Stockbrokers And Financial Advisers Association Limited

29 June 2018

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

By email: submissions@afc.org.au

Dear Mr D'Argaville,

Submission on proposed Australian Financial Complaints Authority Rules

We refer to the consultation paper on the proposed Australian Financial Complaints Authority (**AFCA**) Rules, dated 1 June 2018 (the **Consultation Paper**), which invites written submissions in relation to the proposed AFCA Rules. The Stockbrokers and Financial Advisers Association Limited (**SAFAA**) welcomes the opportunity to provide comment.

We note that AFCA has stated in the Consultation Paper that consideration of its jurisdictional exclusions is outside the scope of the consultation[1]. Similar comments were made during the AFCA Rules consultation seminar on 13 June 2018. In each instance, the rationale was that the proposed AFCA Rules do not encompass any further extension or change to AFCA's jurisdiction beyond the Federal Government's reform program.

We respectfully disagree with this rationale in relation to AFCA's future consideration of complaints concerning the provision of financial services (other than in relation to superannuation)[2]. Specifically, there are two substantive changes to the proposed AFCA Rules, as compared to the current Financial Ombudsman Service (**FOS**) Terms of Reference and the Credit and Investments Ombudsman (**CIO**) Rules, which will extend AFCA's jurisdiction, as follows:

1. Removal of mandatory (CIO) or discretionary (FOS) exclusion for complainants that are not 'retail clients' under the *Corporations Act 2001* (Cth)[3]. Under the proposed AFCA Rules, AFCA will be obliged to consider complaints from such persons, provided they meet the general eligibility requirements.
2. Change in language concerning when AFCA can consider a complaint which is lodged after the stipulated time limits. Currently, FOS and CIO can only consider such complaints in

[1] See page 4.
[2] Our focus is naturally on financial services provided by our members, particularly investment advice and brokerage in relation to securities. These services require members to maintain an Australian financial services (**AFS**) licence (in accordance with section 911A of the Corporations Act) and complaints relating to these services are currently considered by FOS and CIO. Accordingly, references to 'financial services' in this submission are to financial services regulated under the Corporations Act, and we have not considered the position in relation to matters which are currently regulated by other legislation (such as the *National Consumer Credit Protection Act 2009* (Cth)) or under the jurisdiction of the Superannuation Complaints Tribunal.
[3] See section 761G.

'exceptional circumstances'. Under the proposed AFCA Rules, AFCA may consider them where 'special circumstances' apply.

We have included comment below in relation to these matters and respectfully request that the final AFCA Rules be amended to reflect the current jurisdictional limits of FOS and CIO[4], in particular as a) we have seen no evidence to suggest these changes have been mandated by the Federal Government, and b) extensions to AFCA's jurisdiction when compared to the predecessor schemes 'require detailed consideration and extensive consultation after the new scheme has commenced[5]'.

We have also added some general remarks concerning the establishment of AFCA below.

Removal of exclusion for non-retail clients

Under the proposed AFCA Rules, AFCA will be obliged to consider complaints relating to the provision of financial services from a person who is not a retail client under section 761G of Corporations Act (i.e. a 'wholesale client'[6]), provided they meet the eligibility requirements.

However, the current FOS Terms of Reference give FOS discretion to decline to consider complaints where the applicant is not a retail client[7]. The CIO Rules go further – given the definition of 'consumer', CIO cannot consider a complaint relating to financial services where the complainant is not a retail client[8]. Accordingly, the proposed AFCA Rules have removed the exclusion relating to non-retail clients and AFCA's jurisdiction will be extended compared to its predecessors.

In this regard, we have been unable to find any previous suggestion by the Federal Government (either pursuant to a recommendation in the *Ramsey Report* or otherwise) to expand AFCA's jurisdictional scope to non-retail clients; nor was it mentioned by the Australian Securities and Investments Commission (**ASIC**) in its consultation paper concerning proposed oversight of AFCA[9]. AFCA's mapping document, comparing the FOS Terms of Reference, CIO Rules and proposed AFCA Rules (the **Mapping Document**) simply notes that the proposed extension follows discussions with ASIC and Treasury[10].

