

03 07 2018

Mike D'Argaville  
Australian Financial Complaints Authority  
GPO Box 3  
Melbourne VIC 3001  
submissions@afc.org.au

Westpac Place  
Level 19, 275 Kent Street  
Sydney NSW 2000

westpac.com.au

Re: Australian Financial Complaints Authority – Rules consultation

Dear Mr D'Argaville

Thank you for the opportunity to consult on the new draft Australian Financial Complaints Authority (**AFCA**) Rules. Westpac Group (**Westpac**) has participated in each step in the development of AFCA and very much supports the establishment of the new 'one-stop-shop'.

As previously expressed through our participation in Treasury's Review of External Dispute Resolution and Complaints Schemes and in our Submission to the Ramsay Review, Westpac considers an accessible, effective, timely and efficient system for dispute resolution is central to the trust and confidence of customers in the banking system. This system comprises both the internal dispute resolution (**IDR**) and external dispute resolution (**EDR**) mechanisms.

Westpac has undertaken a number of specific initiatives to enhance our IDR mechanism and deliver improvements in our standards of practice, service to customers and the management of complaints. We seek to ensure all complaints received are dealt with genuinely, promptly, fairly and consistently and complaint handling policies and processes are designed to ensure they deliver on this objective.

To further strengthen our internal processes, in 2016, Westpac appointed Adrian Ahern as the Westpac Group Customer Advocate. The Customer Advocate has provided an avenue of independent review for retail and small business customers outside of standard complaints review processes. This position enhances Westpac's existing dispute resolution framework and provides an additional level of confidence for customers in ensuring our process is fair and transparent.

In addition to the appointment of our Customer Advocate, our IDR process plays a vital role in delivering to Our 'Service Promise' (our commitment to providing a superior service experience to our customers and each other every time) and we encourage our customers to tell us if they are dissatisfied with any aspect of their experience. To assist us in addressing customer complaints and resolving disputes satisfactorily, Westpac supports efforts to boost customer confidence in this process by enhancing the transparency of dispute resolution processes and outcomes.

In June this year Westpac created a new Customer and Corporate Relations division, led by Group Executive Carolyn McCann. This new division brings together the management of our customer complaints resolution and reporting and our corporate affairs and sustainability functions from across Westpac. We see this as an important step in ensuring any customer issues stay front and centre at the

highest levels of Westpac. The new division will ensure we maintain open lines of communication with our stakeholder groups to identify and resolve root causes of any issues.

**Westpac’s approach to EDR**

Westpac has 14 million customers<sup>1</sup> and in a given year will process hundreds of millions of consumer and small business transactions. From time-to-time customers will have questions or concerns about certain decisions made by Westpac. Where these questions or concerns cannot be resolved directly with the customer through the IDR process, Westpac ensures customers are aware of and provided with the necessary information to access EDR forums.

In our previous submissions, and through our membership of the Australian Banking Association (ABA), we have expressed our view that AFCA should be efficient and effective and that decision processes should be transparent and clear – this is in the best interest of customers.

Westpac’s priorities are to ensure that:

- AFCA is able to appropriately review more complex and more diverse complaints – this means making sure that there are clear guidelines for the provision of information so that information exchanged is reliable and appropriate for an enhanced dispute resolution scheme;
- Customers experience consistent, efficient and appropriate rulings from AFCA – this includes ensuring that timeframes are appropriate and those complaints that would be more appropriately heard in the courts continue to be heard in the courts;
- That the operation of reporting obligations with regard to systemic issues are clear; and
- Customers’ privacy complaints are appropriately reviewed and customers are clear about where their privacy complaints should be directed.

As we move towards 1 November and the operation of the new AFCA, it is critical that AFCA delivers on the Government’s ‘general considerations’ of accessibility, independence, fairness, accountability, efficiency and effectiveness of the scheme<sup>2</sup>. With these general considerations in mind, Westpac provides the following commentary on the version of the draft Rules as released on 1 June.

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

<sup>1</sup> 1H18 Interim Results

<sup>2</sup> Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2017, Section 1051A

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

### *General observations*

The new draft Rules are easy to digest and are expressed clearly. The quick guide creates a user-friendly roadmap for potential complainants and Financial Firms (FFs) of the AFCA draft Rules. It provides a visual representation of the necessary preconditions and steps to making a complaint and directs the reader to where those preconditions and steps are set out in the Rules. It also sets out up front what remedies might be available to a potential complainant, which assists in setting expectations of both the potential complainant and the FF. The document itself is well constructed with the separation of certain product types and with the inclusion of useful tables – particularly those which clearly summarise the time limits for submission of complaints<sup>3</sup> thresholds and caps<sup>4</sup>.

