

22 May 2023

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

Submitted via online upload at:

<https://www.afca.org.au/news/consultation/rulesandOGconsultation/submission>

**Australian Retail Credit Association (ARCA) submission:
Australian Financial Complaints Authority (AFCA) consultation on proposed
amendments to AFCA Rules and Operational Guidelines (the Consultation)**

Thank you for the opportunity to provide our submission to the Consultation.

ARCA

ARCA is the peak industry association for businesses using information for risk and credit management purposes. Our Members include Australia's leading banks, credit unions, finance companies, fintechs and credit reporting bodies and, through our Associate Members, many other types of related businesses providing services to the industry. Collectively, ARCA's Members account for well over 95% of all consumer lending in Australia.

ARCA regularly engages with AFCA on a range of policy, operational and technical matters and our Members largely comprise AFCA members. As such, ARCA is well positioned to provide feedback on the proposed changes to AFCA's Rules and/or Operational Guidelines.

ARCA's submission

At the outset we wish to note our support for the steps taken by AFCA to address the recommendations of the 2021 Treasury Review of AFCA (**the Treasury Review**). Subject to our comments below, we consider that the proposed amendments to the AFCA Rules and Operational Guidelines contained in the '*AFCA Rules and Operational Guidelines – Proposed amendments: Consultation Paper: March 2023*' (**the Consultation Paper**) are an appropriate initial response to a number of the recommendations arising from the Treasury Review.

Whilst we do not propose to provide feedback in relation to all of the proposed variations contained within the Consultation Paper, we have set out below our comments and feedback to the following Proposals:

Proposal 1: Paid Representatives

ARCA is broadly supportive of the proposal to amend Schedule E of the Operational Guidelines and to replace Rules C2.2g) and C2.2h), with Rules which will provide AFCA with the discretion to;

- cease considering a complaint because of inappropriate conduct by a 'Paid Representative' (as the term will be defined within the Operational Guidelines), and
- cease dealing with a complainant or a Paid Representative for a period of up to 12 months. In the case of a Paid Representative, we note that prior to excluding the Representative from AFCA's services AFCA will inform the Paid Representative of its concerns about the Representatives' conduct and provide it with the opportunity to promptly and properly address AFCA's concerns.

As noted in the Consultation Paper, since 2021 Paid Representatives who engage in certain Debt Management Services (**DMS**) are engaging in 'credit activity' for the purposes of the *National Consumer Credit Protection Act 2009* (**National Credit Act**) and as such, required to hold an Australian Credit Licence (**ACL**). As the entity responsible for the oversight of the ACL regime, we consider that there is significant benefit in ASIC being informed of concerns relating to ACL holders engaging in potential inappropriate conduct. Such benefit includes;

- allowing ASIC to consider if the ACL holder is complying with their general conduct obligations. This may be of particular relevance where ASIC is already aware of potential inappropriate conduct on the part of the Paid Representative and as such, the provision of this information by AFCA may assist with ASIC's consideration of the Representative(s), and
- potentially reducing the risk of harm to other consumers who are also clients of the Paid Representative. Since inappropriate conduct in the context of a single AFCA complaint can be indicative of general practice(s) or wider conduct issues, it is appropriate for ASIC to be aware of such matters so that it can take action to ensure that other consumers are not also negatively affected.

On this basis, we strongly urge AFCA to consider inserting with the Operational Guidelines and/or Rules, an explicit requirement to notify ASIC (within a certain period of time, such as 14 days) about decisions to exercise its discretion exclude a Paid Representative and/or to cease considering a complaint.

Definition of Paid Representative

In relation to the proposed new definition of 'Paid Representative', we consider that there is risk that the exclusion of 'a *lawyer with a current practicing certificate or an Accountant*' may inadvertently result in a significant number of individuals being able to avoid the application of the new Rules. This is because a large number of individuals who hold a practicing certificate or provide accounting services may operate within, or as individual DMS providers.

In our view the fact that an individual operating as, or within a debt management firm may be a practicing lawyer or accountant, should not of itself limit AFCA's ability to appropriately respond to inappropriate conduct by the Representative under the proposed discretionary powers.