In addition, it should be noted that the implementing legislation for AFCA[11] retains the current position in relation to dispute resolution for Australian financial services licensees, so that the relevant requirements (including mandatory AFCA membership) only apply to entities that provide financial services to retail clients[12]. We submit that if the Federal Government had intended to extend AFCA's jurisdictional scope to non-retail clients, this would have been reflected in the implementing legislation.

Further, in its consultation paper on the establishment of AFCA[13], Treasury asked whether the existing exclusions from FOS and CIO jurisdictions present any unreasonable barriers to accessing

[4] Subject to our comments in relation to a mandatory exclusion for wholesale clients (see below).
[5] Consultation Paper, page 4.
[6] Section 761G(4) provides that a person is a wholesale client if they are not a retail client under that section. In this context, we refer to 'non-retail clients' and 'wholesale clients' interchangeably.
[7] Rule 5.2(b).
[8] Rules 6.1(a) and 45.1.
[9] ASIC Consultation Paper 298 *Oversight of the Australian Financial Complaints Authority*.
[10] AFCA *Mapping of FOS Terms of Reference (TOR), CIO Rules and AFCA Rules*, June 2018, pages 11-12.
[11] *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth).
[12] Corporations Act s912A(1)(g) and (2)(c).
[13] Treasury Consultation Paper *Establishment of the Australian Financial Complaints Authority*, November 2017

the schemes[14]. None of the resulting submissions from the Consumer Advocates Group[15], Legal Aid Queensland[16], Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**)[17] or Catherine Wolthuizen and Philip Cullum[18] (which can reasonably be seen a proxy for consumer and small business concerns in relation to the existing arrangements) recommended an extension of AFCA's jurisdiction to non-retail clients. The Legal Aid Queensland submission instead noted that the 'existing exclusions do not place an unreasonable barrier to accessing EDR schemes'[19].

Given the above, we do not accept that the proposed extension of AFCA's jurisdiction in relation to non-retail clients was part of the Federal Government's reform agenda nor see any need for change in this context. We accordingly request that the final AFCA Rules include an exclusion for non-retail clients (thereby reflecting the existing arrangements).

In this regard and given the discrepancy between the FOS and CIO exclusions[20], we submit that the better position is a mandatory exclusion for non-retail client complaints relating to financial services (as per the CIO Rules). As noted above, the implementing legislation for AFCA concerns retail clients only and the relevant dispute resolution obligations (including membership of AFCA) are the only 'general obligations' for AFS licensees under section 912A of the Corporations Act with this limitation (and therefore should not be considered as unintended).

An extension of AFCA's jurisdiction beyond retail clients, in relation to financial services complaints is accordingly inconsistent with its implementing legislation and should not proceed, noting that the AFCA Rules should reflect the requirements of the implementing legislation (which AFCA confirmed was a 'guiding principle' in designing them[21]).

Consideration of time barred complaints in 'special circumstances'

The proposed AFCA Rules include time limits for the consideration of complaints relating to the provision of financial services[22], which are generally consistent with the existing FOS and CIO restrictions[23] as well as statute of limitation legislation in NSW[24].

However, AFCA will be able to consider complaints submitted after the expiration of those time limits if it considered that 'special circumstances' apply[25]. This language differs from the current position, whereby FOS and CIO can only consider otherwise time barred complaints in 'exceptional circumstances'[26]. The Judiciary also have limited rights to extend limitation periods where it is 'just and reasonable to do so', although these generally only concern claims relating to personal injury or death[27].

