

AFCA Rules Consultation – Online Survey Submission - 19 May 2023

#	AFCA proposal	Stakeholder question	Does ABA approve of the proposal? (Options are limited to Yes, No, Don't Know)	ABA comments
1	AFCA proposes to amend its Rules to define the term "Paid Representative" following recent law reform, and to allow AFCA to exercise discretion not to consider a complaint in certain circumstances due to inappropriate conduct. The proposed amendments would also provide AFCA discretion to exclude a Paid Representative due to their inappropriate conduct for a period of up to 12 months. Additional amendments will be made to the Operational Guidelines to explain how the discretion will be exercised and to provide examples of its use. These changes are designed to give effect to Recommendation 4 of the Treasury Review Report regarding poor conduct by Paid Representatives.	Do you think that the proposed Rules amendments in relation to Paid Representatives appropriately respond to Recommendation 4?	Yes	We are comfortable that the proposed Rules amendment in relation to Paid Representatives appropriately addresses Recommendation 4 of the <i>Review of the Australian Financial Complaints Authority - Final Report</i> (Report).
2	AFCA proposes that its Rules provide a more comprehensive ability to address unreasonable Complainant conduct.	Do you think that the proposed new provisions in relation to Complainant conduct are appropriately drafted and achieve the right balance in their application?	Yes	<p>We support the new provisions, including the introduction of examples relating to abuse of AFCA process as a means of delaying collections or recovery action.</p> <p>The ABA considers it would be preferable if rule 8.4b) was expanded to cover inappropriate behaviour against the financial firm due to occupational health and safety issues associated with financial firm staff having to engage with such complainants. To our knowledge, the ABA has not seen an instance where AFCA was agreeable to excluding a complaint where intimidation and harassment was exercised by the complainant towards firm employees. While AFCA has indicated they do not support this behaviour, there do not appear to be provisions to address it (meaning the bank must continue with the complaint, potentially placing staff at risk).</p> <p>We query whether the current drafting of the proposed Rules around excluding a complainant sufficiently caters for the circumstance set out on page 130 of the draft Operational Guidelines, where it states: "Factors that might lead us to exercise this power [in Rule B6.1]... It is apparent to AFCA that the succession of complaints to AFCA are to stave off debt collection activity by the Financial Firm or constitute a concerted attempt to harass the Financial Firm." We consider this factor should be explicit in the Rules.</p> <p>We also note that AFCA has used Rule C.2.2d sparingly in the past (the Treasury Review noted only 68 times out of 15,141 total OTRs in first two years) and consider there could be more scope to use Rule C.2.2d on repeat complainants.</p>
3	AFCA proposes to amend Rule A.8.3b) and to introduce a new Rule A.8.3d) to provide AFCA with the discretion to close a complaint if an appropriate offer of settlement has been made but has not been accepted by a Complainant.	Do you think that the proposed change to Rule A.8.3 is appropriately drafted and will assist in delivering early and fair resolution of complaints?	Yes	<p>While we are supportive of the intent of the Rule change, the ABA puts forward the following queries and notes for consideration and clarification:</p> <ol style="list-style-type: none"> 1. It would be beneficial if AFCA could include additional examples as to when this rule may be invoked in the Operational Guidelines; for example, how would the proposal apply to non-financial loss compensation? 2. Could AFCA please clarify the criteria that it will use to make the assessment, e.g. how it expects the firm to record the offer. Otherwise, complainants and firms may experience delays in the AFCA complaint process. Clearer criteria will also assist AFCA in managing firm and customer expectations, and potentially reduce the likelihood of objection by any party. 3. Could AFCA please clarify the stage this review take place and whether a fee would be incurred by the financial firm? Additionally, if it is deemed that a prior settlement offer is or was appropriate, will this be grounds for OTR and exempt from inclusion in the following year's user fee/charge allocation? 4. Who at AFCA will determine if the offer is 'appropriate' - i.e. will it be an Ombudsman and/or a Case Manager and will it require review from the AFCA Banking Specialist team to double check calculations for more complex cases (which can lead to delays, given volumes)? <p>On a minor note, we highlight that a word appears to be missing from the proposed Rule A.8.3: "In these circumstances, there is no point in the complaint continuing..."</p>
4	AFCA proposes to amend Rule C.2.2 to include previously settled disputes as a ground for AFCA to consider in the exercise of its discretion to exclude a complaint.	Do you think that the proposed new Rule C.2.2g) and the Operational Guidelines discussion of settlement agreements is appropriately drafted?	Yes	<p>We are comfortable with the proposed introduction of the additional example and the wording of the Rule. However, with respect to the associated draft Operational Guidelines on page 160:</p> <ol style="list-style-type: none"> 1. It would be helpful for AFCA to clearly articulate what is required as evidence of the previously agreed settlement to avoid any ambiguity. Where it states "We expect a settlement to be documented so that we can assess this", we suggest replacing the word "documented" with "recorded (including in a call recording)" to make it clear this encompasses non-written evidence. 2. Where it states "If at the time of the settlement the Complainant was not aware of their rights and claims raised in the complaint to AFCA, we would normally assume that the Complainant did not intend to surrender those rights as part of the settlement with the Financial Firm", it would be beneficial if AFCA could specify what evidence will be required by the Complainant to establish that they were not aware of their rights and claims at the time of the settlement. <p>In addition, the ABA seeks clarification as to what stage this consideration will take place, what the fee implications will be for financial firms, and who will be in charge of exercising the discretion within AFCA.</p>

