

AHL INVESTMENTS PTY LTD (“AHL”)

SUBMISSION RE CHANGES TO AFCA PUBLIC REPORTING

Policy Rationale

1. AFCA is proposing a Rules amendment to facilitate reporting the names of the financial firms involved in all new decisions from 1 July 2019 (**Proposed Reporting Regime**).
2. The Proposed Reporting Regime is said by AFCA to be in recognition that “*transparency in [AFCA] data is essential to rebuild trust in the financial sector*”.¹ There is no rationale provided for how the Proposed Reporting Regime will rebuild trust in the financial sector.
3. The Proposed Reporting Regime consultation paper identifies the policy objective as facilitating AFCA’s commitment “*to being open, transparent and accountable to the public*”. There is no rationale provided for how the Proposed Reporting would enhance or facilitate AFCA’s transparency or accountability to the public.
4. Accordingly, there is no basis to suppose that the Proposed Reporting Regime will either rebuild trust in the financial sector or facilitate AFCA’s accountability to the public. The Proposed Reporting Regime would have the effect, and perhaps only the effect, of “naming and shaming” financial firms.

Potential Impact on Regulator Enforcement

5. Naming and shaming by AFCA may well have the unintended consequence of curtailing enforcement powers of the Australian Securities and Investments Commission (**ASIC**).
6. There is authority for the position that the ability of a regulator to proceed both civilly or criminally post a shaming could result in the imposition of a double penalty which is unlawful, undesirable and unfair. For example, in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330 [85] Chief Justice Allsop stated:

“I propose to identify a single penalty in respect of all contraventions in accordance with the totality principle, bearing in mind that what can be seen as four courses of conduct formed part of a single marketing strategy. This is appropriate to ensure that there is not double punishment”.

7. AHL submits that the unfettered ability of ASIC to pursue enforcement action will more likely contribute to the rebuilding of trust in the financial sector than the Proposed Reporting Regime of AFCA. AHL, therefore, cautions the need for careful consideration of the effect of the Proposed Reporting Regime on ASIC’s enforcement powers before implementation, including by expressly raising the concern with ASIC.

Outside Proper Function and Powers of AFCA

8. It is not part of AFCA’s remit to “punish” financial firms. AFCA acknowledges that its role is not “*to punish the firm or impose a fine*” and that it is “*not a government department or agency and not a regulator of the financial services industry*”.²
9. The naming and shaming of financial firms is a form of punishment and is therefore beyond the legitimate role of AFCA.

¹ AFCA News Edition 2 – 10 April 2019

² Operational Guidelines to the Rules Section A.1

10. This point is particularly poignant considering that Financial Firms do not have the protections and rights which they would have if AFCA was a government agency, a regulator or a judicial or quasi-judicial tribunal.

Adverse Consequences for Mortgage Brokers

11. In a society operating pursuant to the rule of law, the use of a “name and shame” regime may only operate where it is without doubt constructive and operates without unfairness to:
 - a. the person the substance of the complaint; and
 - b. third parties.
12. The Proposed Reporting Regime is not constructive or fair for brokers who operate through mortgage aggregators and, in particular, branded mortgage aggregators.
13. AHL is a mortgage aggregator through a franchise network and mobile broker network which both operate under the “Aussie” brand. There are over 1,000 brokers actively engaged in mortgage broking under the “Aussie” brand and as authorised credit representatives of AHL.
14. All of the brokers operate as independent small businesses, many of them family run businesses, providing credit assistance to customers. AHL provides services to the independent small business brokers such as technology, training, general business support and back office administration.
15. Due to the reputational and brand damage associated with ‘naming and shaming’, the Proposed Reporting Regime would:
 - a. unfairly prejudice the small business brokers operating under the “Aussie” brand that are not the subject of the complaints reported;
 - b. not meaningfully identify the actual broker the substance of the complaints reported; and
 - c. not be a meaningful indicator of the quality of the services provided by any one, or even a majority, of the individual small business brokers operating under the Aussie brand.
16. Specifically, reporting at the AHL level would unfairly stigmatise all of the small business brokers operating under the Aussie brand and have a negative impact on their businesses. While this is an issue for all mortgage aggregators the potential unfairness and real world impact would be significantly more acute for branded mortgage aggregators such as Aussie.
17. The analogy in the consultation paper to other industry ombudsman schemes does not recognise this important structural difference in the mortgage broking industry.
18. The unfairness of the Proposed Reporting Regime on small business brokers operating through mortgage aggregators would constitute a breach by AFCA of section 1052 of the *Corporations Act 2001 (Cth)* which requires AFCA to ensure that the mandatory requirements of the AFCA scheme, which includes fairness, are complied with. be the subject of the complaints. This obligation cannot be met under the Proposed Reporting Regime given the unfairness referred to above.

Intended Benefit Not Achieved

19. The benefit of a ‘name and shame’ regime is recognised to be the conscious manipulation of an entity with the purpose of obtaining some desired conduct different to that about which the complaint is made.³

³ Elizabeth Rosenblatt, ‘Fear and Loathing: Shame, Shaming and Intellectual Property’, (2013-2014) 63(1) DePaul Law Review 9.

20. Given the limited nature of the services provided by mortgage aggregators, the extent of the mortgage aggregator's ability to take steps to address the conduct the substance of the reported complaints will be relatively small. That is, the "shaming" will be disproportionate to the ability of the mortgage aggregator to control or correct the conduct.
21. Accordingly, in the context of the mortgage broking industry, the likely harm and unfairness of the Proposed Reporting Regime far outweigh the desired benefit from such regimes.

No objective standard

22. Possibly the most fundamental issue with 'name and shame' reporting is that for it to be fair and appropriate there must be an objective standard breached before an entity is named and shamed.
23. AFCA's decision making approach is to "*do what the AFCA Decision Maker considers fair in all the circumstances*". While the AFCA Decision maker may have regard to legal principles, there is no requirement for there to be any unlawful conduct for an adverse decision to be made against a financial firm.
24. Decisions based on notions of fairness, service quality or errors which are not unlawful, particularly those not subject to independent review or appeal, are not a proper basis on which to base name and shame reporting.

ASIC Approval Required

25. The Proposed Reporting Regime constitutes a material change to the AFCA Scheme. A material change must not be made to the scheme without ASIC's approval: section 1051(5)(b) of the *Corporations Act 2001* (Cth). In seeking ASIC's approval, AFCA should notify ASIC of the very real risk of the Proposed Reporting Regime hindering ASIC's enforcement powers.

Conclusion

26. The Proposed Reporting Regime in its current form:
 - a. has no clear and cogent benefit in terms of rebuilding trust in the financial sector or facilitating AFCA's transparency and accountability and cannot be said to clearly serve the public interest;
 - b. may in fact be against the public interest in light of the fact that decisions are based on notions of fairness, not an objective standard, and the limited review and appeal mechanisms;
 - c. may in fact hinder the enforcement powers of ASIC due to the totality of punishment principle;
 - d. may constitute punishment which is unfair and beyond the remit of AFCA; and
 - e. would operate unfairly on small business brokers who operate through a mortgage aggregator, particularly a branded mortgage aggregator, in contravention of section 1052 of the *Corporations Act 2001* (Cth).

AHL Investments Pty Ltd

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