### *Insurance related observations:*

In relation to the Table at D.4, Westpac seeks guidance as to how AFCA will interpret draft Rule C.1.2(e) regarding the value of a 'complainant's claim'. By way of example, for an income protection claim, the complaint will likely affect both past and future claim entitlements and often entitlements are to age 65. Therefore, as we interpret this rule, AFCA could make a decision in respect of a \$13,400 per month benefit owed in respect of a claim over a number of past years so long as the total amount of that claim did not exceed the \$1 million limit (which equates to up to ~6 years of past benefits). Further, if we are correct in this interpretation, then the \$1 million claim limit renders the \$13,400 per month capped amount redundant. For example, a complaint relating to an income stream policy held outside super in the sum of \$26,800 (twice the capped amount) per month could still be determined by AFCA provided the claimed past benefits were not for more than 3 years (\$964,800).

To allow the \$13,400 per month limit to have a better effect, we have made a suggested amendment in our mark up of Rule C.1.2(e).

Unlike life insurance held within a superannuation fund, decisions on complaints relating to life insurance outside superannuation will not be subject to an appeals process. Additionally, a decision made by AFCA binds Westpac and could affect the complainants' entitlements to future benefits for many years, making it difficult to manage any ongoing claim. This may also affect the future sustainability of the product and have an adverse effect on the risk pool which would be to the detriment of all other policy holders. This is another reason we are seeking clarification on C.1.2(e).

### *EDR Timeframes and complexities*

We note that ASIC has recently published Regulatory Guide 267 (RG 267) (which will replace Regulatory Guide 139) and will later consult on an updated Regulatory Guide 165 (RG 165) and this may have implications for IDR timeframes. It would be useful for AFCA to provide a table summarising the processing time under the new scheme as soon as possible. This will allow FFs to plan effectively.

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<sup>3</sup> AFCA June 2018, draft *Rules of Complaint Resolution Scheme*, p. 27

<sup>4</sup> *ibid.*, p. 38

With regard to EDR timeframes, we also note that the AFCA transition team has indicated that they are aiming to resolve the majority of matters at case management within 2-3 months (approx. 90 days) and more complex matters within 3-6 months (120 days). Westpac would appreciate further guidance on how these time limits are expected to be applied and what is meant by 'complex' in this context. With broader categories of complaints, and the prospect of joined parties (brokers, insurance agents etc.), AFCA will need to consider how it will meet the demands of these timing requirements and complexities which may have been previously dealt with in the courts. This may include consideration of whether timeframes and deadlines for the provision of information by complainants are required.

#### *Small Business threshold*

We welcome assurances from the AFCA transition team that complaints which now fall within the significantly increased small business threshold and which might be considered 'commercial', would likely be referred swiftly to an ombudsman-style conciliation to ensure effective treatment. However, we would also welcome additional guidance with regard to how this referral system is likely to work and whether FFs will be able to seek such a treatment directly.

#### *Timing of complaints resolution*

AFCA will be responsible for many more complaints with increased complexity, whilst balancing accessibility, independence, fairness, accountability, efficiency and effectiveness. To ensure a fair process, Westpac submits that AFCA will need to provide FFs longer periods of time to respond to often complex questions raised as part of some AFCA complaints and will need to consider additional resourcing requirements in respect of these types of disputes.

#### *Method of complaint resolution*

We also note that the AFCA transition team has indicated that they will retain the same degree of flexibility that FOS currently employs with regard to the method of resolution. Westpac supports this flexible approach. We also note that AFCA intends to use panels. Westpac considers that when making a decision as to the appropriate method of resolution, AFCA should consider a request by a FF (or other party) that the complaint be determined by an AFCA Panel. This is particularly important given the broader range of complaints that AFCA will handle which may require industry specific expertise.

We have included proposed wording in our mark-up of draft Rule A.13.1 in this regard.

#### **Reporting obligations**

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

Westpac notes that AFCA, consistent with the guidance now set out in RG267, intends to take a more proactive approach to reporting of systemic issues to ASIC than is the case under the previous FOS Terms of Reference.