5	AFCA proposes to clarify how its existing discretion under Rule C.2.2j) to exclude complaints in respect of wholesale clients will be applied as regards sophisticated or professional investors. The changes are to the Operational Guidelines and give effect to, Review Recommendation 6.	Do you think that the proposed amendment to the Operational Guidelines appropriately responds to the Review Recommendation 6?	Yes	We are comfortable with the proposed introduction of the additional example and the wording of the Rule.
6	The Operational Guidelines regarding the Forward Looking Review Mechanism will be amended to enhance its visibility, accessibility and independence. The Operational Guidelines changes will: <ul style="list-style-type: none"> Remove the requirement that external legal advice showing an error of law must accompany the review request. Provide more guidance about how to apply for a review. Outline the stakeholder consultation model AFCA will adopt to assess whether there are significant issues that warrant review. 	Are the proposed changes to the Operational Guidelines appropriately drafted and in keeping with Recommendation 9 of the Review Report?	Don't know	We query why the Forward Looking Review Mechanism is contained in the Operational Guidelines only (which are not part of the tripartite contract) rather than in the Rules (which are). The ABA suggests including it in the Rules as this would give financial firms the right to enforce and would also better satisfy the objective stated in Treasury's Review of increasing the visibility and accessibility of the Forward looking Review Mechanism. We request AFCA provide specific examples of the Forward Looking Review Mechanism. In addition, it would be beneficial for the Operational Guidelines to clarify how a 'significant impact' would be defined. It would also be beneficial to clarify when AFCA would consider charging the requesting financial institution costs and how these may be calculated.
7	AFCA proposes to replace Rule A.15.4 with A.15.3b), to clearly specify that, if a Complainant does not accept a Determination made by AFCA, neither the Complainant nor the Financial Firm is bound by the Determination.	Do you think that proposed new Rule A.15.3b) is appropriately worded and provides clarity about the effect of a determination not being accepted by a Complainant?	Yes	We are comfortable the proposed wording is appropriate and provides clarity. To further support the Rule we suggest AFCA include reference to the Rule in the actual Determination/cover letter being issued to the complainant.
8	AFCA proposes to introduce a new Rule A14.6 to govern when a Determination may be re-issued because of an accidental slip or omission. This change mirrors the current wording with what is already in AFCA's Operational Guidelines.	Do you think the Rules wording is appropriated drafted and provides clearer guidance and transparency about the existing slip rule?	Yes	We are comfortable with the wording and agree it provides clearer guidance and transparency about the existing slip rule.
9	Rule D.4 sets out the monetary limits (compensation caps and monetary restrictions on AFCA's jurisdiction) for complaints other than Superannuation Complaints. The existing wording around monetary limits in Rule D.4.1 and the heading in the table are inconsistent in the language used. AFCA proposes to amend Rule D.4.1 to remove this inconsistency and align the table content with Rule D.4. This means that both the Rule and the table will state that compensation amount limits apply per claim.	Are there other areas in the AFCA Rules that you consider require similar administrative or minor changes?	No	We are comfortable with the proposed changes.
10	AFCA proposes to amend Rule A.8 to include details of the objection process that is available to a Complainant where AFCA decides under Rule A.8 not to continue to consider their complaint. Currently this is only outlined in Rules A.4.5 and A.4.6	Do you think that the proposed Rules A.8.5 and A.8.6 are appropriately drafted and replicate the existing provisions under A.4.5 and A.4.6?	Yes	We agree the proposed Rules have been appropriately drafted and replicate the existing provisions under A.4.5 and A.4.6.
11	AFCA proposes to amend the Operational Guidelines to include examples of banking and finance complaints or small business complaints that might be decided by an AFCA Panel.	Are there additional assessment criteria that AFCA should consider adopting to meet the stated objective?	Yes	We request AFCA expand on point three and provide examples of "a complaint involving new issues pertaining to consumer behaviour or consumer impact, including in relation to hardship or vulnerability, and the decision may impact the broader community." In addition, the ABA submits that financial firms should be able to request a decision be made by an AFCA panel.
12	AFCA proposes to amend the Schedule E definition of "Financial Service" to include debt management assistance and credit reporting assistance.	Do you agree with the proposed changes?	Yes	We are comfortable with the proposed changes.
13	AFCA proposes to amend Rule A.20.1 to specify that AFCA's annual public reporting must meet AFCA's obligations to regulators.	Do you agree with the proposed changes?	Yes	We are comfortable with the proposed changes.
		Any other comments or feedback?		