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Dear Mr D'Argaville

## AFCA Rules change consultation: Identifying financial firms in published determinations

The Australian Banking Association (**ABA**) welcomes the opportunity to respond to the Australian Financial Complaints Authority (**AFCA**) consultation paper on the proposed changes to Rule A.14.5 and the associated Operational Guidelines to enable AFCA to identify financial firms in published determinations.

The ABA and its members recognise the need for transparency and accountability in AFCA's operating procedures and policies. However, there are good reasons why the historical practice has been not to publish names of financial firms in external dispute resolution determinations. In our submission, these reasons remain relevant. We set these reasons out below, together with some suggestions as to how the regime should operate if AFCA proceeds with the change.

### Background

The ABA and our member banks have supported the establishment of AFCA from its inception as a recommendation of the Ramsay Review, as it is an important step in streamlining the complaints process and providing better resolution of issues for customers. We have been committed to ensuring the success of the scheme, and while AFCA has been operational for a short time, we believe that AFCA has already established itself as an effective external dispute resolution body for industry, consumers and small businesses.

This desire to work closely with AFCA in ensuring it can operate well now and into the future is reflected in our support for a number of recent reforms that will further strengthen it, including:

- the Royal Commission recommendation and Government's subsequent action taken to ensure that all Australian Financial Service Licensees should be required to take reasonable steps to co-operate with AFCA in its resolution of disputes, including by making all relevant documents and records available; and
- the Government's expansion of AFCA's remit to accept eligible legacy financial complaints for conduct extending back to 1 January 2008, noting that ABA member banks provided their consent for AFCA to consider any complaints involving them prior to 1 July.

Within this context of ensuring that AFCA works as efficiently and effectively as possible to resolve disputes and achieve fair outcomes, we provide our response on the specific questions in the consultation below.

#### 1. Does the proposed change satisfy AFCA's transparency requirements?

The ABA acknowledges that AFCA's proposed change to Rule A.14.5, enabling it to identify the financial firm but not other parties in published determinations, is part of its commitment towards being open, transparent and accountable to the public.

We note that this proposal is a significant change from the long-standing approach of predecessor schemes and AFCA's current practice in only publishing determinations in a form that does not identify the parties to a complaint.

### Existing accountability mechanisms – systemic issues

Publicly naming a firm is an important regulatory tool to bring about change in a firm's conduct. It is important to consider when it is appropriate to utilise this tool. In our view, public naming is appropriate where the conduct is pervasive through the organisation.

The best mechanism to identify matters which are pervasive in nature is AFCA's systemic issues power<sup>1</sup>. AFCA must report firms with confirmed systemic issues to regulatory bodies on an identified basis. Confirmed systemic matters have been subject to a higher degree of analysis than individual determinations to confirm that the issue raised is, in fact, systemic. They are more likely to warrant the publication of a firm's identify. In addition, ASIC intends to report on the volume of AFCA complaints made regarding individual firms (at an aggregate level).

Importantly, the systemic issues and other powers to name individual firms leave the decision in the hands of APRA, ASIC or the Commissioner of Taxation. These regulatory bodies are subject to administrative review, giving firms an opportunity to appeal their decisions. There is no similar right in respect of decisions of AFCA, despite the significant harm that may flow from the publication of an unfavourable determination.

We also have some further concern about the proposal given the significant consequences this may have for a financial firm's reputation, including:

- **Complaint resolution and decision making approach:** AFCA is given broad and significant powers to determine its approach to resolving complaints, including the ability to proceed to a determination without giving parties the opportunity to respond after preliminary efforts to informally resolve matters (Rule A.8.1). AFCA is also given significant discretion in how it determines complaints and is not bound by precedents and rules of evidence (Rule A.14). We accept that this discretion is part of AFCA's rules, but note that this is perhaps one of the reasons why the historical practice has been not to identify individual firms.
- **Finality of determinations:** the making of a determination is the final stage of AFCA's complaint resolution process and under Rule A.15.3 those determinations accepted by a complainant are binding on a financial firm. As noted above, there is no appeal mechanism for a financial firm. While this is an accepted element of the AFCA process by industry, it has greater implications when considering the potential impact of identifying financial firms in published determinations.
- **Absence of contextual information:** the ABA notes that in its recent consultation on comparative reporting data, AFCA has appeared to move away from providing more detailed contextual measures including the 'chance of a dispute' metric. The absence of more detailed contextual measures in comparative reporting would reduce the ability of consumers to assess the relative performance of financial firms and understand the likelihood of experiencing problems with a financial firm. The move to identification of individual financial firms in determinations does not assist consumers to understand these matters as transparency on this case by case basis does not say much about overall risks with respect to a particular firm.

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<sup>1</sup> See section 1052E(4) of the *Corporations Act 2001*

## 2. Do the Operational Guidelines adequately explain how the Rules as amended will apply?

In the event that AFCA decides to proceed with the proposed change, the ABA submits that it needs to provide further guidance on how the amended Rules will apply. We particularly refer to the exception that is provided in proposed Rule A.14.5 that a determination will not be published “if there are other compelling reasons not to”. No further reference or context is provided on what would constitute such reasons.

The ABA believes that there are specific circumstances that should be stipulated in the Operational Guidelines as a “compelling reason” for a determination not to be published, including:

- **Confidential information:** where identifying the financial firm may expose proprietary or confidential information about its internal systems and/or policies that could expose it to exploitation (e.g. details on how a firm’s credit risk decisions are made or information about a weakness in a firm’s systems); and
- **Legal or regulatory uncertainty:** where a determination has been made in a complaint involving unresolved or contested interpretations of law or regulatory guidance, these should not be published until the issues are appropriately settled through regulatory enforcement (e.g., by ASIC) or through interpretation by the courts.
- **Requests by parties:** It should be made clear in the guidelines that parties (including financial firms) may equally request that certain details in the determination be changed or that the determination not be published due to compelling reasons for not doing so.

## 3. Do you have any other comments about the proposed change?

The ABA believes that there are a number of other important safeguards that should be inserted into the amended Rule A.14.5 or the Operational Guidelines to strengthen the integrity of the proposed changes, including:

- **Procedural fairness:** Given there is no right of appeal, it is important safeguards are in place to ensure that firms are not unfairly impacted by the publication of an unfavourable determination. Safeguards could include firms being given the opportunity to review determinations prior to publication to assess whether they have been given an adequate opportunity to respond to all aspects of a complaint (e.g., ensure procedural fairness) and/or an acknowledgement within each determination that AFCA, unlike a court, has limited ability to obtain information, and consequently, it proceeds on the information it has available to it which may be incomplete;
- **Complainant preference:** AFCA should create a presumption that any objection by a complainant for a determination to not be published will be acted on unless there are compelling reasons to publish despite the objection; and
- **Withdrawing published determinations:** AFCA should ensure that there is an express provision requiring published determinations to be withdrawn where appropriate, such as if an error in the decision is identified (e.g., error in law/fact or incorrect calculations).

The ABA looks forward to working with AFCA through this consultation process. Please contact Justin Mining on 0400 681 407 or at [justin.mining@ausbanking.org.au](mailto:justin.mining@ausbanking.org.au) if you have any questions or require anything else.

Yours sincerely



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