In this context, it will be important for FFs to understand how and when they will be given the opportunity to consider and respond to an allegation of a systemic issue before AFCA reports such a matter to the relevant regulator. Westpac notes that allegations of systemic issues can often require detailed investigation by FFs due to the complexity of its FFs systems, processes and controls. We note that under RG 267, once AFCA has decided that a matter is a systemic issue, it needs to be reported to ASIC as soon as practicable but no later than 15 days after AFCA has made that decision. We would also appreciate guidance as to the process AFCA intends to follow once it has decided to report a systemic issue to a regulator (including whether, in the normal course, the FF will be given reasonable notice of AFCA's decision to report before the issue is reported to the regulator). We understand that AFCA may provide some further guidance on these in its Operational Guidelines, which we welcome.

In addition, given that the Corporations Act (s1052E) and RG 267 set out when ASIC expects certain matters to be reported to the appropriate authorities and as this is captured by draft Rule A.18.1, the basis for the inclusion of draft Rule A.18.2 is unclear to us. If this rule is to be retained, we think that guidance is required as to what AFCA will consider to be a 'serious breach' and how this is different from a 'serious contravention.'

6. Are there any other issues that require consideration?

**Joining of FFs (draft Rule A.6)**

In our view, FFs should be given the express right to request that AFCA join another party to the complaint. We have included proposed wording in our mark-up of A.6.1 and A.6.2.

The broader suite of complaints now being envisaged by AFCA, and its broader membership, is likely to create many more instances where joined parties will be appropriate. For complaints (other than superannuation complaints), it is proposed that AFCA can join another FF when AFCA considers it 'appropriate'. When AFCA provides its Operational Guidelines, we consider that AFCA should provide details of the circumstances where AFCA would consider it appropriate to join another FF.

**Restrictions on FFs during a complaint (draft Rule A.7.1 and A.7.2)**

We do not consider that a FF should require AFCA's consent to begin legal proceedings:

- where it is necessary to protect any assets securing the debt or to protect any rights the FF may have to freeze, preserve or sell the assets the subject of the complaint; or
- if the legal limitation period for the proceedings is due to expire, provided that the FF only takes the minimum steps necessary to preserve its rights.

In support of this, we note that RG 267 does not contemplate a FF needing the consent of AFCA to bring proceedings when the limitation period is about to expire.

We also do not consider that Westpac should require the consent of AFCA to:

- take any action to protect assets securing the debt; or
- exercise any rights it might have to freeze or preserve the assets the subject of the complaint.

Westpac notes that while consistent with wording provided in the FOS Terms of Reference, limitations of the kind set out in draft Rule A.7.(c)(ii) can have adverse implications for both customers and FFs. In our experience, this restriction can encourage some customers to commence and draw out FOS processes in order to delay formal recovery action for as long as possible. This may afford customers extended use of the security property, but it is often at the cost of eroding their equity and thus worsening their overall financial position. It also means that (if and when) Westpac is allowed to proceed with formal recovery action it is often required to make debt write offs which would not have been necessary if the security property had been sold earlier. We anticipate this issue could be exacerbated for business and commercial lending disputes which may be more complex and protracted, and involve security property which is inclusive of depreciating stock and chattels.

We have included proposed wording in our mark-up of draft Rule A.7.1 and A.7.2 in this regard.

We also note that the restriction on a FF's right to exercise a right to sell assets of the complainant without the consent of AFCA<sup>5</sup>, may lead to a considerably worse situation for a complainant where they have a Margin Lending facility. This risk is heightened in situations where there is market volatility resulting in fluctuations against the relevant borrower. This prohibition on exercising rights to sell assets is similar to the prohibition in FOS Terms of Reference.

Westpac previously sought clarification from FOS on whether this prohibited a margin lender from exercising a power of sale to settle a margin call. FOS confirmed in writing to Westpac that it has been their consistent approach that calling in a margin loan is not debt collection for the purposes of paragraph 13.1 of the FOS Terms of Reference paragraph as the event (of margin call) is anticipated by the terms of the product in the event of certain parameters being met. FOS's consent was therefore not required before an FF executes a margin call. Westpac considers this right to be essential to the viability of the margin lending product and would appreciate confirmation from AFCA that AFCA will take a similar approach.

