(07) 3847 8119
Level 1, 116 Ipswich Rd, Woolloongabba QLD 4102
PO Box 234, Stones Corner QLD 4120
fbaa.com.au

Australian Financial Complaints Authority
submissions@afca.org.au

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The FBAA as the leading professional industry association to finance and mortgage brokers in Australia, welcomes the opportunity to make a submission against the proposed AFCA rule changes to allow the scheme to hear complaints dating back to 1 January 2008 (legacy complaints).

1. Where this may appear as a relatively straightforward ministerial direction, the implications of exposing members to legacy complaints and the challenges on AFCA to impartially hear such complaints while providing procedural fairness is extremely complex. There is also an undeniable implied expectation that AFCA will adjudicate a number of legacy complaints in favour of complainants.

2. The consultation paper poses three questions namely:

    a) Does the proposed change satisfy the requirements of the new authorisation conditions?

    b) Do the Operational Guidelines adequately explain how Section F will apply?

    c) Do you have any other comments about the proposed change?

3. In response to the first question, we believe the proposed change satisfies the requirements of the new authorisation conditions.

4. For the second question, the Operational Guidelines provide a reasonable explanation of how Section F will apply although it is drafted broadly and provides very few limitations on AFCA for how it will deal with legacy complaints. We are pleased to see that the Operational Guidelines acknowledge the difficulties of entertaining legacy complaints – particularly around record keeping. AFCA must adopt a robust approach to hearing legacy complaints.

5. The remainder of this submission falls under the third question.

6. The FBAA is concerned with the difficulty of applying of principles as they existed at a given point in time and the difficulty of not retrospectively judging conduct against 2019 interpretations of law and policy, particularly since there has been a notable shift to consumer-oriented outcomes post the Royal Commission. By our experience, AFCA is not immune from this influence.

7. We are concerned to ensure that the ministerial mandate is nothing more than a requirement to open up EDR to complaints arising for conduct dating back to 2008 and not a missive to AFCA to use EDR determinations to retrospectively address deficiencies in legislative and regulatory frameworks which may have produced outcomes which are unfortunate for consumers but produced through conduct which was consistent with industry practice and considered entirely acceptable at the time.

8. We genuinely hope that very few claims are submitted to AFCA under this expanded timeframe as the risk of not providing a fair hearing to all parties is extremely high.

9. We appreciate that AFCA has been directed by the responsible Minister to hear legacy complaints and that the rule change has been brought about because of this ministerial mandate. The issue of whether to expand the jurisdiction to include legacy complaints was not the subject of consultation and is not a decision made by AFCA. In principle we believe this decision is wrong. We have some significant concerns and speak to these concerns in the interests of protecting our members from potentially unfair treatment.

10. Our concerns relate to four principal areas:

    a) Relevant temporal mindset

    b) Record Keeping

    c) Jurisdiction

    d) Costs

Relevant temporal mindset

11. EDR schemes endeavour to apply the relevant laws and interpretations of those laws as they were in place at the time of the conduct occurred. We are concerned that this will be an extremely difficult undertaking for legacy complaints. There were no national credit laws in place in 2008. Financial services laws were in their relative infancy. The changes to legislation and guidance since 2008 are too numerous to list. The current interpretation and application of concepts such as responsible lending, hardship, unconscionability and conflicts of interest are vastly different to what they were in 2010 and in years following. This is evident from the changes made to regulatory guidance issued by ASIC and the reforms to the NCCP in 2012 and 2014 and the recent consultation for the overhaul of RG209. Financial services laws were virtually reinvented with the *reasonable basis* test being replaced by a *best interests duty* under the FOFA reforms. How can AFCA be expected to compartmentalise changes and the evolution in thinking around financial services and consumer credit from its assessment of complaints and apply the laws at the relevant time when assessing a member's conduct? We believe that only flagrant breaches of existing law will be identifiable through this process. The risk for all other matters is that will be 'infected' by the overriding expectation that AFCA will successfully adjudicate legacy claims in favour of the consumer.

12. AFCA must apply the law and thresholds that were accepted at the relevant time when assessing historical conduct and we are concerned that this is too much to ask of a body which has been directed to open up historical complaints in direct opposition to existing principles such as limitation of actions which exist to protect parties from having to defend against very old claims where relevant staff and records may no longer be accessible to mount a defence.

Record Keeping

13. We are pleased to see that AFCA has recognised in its Operational Guidelines that members may no longer hold relevant records to respond to a complaint because their statutory record keeping obligations do not require them to keep records for the full period covered by the legacy complaints extension. We support AFCA promoting this issue to the forefront of its procedures for handling of legacy complaints. No adverse inferences can be drawn from a member being unable to produce records it was not required to keep. An additional consideration we believe should apply is:

a) If a material matter turns on the existence of a record which a member is not required to keep, AFCA must dismiss the complaint or at least find in favour of the member if no party can produce the record(s). The burden must sit on the complainant to produce the record(s).

