independent Assessor's role is largely redundant if they are powerless to effect change and their recommendation in not binding.

Section C - Exclusions

C.1.3

The AFCA Rules should make it a mandatory exclusion where the decision was a refusal / decline to provide services or offer credit. The current drafting of Rule C.1.3 may be intended to give effect to this although, if it is, we recommend the wording be made clearer.

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C.1.3. currently reads:

Exclusions applying specifically to credit complaints

C.1.3 AFCA must exclude:

a) A complaint about the Financial Firm's assessment of the credit risk posed by a borrower or the security to be required for a loan unless the complaint is about:

(i) Maladministration in lending, loan management or security matters, or

(ii) the variation of a credit contract as a result of the Complainant being in financial hardship

b) A complaint about a Small Business (including Primary Producer) credit facility:

(i) of more than $5 million or higher amount that applies as a result of an adjustment in accordance with rule D.4.3, and

(ii) where the complaint is submitted by the borrower or a guarantor of the borrower's debt.

This drafting does not make it clear that a complaint cannot be brought against a credit provider for their refusal to offer credit (or a credit assistance provider for their refusal to provide credit assistance). The current drafting is quite narrow and focuses only on *the assessment of the credit risk posed by a borrower or the security to be required for a loan*. Credit providers consider many other factors when performing an assessment of unsuitability and may choose to decline to offer credit for many different reasons. The reasons are not usually conveyed to the consumer and the credit provider is not required to provide the consumer with a copy of the responsible lending assessment (or its reasons). Credit assistance providers have different criteria again. We recognise one of the challenges is that the exclusion must apply to credit providers and credit assistance providers and that their activities are different.

We recommend C.1.3 a) be re-worded to more broadly exclude complaints about the decision to engage in activities. This includes where no offer of credit is made or where the decision is to refuse to provide assistance. The sub-categories i) and ii) can remain.
The wording used under the Insurance section C.1.4 d) seems clearer and may be more effective. C.1.4 d) excludes a complaint about a decision to refuse to provide insurance cover. The drafting of C.1.3 a) could utilise the language of the credit legislation by referring to a refusal to engage in credit activities or a refusal to offer credit or credit assistance

More generally

We are still looking for more comfort around protection of members from frivolous claims. We recognise that the rules permit AFCA to exercise discretion to not hear complaints however there is nothing in the Rules or commentary that relates to the costs passed on to Financial Firms.

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We strongly maintain that the scheme should adopt a no-fault policy where members are not charged for having their names put forward to the scheme and where it is subsequently found that a claim is baseless.

We have also previously proposed that member firms should receive one fee-free notification in each membership year. AFCA could waive (or absorb) any fees associated with the first complaint received in any membership year where that complaint does not proceed to a determination or other outcome by AFCA.

The FBAA could provide dozens of examples of where the "free-hit" of EDR is being lauded over members. The actions of debt repair companies brought some of this conduct into the spotlight. The anecdote below is from a recent real-life example.

Example of how EDR threat is being used

A licensee inadvertently shared one consumer's information with another consumer. The recipient knew the information they had received was sent to them in error yet proceeded to review the information (in the process committing their own breach of privacy laws) before contacting the intended recipient to advise them. Only on being contacted by the intended recipient was the licensee made aware that the breach had occurred. The consumer did not suffer any loss. The consumer demanded by way of compensation that the licensee upgrade their upcoming overseas flights from economy to business class tickets at a cost of many thousands of dollars. The licensee did not agree to this but ultimately agreed to pay a significant sum to the consumer where the appropriate remedy would have been little more than an apology and a token gesture. The consumer was familiar with the costs charged to licensees by EDR schemes. The cost of the dispute merely being lodged with EDR made it almost impossible for the licensee to negotiate a fair settlement with the consumer.

END

Yours faithfully

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