#### ***Small business or big business (draft Rule A.7.2)***

We note that the increased thresholds are a decision of Government and are not open for consultation. We simply note some points in relation to ensuring that AFCA meets the 'general considerations' noted above.

An entity may have a credit facility that is within AFCA's jurisdiction, and can make a complaint to AFCA which will mean the FF must seek consent of AFCA before commencing/continuing proceedings on a matter that is outside AFCA's jurisdiction (and therefore could not make a decision about). It would be appropriate to make clear that AFCA cannot unreasonably withhold its consent (and we have included proposed wording in our mark-up of A.7.2).

As per draft Rule C.2.1, AFCA will only exercise its discretion to exclude a complaint if there are 'compelling' reasons. Westpac notes that the financial classification of the client should be one such reason, especially given the new small business test. This is in keeping with the recommendation from the Ramsay Review, which noted that in respect to efficient complaint management, "the power to refuse to

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<sup>5</sup> *ibid.*, A.7.2(c)

hear disputes which are not suited to being resolved in an informal manner” should be “equally important” to “adequate coverage, powers, remedies, resources”<sup>6</sup>.

The proposed definition of small business differs from the definition adopted by the Code of Banking Practice 2013 edition (and in the current draft Banking Code of Practice that the ABA has submitted to ASIC for approval), FOS Terms of Reference, and Credit and Investment Ombudsman (CIO) Rules, which provide a “small business” is a business that employs less than 20 employees generally, or less than 100 employees *conditional on* the business being for or including the manufacture of goods. In addition, the Banking Code of Practice also includes a monetary threshold related to the previous financial year’s turnover of that business.

The only limitation in the draft AFCA Rules for a ‘Small Business’ is that the business has fewer than 100 employees. With only this limitation, it is open for large businesses to be able to use, or potentially misuse, AFCA. For example, it is possible for a business that operates with minimal staff, possibly including a complex structure of related companies or trust arrangements, but has a turnover in the tens of millions of dollars, to lodge a complaint with AFCA. Such types of businesses could clog up AFCA with complaints making it harder for those small businesses with limited resources that are in greatest need of the low cost efficient service of AFCA. This is contrary to the intention that AFCA will enhance access for consumers and small businesses to fair, efficient, timely and effective free dispute resolution. As noted above, Westpac’s view is that AFCA should stand ready to exclude such complaints under draft Rule C.2.1.

These same concerns are relevant to the operation of draft Rule C.1.2(f) in relation to Related Bodies Corporate and corporate structures where the number of employees is less than 100. There is currently no definition of what constitutes an employee in the draft AFCA Rules. With the concept of an employee open to interpretation, or more importantly lacking an appropriately expansive meaning, it is possible that large businesses may qualify to utilise AFCA merely due to the way in which such businesses structure their employee arrangements (*i.e.* firms which outsource to unrelated bodies corporate); similarly, while less likely, it is possible in time that businesses could structure their employment arrangements for the sole purpose of being able to take advantage of the 100 employee threshold currently set in the draft AFCA Rules.

Further, we note that business lending is a highly specialised area where bankers are required to exercise their professional judgement and discretion when following the FF’s guidelines. With the proposed changes to the definition of ‘small business,’ AFCA will need to consider more complex complaints and these complaints will often involve an examination by AFCA of the discretion that was exercised by the banker. Consideration of such complex complaints may also lead to a back log at AFCA which could mean that consumers and smaller business find it harder to access the low cost efficient service of AFCA. Further, there is a significant risk that decisions taken by AFCA with respect to the discretion exercised by specialist business bankers could have broad ranging consequences for business lending across the industry, effectively restricting access to credit. A suitably limited appeals mechanism that would allow an FF to appeal if it takes the view (for example) that AFCA has made a decision on manifestly incorrect facts, or in respect of a matter that could have broad ranging consumer or industry implications, might mitigate against this risk.

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<sup>6</sup> The Treasury 2017, *Review of the financial system external dispute resolution and complaints framework*, Commonwealth Government, p. 21

#### ***Limiting action outside AFCA jurisdiction (draft Rule A.7.2(e))***

The current draft Rules prevent a FF (without the consent of AFCA) from continuing any legal proceedings about a Small Business for a credit facility of more than \$5 million (*i.e.* greater than the monetary threshold of AFCA). This is open to misuse as businesses may lodge a complaint with AFCA for the purpose of stalling other legal proceedings, which are outside the jurisdiction of AFCA. This conflicts with the current position of both FOS and the CIO, which do not restrict a FF (referred to as a *Financial Services Provider* in their Terms of Reference) from commencing or continuing legal proceedings outside the monetary jurisdiction of FOS or CIO respectively.