[14] See question 19.
[15] A joint submission from the Consumer Action Law Centre, Consumer Credit Law Centre SA, Consumer Credit Legal Service (WA) Inc, Consumers' Federation of Australia, Financial Counselling Australia, Financial Rights Legal Centre and Public Interest Advocacy Centre, dated 29 November 2017.
[16] Treasury Consultation Paper –Establishment of the Australian Financial Complaints Authority, submission by Legal Aid Queensland, dated November 2017
[17] Establishment of the Australian Financial Complaints Authority, submission by ASBFEO, dated 20 November 2017.
[18] Establishment of the Australian Financial Complaints Authority - a response to the consultation paper, by Catherine Wolthuizen and Philip Cullum, dated 20 November 2017.
[19] Page 6.
[20] As noted above, FOS have discretion to exclude complaints by wholesale clients, whereas CIO must not consider such complaints where they relate to a financial service within the meaning of the Corporations Act.
[21] Consultation Paper, page 6.
[22] Proposed AFCA Rule B.4.3.1.
[23] FOS Terms of Reference, Rule 6.2(b) and CIO Rule 6.3.
[24] *Limitation Act 1969* (NSW), section 14.
[25] Proposed AFCA Rule B.4.4.2.
[26] FOS Terms of Reference, Rule 6.2(b) and CIO Rule 6.4.
[27] See for example sections 60C, 60D and 62A of the Limitation Act.

The Consultation Paper does not provide any background as to the basis for this proposed new language, nor does the Mapping Document (which simply notes the change)[28]. Similarly, while ASIC's regulatory guide on its intended oversight of AFCA[29] notes the concept of 'special circumstances'[30], there is no explanation as to what this means nor why it was changed from the previous 'exceptional circumstances' which applied to FOS and CIO.

Further, the new language was not raised in Treasury's consultation paper on the establishment of AFCA in November 2017 (as acknowledged on page 14 of the paper). Indeed, while the Consumer Advocates Group noted in their submission to the consultation that capacity to consider complaints in exceptional circumstances was an essential feature of an effective external dispute resolution system[31], it did not suggest any extension beyond the current powers. Similarly, in its submission, Legal Aid Queensland noted that time limits are covered by the existing FOS Terms of Reference and CIO Rules and should be address in the AFCA Rules, without requesting any additional capacity[32][33].

Presuming 'special circumstances' are broader than 'exceptional circumstances', which the ordinary meaning would suggest, it appears that AFCA will have broader powers to consider time-barred complaints than its predecessors, without consultation or an explanation as to basis for the increase being provided.

Absent such consultation and an adequate explanation being provided and given that the change does not appear to have been included in the Federal Government's reform program[34], the proposed AFCA Rules should not extend AFCA's powers in this regard, particularly given the various policy considerations associated with limitation periods generally (including matters of equity and practical issues such as a lack of contemporaneous evidence for older cases) and the restrictions that apply to the NSW Judiciary under corresponding statute of limitations legislation (which reflect those policy considerations).

Accordingly, we request that the final AFCA Rules reflect the current FOS and CIO position, so that AFCA may only consider otherwise time-barred financial services complaints in 'exceptional circumstances'.

General observations

Notwithstanding AFCA's comments that this is a focused consultation covering a limited number of issues[35], we believe it is appropriate to restate our material concerns in relation to the establishment of AFCA generally and which have previously been raised in our various submissions in relation to the Federal Government's review of the financial system's external dispute resolution and complaints framework[36].

[28] Page 14.
[29] ASIC Regulatory Guide 267 *Oversight of the Australian Financial Complaints Authority*, issued 20 June 2018.
[30] See paragraph 168.
[31] See pages 16 – 17.
[32] See page 8.
[33] Neither the ASBFEO nor the Wolthuizen and Cullum submissions included any reference to a need for change in this regard.
[34] Once again, we have been unable to find any previous suggestion by the Federal Government (either following a recommendation in the Ramsey Report or otherwise) to expand AFCA's powers in this context.
[35] Consultation Paper, page 4.
[36] See for example, our submissions dated 7 February 2017, 13 June 2017 and 4 July 2017 in relation to the Review of the Financial System External Dispute Resolution and Complaints Framework and our submission dated 20 November 2017 in relation to the Treasury consultation on the Terms of Reference and other establishment issues for AFCA.

