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Australian Financial Complaints Authority

20th June 2019

via email: submissions@afca.org.au

The Finance Brokers Association of Australia Limited (FBAA) as the leading professional association to finance and mortgage brokers in Australia, is please to submit the following response paper.

Re: Rule changes to identify financial firms in published determinations

The FBAA appreciates the opportunity to make a submission in relation to the proposed AFCA rule change seeking to identify financial firms in its written determinations.

We do not support the rule change as it is currently proposed.

For a moment consider how this proposal would be received if AFCA were proposing to name consumers in written determinations? What arguments would consumers and consumer rights advocates put forward in response? Clearly such a move could not succeed. Why is something that would be seen as so unfair as naming complainants not considered inappropriate for the other party to the dispute? In almost all cases they are not there by their own choosing.

General observations relating to the proposal to identify financial firms in determinations

There is a widening gap between the rights of consumers and the rights of financial firms to receive fair and impartial treatment through the dispute resolution process. The bias is swinging heavily away from fairness for financial firms.

Already financial firms are motivated through law, ASIC guidance and the prospect of dealing with AFCA to resolve disputes with consumers at IDR level. Financial firms face a significant number of obligations when dealing with complainants such as the timeframes they must attempt to resolve disputes within, the cessation of enforcement action whilst complaints are on foot and the communication they must provide to complainants. Financial firms must observe their all of their dispute resolution obligations or face the risk of further sanctions against their licence. Consumers on the other hand, have no obligations. If a financial firm is untruthful they risk being referred to ASIC (in addition to having a determination made against them by AFCA) for breaching their general obligations to act efficiently, fairly and honestly. There are no consequences for a complainant who is untruthful.

The cost of having a matter proceed to EDR runs into the thousands. Financial firms are required to produce considerable amounts of information to AFCA in relation to each matter. There is a time cost of preparing for EDR matters and financial firms are strongly encouraged at each EDR resolution point to resolve disputes by offering concessions to the complainant regardless of fault. By the time a matter proceeds to a determination, a financial firm will have committed more than $10,000 towards a dispute. This is regardless of whether the complaint has merit or whether the complainant has been truthful. AFCA fees alone could exceed this figure.

AFCA now proposes to name financial firms that find themselves contesting a complaint through to a written determination. We do not support this position. Such an approach is more prejudicial to the financial firm than any benefit it can be said to carry. It unfairly impacts financial firms that choose to contest a dispute and acts as just one more adverse consequence for a financial firm attempting to defend a complaint.

Identifying financial firms in all written determinations merely because the entity contested a consumer dispute carries negative connotations and may provide opportunistic third parties with incentive to seek out additional complainants. Such determinations may also provide a template for other consumers to follow to construct a dispute against a member.

The FBAA may be open to supporting a modified proposal whereby financial firms are named only where their own conduct is particularly poor and where there may be some public interest in knowing the name of the financial firm. This would need to be the subject of further consultation. Some of the circumstances in which this could arise are suggested below. The list is not exhaustive or determinative:

- The matter clearly should have been resolved in favour of the consumer at IDR stage;
- The matter has only gone to EDR because the financial firm has been unreasonable or has failed to adequately discharge their own IDR obligations;
- The financial firm has a track record of multiple appearances at EDR and where determinations have been made against them;
- The financial firm's conduct is egregious (albeit a more appropriate outcome is to refer the entity to ASIC).

We recognise that an approach such as this introduces more complexity but it would more fairly balances the rights of parties and protects financial firms from reputational damage where their defence of a complaint is justified.

We understand the need to assist consumers through the dispute process to ensure they are not unfairly disadvantaged by their lack of understanding however, at some point consumer assistance becomes consumer advocacy. AFCA's role is that of an impartial third party and we hold serious concerns that AFCA is moving too far away from neutral umpire towards a consumer advocacy role.

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

No it does not. Transparency is required to demonstrate to all stakeholders that AFCA is acting consistently and appropriately. It would be no more or less proper to publish the name of the complainant than the financial firm.
Publishing member names is not necessary to deliver on AFCA's transparency requirement. The published determination provides complete transparency on AFCA's actions.

As the commentary to A14.5 states: "although previous Determinations should not be treated as precedents, they do provide users of the AFCA scheme an idea of how similar fact scenarios might be viewed."

There is nothing more that will be gained by naming financial firms other than to malign them. Published determinations serve the same function deidentified as they do identified.

The very drafting of the proposed rule highlights the indifference to the potential consequences to financial firms of having their names published in written determinations whilst extending measures to ensure other parties are not indirectly identified.

A.14.5	AFCA will publish its Determinations in a form, which identifies the financial firm or firms but does not identify the other parties to the complaint. A Determination will not be published if to do so would risk identifying any party other than the financial firm or firms, or if there are other compelling reasons not to publish it.

The drafting of this rule shows no regard to the impact on financial firms being named in determinations.

The proposal also fails to distinguish between the reputational damage that may be suffered by a small firm versus the impact such a move may have on large entities. The adverse findings against banks in the Royal Commission have had negligible to no negative impact on their standing in the marketplace. Smaller businesses are considerably more vulnerable to the impacts of negative coverage.

We challenge the true intention for AFCA seeking to identify financial firms in its determinations. Transparency is a specious reason. Each determination turns on the facts of the relevant matter. Both parties to a dispute are entitled to hold the view they do and if matters were clear cut then the dispute would have been resolved at IDR or in conciliation.

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

We refer to our response to Question 1.

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

We genuinely hope that this change is not a foregone conclusion. The consultation window for this proposed change is extremely small and we do not believe the rights of all parties are being correctly balanced. The FBAA reaffirms its opposition to this measure.

AFCA has not provided any information about any shortcomings of the current approach nor has it identified a specific problem that it seeks to address through the proposed change. Merely stating that "other bodies do it" is not justification of itself.

Transparency is multilateral. Either all parties are entitled to transparency or all are not. Judicial determinations publish the names of all parties. There are cogent arguments for naming consumers in determinations. It is important to highlight that where we have a system that offers zero risk to complainants and financially penalises financial firms regardless of the outcome, such system is open to abuse. One measure of protection which could be afforded to financial firms is transparency in respect of a consumer's past EDR conduct. Such transparency may protect financial firms from dealing with recidivist offenders and vexatious complainants.

Should AFCA wish to further consult on this concept it should provide a compelling case that specifically addresses the need to identify financial firms by name. To date no such reasons have been provided.

Face to face discussions are more effective at advancing proposals than proceeding solely via written submissions. We encourage AFCA to offer roundtables or face to face meetings with industry representatives to provide a more fair and effective forum to discuss issues such as those addressed in this proposed rule change. Whilst the change itself may appear concise and even somewhat benign, the potential impact on financial firms could be devastating. We are genuinely concerned that this will not receive sufficient consideration before any further steps are taken and proceeding solely via written submission ensures we do not receive feedback on the consultation in a timely manner.

End.

Any further queries please contact the writer.

Yours faithfully

Peter J White AM MAICD
Managing Director

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