



AUSTRALIAN COLLECTORS &
DEBT BUYERS ASSOCIATION

22 May 2023

Executive General Manager Jurisdiction
Australian Financial Complaints Authority
GPO Box 3
MELBOURNE VIC 3001

email: consultation@afca.org.au

Dear Sir,

Consultation Paper:

AFCA Rules and Operational Guidelines – Proposed amendments

The Australian Collectors & Debt Buyers Association (ACDBA) is pleased to provide the attached Submission in response to the above Consultation Paper issued 27 March 2023.

Please do not hesitate to contact the writer to discuss any aspect of the Submission.

Yours sincerely

AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION

A handwritten signature in black ink, appearing to read 'Alan Harries'. The signature is stylized and somewhat abstract, with a large loop at the end.

Alan Harries

CEO

Email: [REDACTED]



AUSTRALIAN COLLECTORS &
DEBT BUYERS ASSOCIATION

***Submission to
Consultation Paper:
AFCA Rules and
Operational Guidelines –
Proposed amendments***

May 2023

Introduction

Australian Collectors & Debt Buyers Association (ACDBA) welcomes the opportunity to provide perspectives to the Australian Financial Complaints Authority (AFCA) in respect to the Consultation Paper issued 27 March 2023 (Consultation).

Established in 2009 for the benefit of companies who collect, buy and/or sell debt – ACDBA’s members (refer Appendix 1) represent the majority of the collection market in Australia.

The core business of our members within the financial services industry is in the credit impaired consumer segment, whether as collectors or debt purchasers, working with consumers who for various reasons, have found themselves in default of their credit obligations.

ACDBA members purchasing debt, each hold an Australian Credit Licence and are members of the Australian Financial Complaints Authority (AFCA). Our members do not provide financial advice.

Debt purchasing

Accounts assigned to debt purchasers typically involve debts where an acceleration clause in the financial agreement has been triggered by the customer’s default in making repayments.

Many with accelerated debts are in hardship giving rise to complex, contested and unresolved issues. Debt purchasers are specialists in dealing with and managing hardship as they almost exclusively interact with customers in some form of financial difficulty.

Perspective

ACDBA supports and congratulates AFCA on the proposed amendments to the AFCA Rules and Operational Guidelines as outlined in the Consultation to address recommendations made in Treasury’s Independent Review of AFCA.

ACDBA having long called for the introduction and application of a suitable equivalent Rule to AFCA’s predecessor scheme’s ‘Reasonable Offer Rule’ promoting fair and efficient resolution of complaints at an early stage is pleased to see the specific amendment to Rule A.8.3 for early resolution of complaints by way of settlement offers which provide an appropriate remedy or compensation.

Responses to consultation questions

Managing conduct within the scheme

Question 1: Do you think that the proposed Rules amendments in relation to Paid Representatives appropriately respond to Recommendation 4?

ACDBA supports these amendments as an appropriate response to Recommendation 4.

Question 2: Do you think that the proposed new provisions in relation to Complainant conduct are appropriately drafted and achieve the right balance in their application?

ACDBA supports the initiative to provide a more comprehensive ability to address unreasonable Complainant conduct against AFCA and the proposed changes appear to achieve an appropriate balance in their application.

Such conduct is however not limited towards AFCA staff but on occasion such Complainant conduct is similarly directed towards staff at the member financial firm.

In these circumstances similar provisions should be introduced to facilitate financial firms reporting unreasonable Complainant conduct directed to the firm's staff with discretion available for AFCA to stop considering a complaint because of unreasonable Complainant conduct against the financial firm.

Appropriate offers of settlement or previously settled matters

Question 3: 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?

ACDBA supports the proposed change to Rule A.8.3 as being appropriately drafted.

Of concern however is that Rule A.8.3 is expressed in discretionary terms. We submit none of the four circumstances proposed under the modified Rule should be discretionary - rather the facts ought to be the only determining factor in whether such a complaint be discontinued.

As drafted, this rule change will best assist in delivering early and fair resolution of complaints when considered throughout the early stages of complaint resolution. To achieve this outcome, whenever a financial firm communicates to AFCA details of an offer of settlement made to the Complainant, AFCA's processes should include promptly reviewing that offer and if considered to be an appropriate remedy or compensation for the complaint, communicate this to the Complainant and discontinue considering the complaint.

The current version of Rule A.8.3 provides AFCA with the ability to exclude a complaint where the complainant has been appropriately compensated for their loss although in ACDBA members' experience AFCA's use of this rule has been considerably limited.

For this reason, we welcome the proposed change to the Rule, however for the change to meaningfully improve the delivery of early and fair complaint resolution, we consider that more guidance is required in the Operational Guidelines to support the use of the Rule.

