Submission to AFCA regarding draft Rules

Background: Consumer who, having been through the EDR process with CIO, finding in FSP favour. Took matter to court. The FSP then used the information and documents from those CIO proceedings – confidential and Without Prejudice; using them with extreme prejudice to affect those court proceedings – actually affecting those proceedings. FSP was reported to CIO and ASIC for Serious Misconduct.

Aim: To prevent the loopholes in the previous EDR being carried over or made worse in the new EDR, and to ensure the rights of complainants are properly respected; and to ensure that measures are in place so that if a complainant rejects a decision or determination, their rights are fully protected in regards to taking the matter to court.

Comments are as follows:

A.1.2 Being free to a complainants means no consideration – and no contract. Better to say that all members are contractually bound by their membership and that complainants, by using the services of AFCA, agree to be bound by the rules and guidelines of AFCA. (Same as FOS and CIO)

A.1.5.A The confidential and without prejudice obligations in these rules, apply to all documents and information in regards to EDR cases that occurred prior to the 1 Nov 2018, as if those cases had occurred under this EDR. This is to ensure that the private, confidential and "without prejudice" nature of the previous EDR schemes continues.

A.1.6 (new) A Complainant, who at the end of the AFCA Complaint Resolution process, who rejects the decisions and or determinations of AFCA, retains their full legal right to pursue the matter in Court, unaffected in any way, by the fully confidential, without prejudice nature of the AFCA proceedings. This is as per CIO Rule 39.3 – as per old ASIC RG139.190 and RG139.217.

A.1.7 (new) The AFCA Complaint Resolution Scheme is not a Court and does not exercise any Judicial Functions. Any decisions and determinations do not, in any way, create any precedent for any Court to follow, or act as evidence, in any way, in any court – and are barred from being submitted to any court in relation to a matter that involves that was considered in those EDR proceedings. This as per *Utopia Financial Services v Financial Ombudsman Service [2012] WASC 279.*

A.3.1 Need to add that in addition to agreeing for complaint to be handled under the rules, the complaint agrees to comply with, and be bound by those rules.

A.6.3 Where a Financial Firm includes those that act on its behalf, the complainant may not have identified the correct AFCA Member who is actually responsible. If a member is acting on behalf of another member, AFCA will open the complaint in the name of the member being acted on behalf of. This allows AFCA to resolve the complaint against the appropriate member. This addresses situations where you have a Mortgage Broker => Mortgage Manager => Servicer => Lender of Record. The Lender of Record would be the AFCA Member from a complaint perspective – as that includes all that can act on its behalf. The lender is also the only one who has a legal relationship with the complainant.

A.6.4 An AFCA member may nominate another AFCA member to respond on its behalf.

A.6.5 As per A.6.2 and A.6.3, it is the person who has the legally binding relationship with the Complainant who will, unless deemed otherwise, will be the appropriate Member for all complaints, to be the "financial Firm" the complaint is opened against.

The gist of these points is to avoid Members ducking behind other members to avoid being held accountable. This was a loophole possible under CIO Rule 19.3 – which was used by two CIO members that I know of.

A.7.7 A Financial Firm must not include the duration of any AFCA dispute resolution in a Limitations defence in any proceedings, if the complainant, at the end of the AFCA process, decides to take the matter to court.

A.8.1 This will usually involve creating a Complaint Summary with Complainant and Member position, so that all parties are "on the same page". From there, informal methods are tried first.

A.9.2 Although being satisfied, AFCA must still be able to infer from the failure to produce the information by a member that it will treat that AFCA may treat that failure negatively from the Members perspective.

A.9.5 AFCA needs to bear in mind that most borrowers do not enter financial transactions with the intent on lodging complaints. Not all information may be readily available and the failure to provide a specific requirement does not necessarily mean the complaint would not be made out. Word it in a nicer way at least.

A.10.1 Need to add, that in accordance with rule A11, all information, and any documents prepared by the scheme, are provided on a Confidential and "without Prejudice" basis – both whilst a complaint is open and after a complaint is closed.

A.10.2 Same should apply before a Preliminary Assessment. Complainant needs to be able to make a submission based on what the member responds with. Even a court allows that.

A.11.1 Should clearly state "Confidential and Without Prejudice" basis.

Need to clarify "information" to be "information, documents – including any and all scheme prepared documents such as decisions, preliminary assessments, and determinations". This is to prevent the use of an AFCA determination, "not being information", as a basis for an "abuse of process" application in court – "*AFCA already having decided in prelim assessment AND Determination*" . This is what was actually done by a CIO Member in June 2018. .

Need to add requirement for AFCA to first be notified, and approval be granted, for any use (equivalent of CIO Rule 33.8). Prevents "appropriate court process" being abused – and restricted only to those not detrimental to complainant. (AFCA is not to be used as a weapon against any complainant, by any member).

AFCA could add an "explanation" that EDR confidentiality is similar to court ordered mediation – Confidential, without prejudice, and other than advising if the matter has been resolved, nothing can be mentioned in court.

A.11.2 Need to state that the confidentiality obligation is a permanent obligation as per CIO Rule 32.2. Change "must maintain" to "must always maintain". Information defined as per above.