We have included proposed wording in our mark-up of draft Rule A.7.2(e) (being draft Rule A.7.2(d) in our mark-up).

#### ***Defamation Action protection (draft Rule A.7.6)***

The current drafting of the rule can be broadly interpreted as preventing defamation action being brought in relation to statements made outside of communications with AFCA about a complaint. This would prevent legitimate actions being taken against a person, merely because they are party to, or Another Affected Person, in relation to a complaint with AFCA.

We have included proposed wording in our mark-up of draft Rule A.7.6.

#### ***Quality of Information (draft Rule A.9)***

Given the broader scope of complaints to be handled by AFCA and the prospect of more complex matters coming before it, it is critical that there are clear guidelines for the provision of appropriate quality information to AFCA from complainants and FFs. We note the AFCA transition team has indicated that the additional guidance we have sought here is more appropriate for 'Approach Documents'. Westpac's view is that the additional guidance material, which AFCA proposes to release in September, should include clarity on these processes. We particularly underline this with respect to its impact upon information later provided under draft Rule A.11.5 (which deals with providing information to regulators).

#### ***Statutory declarations (draft Rule A.9.2)***

Under draft Rule A.9.2, a party that relies on Rule A.9.1 is required to provide AFCA with a statutory declaration detailing the steps that it took to try to comply with AFCA's request. Given how regularly this may mean that parties need to provide AFCA with statutory declarations, we have proposed in our mark-up of draft Rule A.9.2 that statutory declarations are only required to be provided when requested by AFCA. We consider that parties should be able to initially provide AFCA with the reasons why it needs to rely on Rule A.9.1 and then AFCA can decide whether the situation warrants a statutory declaration being provided. This process could be outlined in the Operational Guidelines.

#### ***Other requests from AFCA (draft Rule A.9.3)***

Beyond the ability to require that information be provided to AFCA, AFCA can require a party to do anything else that AFCA considers may assist consideration of the complaint (*e.g.* requiring a party to attend an interview). We consider that:



- AFCA should be required to act 'reasonably' when deciding if the requested action may assist AFCA's consideration of the complaint; and
- this rule should be subject to exceptions where the requested action would: cause the party to breach other legal obligations or a court order; prejudice a current investigation by a law enforcement agent, cause a waiver of legal professional privilege; or be impossible for the party to complete.

We have included proposed wording in our mark-up of draft Rule A.9.3.

***Information Sharing (draft Rule A.10)***

This draft Rule states that AFCA will generally share the information provided by the parties. The FOS Terms of Reference (Rule 8.4) included the ability for a party to advise that it did not consent to certain information being shared among the parties. Given that information (which could include commercially sensitive information) could therefore be shared with other FFs joined to the complaint, we are of the view that a qualifier similar to that included in the FOS Terms of Reference is necessary. Similar to the FOS Terms of Reference, we consider that if a party to a complaint does not consent to provide information to another party to the complaint, AFCA should not use that information to reach a decision adverse to the party to whom the confidential information is denied (**Other Party**) unless AFCA determines that it is appropriate to do so. For example, AFCA may determine that it is appropriate to rely on such information to make an adverse finding, where AFCA is able to articulate to the Other Party the reasons why AFCA has made the adverse finding based on the information without needing to disclose the actual content of the confidential information. We have included proposed wording in our mark-up of draft Rule A.10.4.

Further, it is unclear to us why AFCA requires the ability to share information with parties even after the complaint has closed (draft Rule A.10.1). Given that AFCA is required to share all relevant information with the parties (unless special circumstances apply) before making a determination, we do not think that information should need to be shared after a complaint has closed. We have included proposed wording in our mark-up of draft Rule A.10.1.

***Confidentiality (draft Rule A.11.2)***

Under this draft Rule, parties are required to maintain the confidentiality of all information provided to them through the course of a complaint except to the extent reasonably necessary to resolve the complaint. What different parties may consider is 'reasonably necessary to resolve the complaint' could be very broad.