Jurisdiction

AFCA should impose a higher standard of probity to legacy complaints.

14. We do not agree with the position advanced relating to the rules applied to legacy complaints.

15. Under the heading "What rules will apply when considering a legacy complaint?" AFCA writes:

When considering a legacy complaint, we must apply the AFCA Rules as at 30 June 2019. This applies regardless of the governing rules or Terms of Reference of any predecessor scheme that were applicable at the date the loss or right to bring an action arose, or the rules or Terms of Reference that applied if a legacy complaint was previously lodged with a predecessor scheme. This is different to other complaints, when AFCA must apply the rules that were in existence at the date the complaint was first submitted –see rule A.23.5.

16. We do not support this approach and say it is procedurally unfair. AFCA recognises that this approach is different to other complaints. We say that it should not be and the only reason for any difference is the political influence in the background. The only way to afford procedural fairness to all parties is to apply the rules that were in existence at the relevant date. This is the reason why AFCA adopts this approach for all other complaints. The objective of opening the scheme to legacy complaints is not to give legacy complainants a superior outcome. It is to afford previously dissuaded complainants an opportunity to have their complaints heard.

17. Many current members of AFCA only became EDR scheme members after 2010 in respect of the commencement of the *National Consumer Credit Protection Act* or later where entities obtained licenses after the commencement of the Credit legislation. It would seem nonsensical to allow a complaint to proceed against a current member relating to conduct which occurred as much as eleven or twelve years ago when these entities were not subject to national regulation and were not EDR members.

18. Many of the laws that now govern conduct in the provision of services relating to consumer credit did not exist before 2010. The approach now taken to enforcement of financial services and consumer credit laws is significantly different to the approach taken in prior years.

19. Under the heading "Who can submit a legacy complaint?" AFCA writes:

A complainant must be an eligible person at the time their complaint is submitted to AFCA, even if not [*sic*] they may not have been eligible at the time the loss or right to bring an action arose–this is consistent with rule A.4.1.

20. We do not support this approach and say it is procedurally unfair.

21. Whilst we recognise that this rule may strike an appropriate balance for access to EDR by consumers in the ordinary course, we are talking about legacy complaints which may be levelled against entities that did not become members of an EDR scheme for many years after the conduct in question. Consumers should not become accidental beneficiaries of something as radical as the ministerial mandated timeframe extension addressed through this consultation.

22. AFCA should apply a higher eligibility threshold to complainants bringing legacy complaints against entities who were not members of any EDR scheme until well after the conduct in question. The purpose of the extension is primarily to address inadequate complaints handling at the time which led to consumers who may have been eligible to bring a claim to EDR being dissuaded through licensee misconduct. If consumers did not have redress to EDR at the time of the conduct or when their complaint was first brought to the attention of the licensee, they should not have redress to it now.

Costs

23. **We submit that AFCA should absorb any costs relating to preliminary investigation of legacy complaints and only levy charges against members once a case is made out.**

24. The costs to members of being involved in EDR, regardless of the outcome, are growing rapidly. Members who have been involved with EDR in recent years already report being exposed to substantial costs and high EDR scheme fees even where findings have ultimately resolved in members' favour. One licensee was recently charged $5,500 for the scheme to reach a conclusion that the complaint should proceed against other parties – a position that was advanced by the licensee at first point of contact. The "charge without fault" approach of AFCA is not consistent with the notion of an independent and unbiased scheme.

25. As identified earlier in this submission, some of the fundamental protections built in around timely prosecution of complaints are being stripped away by the ministerial mandate to hear legacy complaints. Members may dispose of records after 7 years. They may no longer hold records that would be relevant to responding to inquiries made by AFCA. AFCA must not draw adverse inferences from a member being unable to produce documentation relating to matters that are older than the time period they are required to keep records for.

26. We have no objection to members being charged once the legitimacy/merits of a legacy complaint are made out, however members should not be charged for AFCA's early investigations and for working with complainants to substantiate a claim.

27. This is a simple issue to manage. AFCA can, and should introduce a different charging threshold for legacy complaints. Only after a complainant is able to conclusively demonstrate a sound basis for an evidence-contested hearing.

Conclusion

28. The FBAA recognises the difficulties AFCA faces when attempting to establish a legacy complaints scheme. We believe the scheme is fundamentally wrong and is politically motivated. It may elevate the interests of a very small group of potentially mistreated consumers but does so at the denigration of the rights of all licensee members across both financial services and consumer credit.

29. Above all else, AFCA must maintain its position as an independent, impartial dispute resolution scheme. Where a Government-mandated legacy complaints scheme results in AFCA undertaking additional inquiries to establish bona fides around a consumer complaint then any costs of this must be borne by those directing the extension and not extracted from members. Anything less will be seen as an exploitation of the mandatory single EDR scheme regime which now exists in Australia.

End.

Peter J White
Managing Director