A.12.1 Before issuing a preliminary assessment, there should also be a preliminary summary. There is no point "deciding" on a complaint if the summary of the complaint does not match what the complainant was intending to be decided. The CIO process did not require a complainant to approve or review the case managers summary.

A.12.2 CIO process at least gave the complainant the right of reply to the Members response. The AFCA process appears to be missing that. Seems to be a procedural fairness failure. Should probably first have initial assessment – booth parties can provide feedback – and then a preliminary assessment based on both feedbacks.

A12.4 Add a reminder that everything submitted or received still retains its confidential and without prejudice status – and nothing, including the preliminary assessment, can be used or disclosed to any person outside of the AFCA complaint process.

A.14.2 Need to add e) Principles of Equity. A promise made to induce a contract ("discount of 1% for life of loan" in an advertisement or "competitive rates") will create an estoppel to bind the promisor to

that promise. None of the four principles factor that in and would find against member if Terms and Conditions did not include it – whereas court would find for complainant irrespective of Terms and Conditions.

A.14.3 Need to add that AFCA expects, and requires, that its members will always provide all information relevant to resolving the dispute, even if it is not favourable to the member, and even if not specifically asked for. Stops members hiding behind internal decisions or policies and allows disputes to be resolved "in all circumstances".

A.14.5 Add that a party may not use that de-identified published Determination in any future manner such that the complainant or member is identified. This is to ensure that the confidential nature of AFCA EDR is maintained and guaranteed.

A.15.3 AFCA is to first review that "binding release" to ensure that both a) and b) are complied with. AFCA to act as "go between" to ensure process is followed, so that Member is in full compliance, and so there is no dispute later as to what actually got settled and how. If everything is without prejudice and confidential, AFCA needs to be the middleman in the actioning of the Determination.

A.16.5 What is the point if the recommendation is not binding? Is it binding on the Member? Is it binding on the Complainant?

If the AFCA Case Manager Preliminary assessment misses a vital point, and the initial response under 16.1 does not fix it – what is the point of 16.5 if a Preliminary Assessment cannot be fixed. That is why need both Initial Assessment – get feedback – Preliminary feedback – then goes to determination.

After the Preliminary Assessment stage no, but at Preliminary Assessment stage – Independent Assessor should be able to recommend redoing preliminary assessment, and the basis for requesting so. This would definitely reduce the number of Determinations needed – and the number of complaints that end up in court. This is kind of like CIO Rule 8.1 / 8.2.

**** Although there is the expulsion option in the AFCA Constitution, there is no other option available under AFCA constitution for non-compliance with AFCA Rules / ToR ***

A.18.3 Needs to be made clear that any breach of confidentiality or use of the "without prejudice" information, including an AFCA preliminary decision or a determination, outside of the AFCA dispute resolution process, undermines the foundations of the EDR process and is automatically deemed to be a "serious breach" as per old RG139.217(existing). It is needed to meet RG139.162(proposed) and RG139.163 (proposed).

Given that it cannot generally be "undone" – AFCA must have remediation options such as under a.16.3 – Independent Assessor (or the AFCA Board) can award the amount of the claim against the Member in breach – and an "order to comply" for the Member to undo, as far as possible, any damage done. There has to be a consequence of non-compliance which affects a complainants fundamental right to have the matter heard in court, unaffected in any way from the EDR process.

A.18.4 (new) All members understand and agree that following the rules of ASIC approved EDR is fundamental to the ongoing success of the EDR. Any breach of the AFCA Rules by a member may result in expulsion. Each member agrees that that the AFCA Board, by resolution, may propose a penalty and or other such remedial action, apply as an alternative to expulsion. If alternative not met, it automatically as "grounds for expulsion" – and refer the matter to ASIC ATO etc. (This is equivalent to FOS TOR 13.7 – just in more detail)

A.18.5 (new) A member will, in accordance with procedural fairness, be given no less than 7 days to respond to a "request to explain" in regards to any allegation that an AFCA rules has been breached by the member. Any finding of a breach that negatively impacts a complaint or a complainant, will be reported to an appropriate authority, and is automatically grounds for expulsion. This matches RG139.158 (proposed)

A.22.1	You are providing a service under the ACL to members under a contract for service. You can exclude those Guarantees, but you can limit your liability to providing the service again – suggest you incorporate that in some manner.
B.4.3.1	Should be an OR rather than an AND at the end. If an IDR response goes over the six years, a complaint will be rejected under a) even if they had raised it with Member in time.
E.1	
Financial Firm	Under d) Why just rules B.2 A.7.1 and A.7.6? Should be all B.2 and all of A. CIO definition of FSP was cleaner and clearer. Should also include that the "state of mind" of that "other person" is also, for the purposes of the complaint, is the State of Mind of the Financial firm. Should also state that the actions of those acting, in any way, on behalf of the Financial Firm, is also an action of the Member (As per ASIC Act 12GH) The quick guide shows this correctly – just need to make sure it is explained clearly. Also need to make sure not just employees or agents – must include representatives and those "acting on behalf of the member" – so as to catch all the relationships which specify they are not agents but are acting "on behalf of" such as securitisation complaints.

End of Submission.

Submission sent via submissions@afc.org.au