We consider that the right to disclose information in the circumstances listed in A.11.2(a) and (b) should be qualified by an obligation on the disclosing party to ensure that the third party (to which information is to be disclosed):

- is subject to confidentiality obligations; and
- has agreed to only use the information for the reason it was disclosed to them.

We have included proposed wording in our mark-up of draft Rule A.11.2(d).

### **Systemic Issues (draft Rule A.17)**

#### *Time for FF to respond and ability to require information and documents (draft Rule A.17.2)*

Under draft Rule A.17.2(a), AFCA must raise the potential systemic issue with the FF and give it the opportunity to respond. We consider that the time period specified by AFCA for the FF to respond must be reasonable given the often complex nature of systemic issues.

Under draft Rule A.17.2(b), when investigating a potential systemic issue, AFCA can require the FF to provide any information and documents AFCA considers necessary to investigate the issue.

There was no equivalent to this provision in the FOS Terms of Reference. This rule should be subject to similar exclusions as those that apply to AFCA's general right to request documents and information when investigating a complaint (in Rule A.9.1(a) to (c)) – for example, when to provide the information would breach a court order). In addition, exclusions should apply where providing the information or documents would create an unreasonable burden on the FF or cause legal professional privileged to be waived.

We have included proposed wording in our mark-up of draft Rule A.17.2.

#### *Ability to require FF to take or refrain from taking certain action (draft Rule A.17.4)*

Under this draft Rule, as part of investigating and referring a systemic issue, AFCA can require the FF to do or refrain from doing *any* act which AFCA considers necessary to achieve any one or more stated objectives. There was no equivalent to this provision in the FOS Terms of Reference.

We consider that the breadth of this rule goes beyond the intended scope of AFCA's powers and it would be more appropriate for ASIC (or another relevant regulatory body) to use their existing powers to make such directions. This is particularly the case as AFCA's determinations (unlike that of ASIC) will largely not be subject to judicial review and are not bound by the rules of evidence. In addition, in a complex organisation such as Westpac, requiring Westpac to take or refrain from taking an action may have broad reaching impacts on the operations of the bank and customers (who may otherwise have not been affected), and may have cost implications. For this reason, it is our strong view that Rule A.17.4 should be deleted in its entirety.

However, if AFCA does not accept this request, then we consider that there must be exceptions to this Rule (for example, where the request could cause the FF to breach other legal obligations, cause a waiver of legal professional privilege, could harm other customers or where the request would be impossible or unreasonably burdensome for the FF to comply with).

In addition to the breadth of the requirement to do or refrain from undertaking certain actions, the FF may be required to remedy any "... *loss or disadvantage suffered by consumers or Small Businesses (whether or not they have complained about the systemic issue)*"<sup>7</sup>. This requirement may lead to disproportionate consequence to the FF, especially as 'loss or disadvantage' cannot always be objectively defined. The scope of this power as currently drafted may allow AFCA to make directions that are impossible for FFs to

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<sup>7</sup> Draft AFCA Rule A.17.4(c)

comply with, or require the FF to breach other legal obligations in order to comply, or require disproportionate resources to be expended in order to identify all potentially affected consumers or Small Businesses. We also note that determinations made by AFCA under this broad power will be subject to little or no judicial review.

We have included proposed wording by inclusion of a new draft Rule A.17.5.

Further, the term 'remedial action' is used in draft Rule A.17 and is not defined. We consider that a definition of this term should be included or alternatively, that the Operational Guidelines should provide details of what 'remedial action' may consist of in this context (for example, that it may or may not involve the payment of compensation).

#### ***Time limits for Superannuation Complaints (draft Rule B.4)***

As drafted, we do not think that draft Rule B.4.1.5 is clear as to whether the circumstances set out in paragraphs (a) and (b) of the Rule fall inside or outside of the matters that AFCA will generally not consider unless submitted within two years of the date of the IDR Response.

We have included proposed amendments in our mark-up of draft Rule B.4.1.5 (based on our understanding from the table in draft Rule B.4.5.2).

Further, we note that the time limits for superannuation complaints under draft Rule B.4 do not include a time limit for income stream risk claims. We would appreciate if AFCA could confirm if it proposes to include a time limit for these types of claims.