Specifically, we reiterate our strong objection to the arbitrary increase in AFCA's claim and compensation limits for financial services complaints, noting that:

a) The existing limits applicable to FOS and CIO are already the highest of any comparable scheme in any other country;

b) There is no evidence that consumers of investment advisory and brokerage services are suffering by not being able to access the current external dispute resolution schemes because of the current monetary limits[37]. As CIO noted in its submission to the Senate Economics Legislation Committee on the establishment of AFCA[38], FOS has never sought to increase its limits, notwithstanding its capacity to do so, while CIO has never seen a need for higher caps[39];

c) The Courts remain the appropriate forum to consider significant disputes relating to financial advice and brokerage, particularly given their general complexity;

d) The proposed AFCA arrangements do not include any of the safeguards that we believe are necessary to justify a higher claim limit (particularly rights to compel the production of evidence and party rights of appeal); and

e) Increased claim and compensation limits will result in significant increases in the cost of obtaining appropriate professional indemnity insurance and difficulties in obtaining cover.

More generally, higher claim and compensation limits for AFCA, when coupled with their broad capacity to consider all matters in making a determination (noting that AFCA will not be required to test a claim according to legal principles, including consideration of the contractual framework agreed between a financial service provider and its clients, which generally include limitations of liability except for negligence, wilful default or fraud[40]), *necessarily* increase the risks associated with providing financial services generally, and particularly the provision of financial advice and brokerage services.

A natural consequence of increased risk is for providers to seek greater rewards via higher pricing charged to clients. This upward pressure on pricing will likely be accentuated by increased professional indemnity costs (as noted above).

In addition, in our submission in February 2017, we noted that increased limits could result in a hollowing out of the market for small to medium advisory firms and that it would be a bad outcome if the only choice investors had was between the very largest financial service houses[41]. These concerns are amplified by the findings at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry where issues surrounding vertical integration and failures to appropriately manage conflicts of interest or meet client 'best interest' obligations have blighted the reputation of the largest financial service houses that provide advice.

It is a perverse outcome that the higher claim and compensation limits for AFCA will likely have the effect of forcing more Australian consumers seeking investment advice and brokerage services to the very firms at the centre of the controversies identified by the Royal Commission, and to paying

[37] While we acknowledge the position may be different in relation to superannuation and credit related services, the proposed AFCA Rules already include differing rights and obligations vis-à-vis differing services, including differing claim and compensation limits. We see no reason why the existing limits could not be retained for financial services regulated by the Corporations Act.
[38] CIO submission to the consultation on the Senate Economics Legislation Inquiry into the Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Bill 2017, dated 29 September 2017.
[39] Page 4.
[40] An AFCA decision maker must do what they consider is fair in all the circumstances and must simply *have regard* to legal principles (see proposed AFCA Rule A.14.2). They are also not bound by the rules of evidence or previous decision (see proposed AFCA Rule A.14.3).
[41] SAFAA submission to the Interim Report of the Review of the Financial System External Dispute Resolution and Complaints Framework, 7 February 2017, page 6.

higher prices to those entities. As the CIO feared in its submission to the Senate Economics Legislation Committee, the major banks will be the 'big winners' from the establishment of AFCA[42].

We accordingly request that the final AFCA Rules reinstate the claim and compensation limits which apply to FOS and CIO in relation to financial services regulated by the Corporations Act (including investment advice and brokerage).

Should you require any further information, please contact Peter Stepek, Policy Executive, on (02) 8080 3200 or email pstepek@stockbrokers.org.au.

Yours sincerely,

Andrew Green
Chief Executive

[42] See footnote 38, page 5.