The two examples included in the Operational Guidelines fall somewhat short of being helpful for the range of matters our mutual members are typically involved with. Below are additional relevant examples AFCA might consider including:

- The Complainant complains that due to a recent change in their financial circumstances they are currently experiencing financial hardship, and they would like the financial firm to hold their current debt collection activity to consider their hardship. The financial firm confirms they are willing to accept the payment arrangement appropriate to the Complainant's financial circumstances and additionally offers to apply a debt reduction to the current balance to resolve the AFCA complaint and address the Complainant's current hardship concerns whereas the Complainant requests that the financial firm waive the debt based on their current financial hardship, or alternatively that AFCA progress the complaint.
- The Complainant complains that the financial firm failed to meet its obligations when providing them with their loan, causing significant stress and inconvenience. The financial firm proposes to reduce the loan by the amount of all interest and fees charged to the loan and by a further amount equal to the maximum amount which can be awarded by AFCA for a claim for non-financial loss.
- The Complainant complains about an unsecured debt and wishes to repay by instalments and the financial firm has offered an affordable and appropriate arrangement that would see the entire debt paid off with fees and interest over 7 years.
- The Complainant complains that a default is incorrectly listed on their credit history and the financial firm offers to remove the default.

The proposed changes to Rule A.8.3 are intended to ensure matters do not progress to case management or decision status where appropriate offers of settlement have already been made.

The Operational Guidelines currently confirm that where AFCA refuses to consider a complaint any further under Rule A.8.3 it will follow a designated process. This process includes that if the Complainant objects to AFCA's finding to exclude the complaint that:

"If the initial AFCA staff member disagrees with the Complainant's objection, the matter will be reviewed by a more senior AFCA staff member. The senior AFCA staff member will consider if the objection has substance and will decide whether to exclude the complaint after considering all the information before us. We may ask the parties for their views and for any other information we need to reach a decision. In more complex cases, an AFCA Decision Maker may make the review decision.

If the senior AFCA staff member or AFCA Decision Maker decides the Complainant's objection has substance, the complaint will be progressed for further consideration by us.

If the senior AFCA staff member or AFCA Decision Maker decides the Complainant's objection does not have substance, the file will be closed."

Therefore, unlike the Preliminary Assessment process, which must proceed to a Determination if the Complainant makes this request (Rule A.12.3(b)(ii)), we understand that exclusion by AFCA under Rule A.8.3 (as amended) will not proceed to Determination should the Complainant so request.

We submit it would be useful for all parties for AFCA to include further express confirmation of this process within the Operational Guidelines to ensure clarity in relation to AFCA's exercise of this Rule.

Question 4: Do you think that the proposed new Rule C.2.2g) and the Operational Guidelines discussion of settlement agreements is appropriately drafted?

The only improvement to the drafting ACDBA would offer is in relation to the Operational Guidelines, specifically to achieve consistency in the guidance provided:

Current proposed guidance

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.

If the settlement agreement is expressed broadly and without specificity eg 'all liability', we will consider whether a reasonable person with the same background as the Complainant would have understood that they were settling the matters raised in the complaint submitted to AFCA.

Suggested improved guidance

If at the time of the settlement a reasonable person with the same background as the Complainant would not have been 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.

If the settlement agreement is expressed broadly and without specificity eg 'all liability', we will consider whether a reasonable person with the same background as the Complainant would have understood that they were settling the matters raised in the complaint submitted to AFCA.

How we deal with complaints lodged by sophisticated or professional investors

Question 5: Do you think that the proposed amendment to the Operational Guidelines appropriately responds to the Review Recommendation 6?

No comment.

Forward Looking Review mechanism

Question 6: Are the proposed changes to the Operational Guidelines appropriately drafted and in keeping with Recommendation 9 of the Review Report?

ACDBA supports the proposed changes to the Operational Guidelines as being appropriately drafted and in keeping with Recommendation 9.

Effect of Determinations and slip rule

Question 7: 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?

ACDBA supports this proposed new Rule as appropriately worded and clarifying the effect of a determination not being accepted by a Complainant.

Question 8: Do you think the Rules wording is appropriated drafted and provides clearer guidance and transparency about the existing slip rule?

ACDBA supports the wording of the new Rule A.14.6 as drafted to give effect to clearer guidance and transparency on this issue.

Other changes

Question 9: Are there other areas in the AFCA Rules that you consider require similar administrative or minor changes?

ACDBA is unaware of the need for any other similar minor changes to the Rules but makes a suggestion for a change to the Operational Guidelines later in this submission.