#### ***Test Cases (draft Rule C.2.2(f))***

The draft Rules provide that AFCA may agree to exclude a case if it agrees to allow the FF to treat the complaint as a test case and the FF undertakes (among other things) to pay the complainant's costs of the proceedings. Similar provisions were included in the FOS Terms of Reference. Westpac considers it unlikely that test cases will be more attractive for FFs under AFCA, notwithstanding the increased risks of AFCA decisions with broad ranging consumer and industry implications, the increased jurisdictional limits and the expansion into business and commercial lending. Any test case that might otherwise be worthwhile to a FF from a precedent perspective would likely involve significant legal costs due to the complexity of the lending, underlying businesses, company and other arrangements and numbers of parties. Those complexities would increase from the additional involvement in an oversight capacity by AFCA.

Westpac suggests that a more attractive mechanisms for cases excluded by AFCA might be for the FF to agree to pay for AFCA's costs associated with participating in proceedings the FF might bring against an AFCA complainant, if AFCA, at its discretion (and with leave of the relevant Court), takes the view that the issues in a particular matter could have broader consumer/industry implications, and that the Court would be assisted by its intervention.

### ***Remedies for a Superannuation Complaint (draft Rule D.1.1(c))***

Draft Rule D.1.1(c) states that, in relation to a Superannuation Complaint, AFCA has the power to vary the terms of the governing rules in relation to the complainant. We consider that guidance should be provided in the Operational Guidelines as to the circumstance AFCA would envisage amending a life insurance policy held by a super fund trustee. We would hope that AFCA would give consideration to the implications of broad ranging amendments, which could have an effect on the cost of insurance. Further if a decision did affect a premium, then Westpac would need to consider its responsibilities with regard to compliance with statutory covenants (such as under section 52(7) of the Superannuation Industry (Supervision) Act 1993 (Cth) and any tax implications).

### ***Privacy complaints (draft Rule D.2)***

The draft Rules provide for AFCA to consider privacy complaints whereas FOS Terms of Reference included only certain privacy related complaints (with the rest to be referred to OAIC). The mapping document indicates that this is subject to approval by OAIC.

Westpac is not supportive of any broadening of powers to allow, under specific delegation from the OAIC, the investigation and conciliation of all privacy complaints by AFCA. Westpac would rather see AFCA be granted a limited authority to investigate privacy complaints in circumstances where the privacy issue is inextricably linked to a broader complaint falling under AFCA's jurisdiction.

We note further that as a result of the introduction of Comprehensive Credit Reporting and Open Banking there may be an increase in privacy complaints and the vast majority of consumers would ordinarily expect the OAIC to handle such matters directly and it would have the necessary resources to do so.

To the extent that AFCA would continue to consider disputes that do involve a privacy concern, Westpac would welcome clarification in AFCA's Operational Guidelines regarding the amounts that AFCA would award for privacy breaches that do not result in damage to complainants, including whether awarded amounts would be separate or inclusive of any claimed associated non-financial loss (currently capped by FOS at \$3,000 per claim).

Westpac would also welcome clarification in AFCA's Operational Guidelines as to whether complainants who do not accept AFCA's determination around a privacy complaint will be able to refer the same claim to the OAIC for further consideration (as is currently the situation with FOS privacy determinations).

### ***Adjudicators, Ombudsman, Panel Member (draft Rule E.1)***

There is limited information on the considerations when appointment of any of the following AFCA Decision Makers is made:

- Adjudicator;
- Ombudsman
- Panel Member

The definition of these appointments references clause 12 of the Constitution of AFCA. The relevant clause of the constitution appointing these roles is clause 11, and allows the appointment to be solely at the discretion of the Directors. The FOS Terms of Reference include a description of the composition of

Panels appointed by FOS. We ask that further guidance be provided on the extent of the powers or duties of these positions in the draft Rules or in the Operational Guidelines.

*Further minor comments*

The term 'special circumstances' is used numerous times in the Terms of Reference. We consider that a definition of this term should be included or alternatively, that the Operational Guidelines should provide details of what AFCA will consider a 'special circumstance.'

We make a number of other small points with regard to drafting in the attached marked up word document.

We thank you for this opportunity to comment on the draft AFCA rules. Should you require any further information, do not hesitate to contact Jaimie Lovell on 0450 132 858 or by email at [jaimie.lovell@westpac.com.au](mailto:jaimie.lovell@westpac.com.au).

Yours sincerely,



**Michael ChouEIFate**  
**Group Head of Government and Industry Affairs**