

AFCA Rules Change Consultation
Submission by Australian Finance Group Ltd ACN 066 385 822
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Australian Finance Group Ltd (**AFG**) was founded in 1994, was listed on the Australian Securities Exchange in 2015, and has grown to become one of Australia's largest mortgage broking groups. Approximately 2,950 brokers (of which 1320 are credit representatives of AFG) arrange residential mortgages, commercial finance and other loan products through AFG.

AFG welcomes the opportunity to respond to the *AFCA Rules Change Consultation* paper issued by the Australian Financial Complaints Authority (**AFCA**) on 18 March 2019 (the **Consultation Paper**). For the purposes of this submission, AFG's response is limited to the following question.¹

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

In the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Final Report**), Commissioner Hayne recommended that (Recommendation 7.1):

"The three principal recommendations to establish a compensation scheme of last resort made by the panel appointed by government to review external dispute and complaints arrangements made in its supplementary final report should be carried into effect."

In the Government's acceptance, Government additionally noted that:

"The Government will also require AFCA to consider disputes dating back to 1 January 2008 — the period looked at by the Royal Commission, if the dispute falls within AFCA's thresholds as they stand today. This will ensure that consumers and small businesses that have suffered from misconduct but have not yet been heard will be able to take their cases to AFCA. Consumers and small businesses will have twelve months from the date that AFCA commences accepting legacy disputes to lodge their complaint with AFCA."

AFG agrees with Commissioner Hayne's proposal that if a consumer resorts to an EDR mechanism such as the Australian Financial Complaints Authority (**AFCA**), and was unable to be compensated due to the Financial Service Provider (**FSP**) not adhering to the decision, which remains unpaid after reasonable steps have been taken, that consumers have their complaints heard, and able to be compensated for any crystallised losses incurred as awarded within the decision from AFCA, a court or a tribunal (where the circumstances of that claim would have been eligible for consideration by AFCA). AFG will naturally adhere to any requests should the suggested rules amendments be made.

¹ Consultation Paper, page 2.

However, there are concerns with Government's response going beyond the recommendation of the compensation scheme of last resort, with claims being able to be raised dating back to 1 January 2008, far exceeding the statute of limitations set out in the relevant state based statute of limitation legislation (of 6 years). This will in effect be providing ACFA, although for a limited period, a power greater than that set out in existing statute.

Furthermore, FSPs will likely have in place document retention and destruction policies and processes which, depending on the document in question, would align to these limitation periods. This coupled with the passage of time, loss of memory and/or change of employee, will significantly hinder an FSP's ability to adequately investigate, and where appropriate, defend claims. This causes a risk of greater claims being unduly substantiated by AFCA. AFCA will need to ensure it has adequate processes in place in managing these instances. This will assist to reduce frivolous and vexatious claims by consumers to AFCA (which are currently funded by the credit licensee) because consumers are more likely to lodge any claim through AFCA (even if that claim has no merit or a low likelihood of success) as it doesn't cost them anything and the FSP may not be in a position to defend themselves.

Another area of potential concern arises in relation to professional indemnity insurance (**PI insurance**) cover of FSPs. There may be instances where an FSP's PI insurance will not provide indemnity for claims raised after the statute of limitations has expired, or in instances where an FSP has ceased business and has only maintained 'run-off' cover for the prescribed period set by Australian Securities and Investments Commission (**ASIC**)². If a claim is made against the FSP, and PI insurance indemnity is not available, the FSP may not have the means to defend the claim.

AFG further notes that, in these circumstances where AFCA will become the tribunal of last resort (in most cases), the AFCA process should be fair and balanced and ensure that a due process is followed. AFG suggests that a regular audit of AFCA's decisions should be carried out by ASIC to ensure that they are consistent in applying whichever is more appropriate of either:

- the current law; or
- the law and relevant regulatory guidance which applied at the time of the activity being considered.

For the avoidance of doubt; AFG's view is that legislation or regulatory guidance which came into being after a specific activity, should not be applied retrospectively, where it is unfair or unreasonable to do so. For example a lending decision should not retrospectively be subject to obligations or restrictions that did not exist at the time the lending decision was made.

Please do not hesitate to contact AFG if you require any further detail about the matters raised in this submission or if AFG can provide any further assistance in the development of alternative proposals.

² ASIC RG 210 Compensation and insurance arrangements which prescribes a period of 12 months (see RG 210.28).