Question 10: 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?

ACDBA agrees with the drafting of the proposed Rules as appropriately replicating the existing provisions under A.4.5 and A.4.6.

Question 11: Are there additional assessment criteria that AFCA should consider adopting to meet the stated objective?

ACDBA is unaware of any additional assessment criteria which should be considered.

Other matters

ACDBA takes this opportunity to flag up two issues requiring consideration:

Refer-back periods

We suggest a change to standardise refer-back periods across all complaints under Rule A.5.3.

The Operational Guidelines currently detail four possibilities determining the relevant refer-back period AFCA will allow the financial firm:

- The first two possibilities (referred to as post-IDR) usually lead to a 21 day refer-back period.
- The third possibility leads to at least a 21 day refer-back period as the complaint or further issue had not previously been through IDR.
- The final possibility which arises during the initial IDR timeframe can however lead to considerably shorter refer-back periods.

The possible shorter refer-back periods specified under the final possibility work against the opportunity for early resolution of the complaint. The overarching consideration when specifying a refer-back period should always be to provide adequate opportunity to allow resolution of the complaint by the financial firm through its IDR processes.

Consider these two scenarios:

- A. A Complainant lodges an AFCA complaint 20 days after first raising the matter with the financial firm (still being within the 21 day IDR timeframe). In this case AFCA would according to the Operational Guidelines provide a refer-back period of 1 day
- B. A Complainant lodges an AFCA complaint 22 days after first raising the matter with the financial firm (being outside the 21 day IDR timeframe). In this case AFCA would according to the Operational Guidelines provide a refer-back period of 21 days

The financial firm in Scenario A would not be afforded the same opportunity as the financial firm in Scenario B to resolve the matter at refer-back, simply due to the timing of the lodgement of the AFCA complaint by the customer – with respect this is procedurally unfair.

Additionally, such short refer-back periods (1 day in Scenario A above) undermine the ability for the financial firm to resolve the complaint in refer-back.

AFCA initially relies upon the chronology provided by the Complainant to determine the refer-back period pursuant to the four possibilities referenced above, however some customers may provide inaccurate information as to the date when they complained to the financial firm. Such erroneous information can adversely impact the refer-back period specified by AFCA.

It is noted from AFCA's Datacube statistics that financial firms currently resolve more than 50% of matters in refer-back. We submit standardisation of refer-back periods to provide a minimum of 21 days will likely lead to a greater proportion of complaints being resolved in the refer-back period – this will be beneficial for all parties and warrants careful consideration for such a change to AFCA's Operational Guidelines.

AFCA Datacube metrics

ASIC's Regulatory Guide 267 details AFCA's communications should be clear, timely, and relevant to the audience (RG 267.95) and that when developing communications strategies AFCA should ensure that information is: easy to access; user friendly (taking into account plain language principles); practically relevant; and provided at key stages of the complaint resolution process (RG 267.96).

AFCA's current Datacube publishes complaint information twice each year. One of the metrics is the 'non-response rate'. AFCA's Datacube glossary defines this rate as '*the percentage of complaints that progressed to the Case Management stage without an initial response at the Registration and Referral stage*'.

Under this definition the 'non-response rate' does not reflect the overall 'non-response rate' of all complaints made to AFCA about the financial firm, but only the 'non-responses' to matters which progress to case management.

This metric does not make the financial firm's overall non-response rate 'easy to access, user friendly or practically relevant' and can result in confusing and conflicting financial firm data. For example, a financial firm may achieve a near 100% resolution rate (that is, the rate of complaints resolved by the financial firm), but a very small number of 'non-responses' could also result in a near 100% 'non-response rate'.

ACDBA submits AFCA should amend its calculation of the 'non-response rate' to reflect the overall 'non-responses' by a financial firm, that is, 'non-responses' be reported as a percentage of the total number of complaints received by AFCA for the financial firm.

Contact

For any enquiry in relation to this Submission, please contact:

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Appendix 1 - Members of Australian Collectors & Debt Buyers Association

- Axxess Australia Pty Ltd
- CCC Financial Solutions Pty Ltd
- CFMG Pty Ltd t/as reminda
- Charter Mercantile Pty Ltd
- CollectAU Pty Ltd
- Complete Credit Solutions Pty Ltd
- Credit Corp Group Limited (ASX: CCP)
- Lyndon Peak Pty Ltd t/as Access Mercantile Services
- PF Australia Pty Ltd
- PRA Australia Pty Ltd
- Recoveries Corporation Holdings Pty Ltd
- Shield Mercantile Pty Ltd
- Standard8 Advisory Pty Ltd
- Strategic Collections Pty Ltd