In this regard we note that ASIC does not appear to apply the same exclusion to those individuals operating within or as, a debt management firm. We also note that whilst individuals who hold a practicing certificate or provide accounting services may also be subject to professional rules of conduct specific to their profession, such rules are unlikely to provide AFCA an equivalent means of responding to inappropriate conduct.

The proposed definition may also provide individual Paid Representatives with the ability to avoid the application of the new discretionary powers by simply transferring the management (either in practice or in name only) of complaints to an individual who is a practicing lawyer or accountant.

On this basis, we strongly urge AFCA to consider amending the proposed definition of 'Paid Representative' in line with the suggested variation below or similar wording (our suggested variation is in purple):

*Paid Representative means a person or service (other than a lawyer with a current practicing certificate or an Accountant **who is not providing debt management services, and/or their services on behalf of, or as, a licensed debt management firm**) who may receive financial remuneration for acting for a Complainant in relation to their complaint lodged with AFCA.*

Further guidance

As is evident from the issues discussed above, the proposed changes to the Rules in regards to Paid Representatives raise a number of uncertainties in relation to the intended application of the new provisions. In light of this complexity, we consider that it is appropriate for AFCA to provide detailed guidance in relation to the proposed Paid Representative provisions.

For instance, such guidance could clarify:

- if, and how, a Financial Firm (or other stakeholder) may raise with AFCA concerns about inappropriate conduct, and
- precisely how AFCA intends to ensure that it is exercising its discretion appropriately, in instances where the Paid Representative disputes AFCA (or a Financial Firm and/or ASIC) labelling their activities as DMA as defined in the NCCP or where it is otherwise unclear if the services being provided are in fact, DMS? On this point, guidance should also include detail about how a Financial Firm can raise a complaint in relation to a particular DMF and the type/amount of information the Firm would need to provide to AFCA to demonstrate that the services being provided fall within the definition of DMS.

Proposal 3: Appropriate settlement offers

ARCA supports the proposal to amend Rule A.8.3 to introduce a new Rule A.8.3d) which will permit AFCA to discontinue its consideration of a complaint in circumstances where;

“...the Financial Firm has appropriately compensated the Complainant for their loss, or has offered the Complainant an appropriate remedy or compensation, which has not been accepted”

To assist stakeholders to understand this new rule, we urge AFCA to provide additional guidance on the types of remedies and the circumstances in which these remedies would be considered *“an appropriate remedy or compensation”*.

For example, in the case of a complaint relating to an allegation that incorrect or inaccurate information is contained within a complainants' credit report, there would be benefit in AFCA clarifying the circumstances in which an offer to correct information (or if necessary to ensure accuracy, removal of information) is considered *“an appropriate remedy”* for the purposes of the new rule A8.3.

In regards to complaints relating to credit reporting matters (and in particular, credit enquiry information), there would also be benefit in AFCA providing guidance in relation to its approach more generally. For instance, in relation to matters relating to loss it is unclear precisely what type or amount of 'loss' AFCA considers a complainant may be entitled to claim and/or a Financial Firm entitled to compensate, in circumstances where;

- the complaint relates to a credit enquiry, and
- the enquiry was found to be correctly reported, or
- the enquiry has been removed or corrected (particularly where the complainant has not subsequently applied for credit).

Potential additional amendments to AFCA Rules and/or Operational Guidelines

We note that the Consultation Paper does not contain any proposals to amend the AFCA Rules or the Operational Guidelines in response to Recommendation 11, as contained in the Final Consultation report.

Recommendation 11 provides that:

“AFCA should ensure consultation is undertaken on each Approach Document prior to final publication.”

In terms of AFCA's response to Recommendation 11, we note from AFCA's website that it has, and it will take the following steps:

- It has researched options for improving future consultations with input from key stakeholders.
- It is piloting a new consultation process on new Approaches following which AFCA will finalise a formal consultation process to identify any unintended consequences of new AFCA Approaches and inform key stakeholders.

Whilst we are supportive of these measures, we consider that it is appropriate for the Rules and/or Operational Guidance to also be amended so as to set out the measures which AFCA intends to implement to ensure that consultation is undertaken on each Approach Document prior to final publication.

Such amendments should include an explicit requirement for AFCA to consult with a variety of specified stakeholders such as industry associations, Financial Firms (including credit providers and credit reporting bodies), etc.

However, such amendments to the Rules and/or Operational Guidelines should not occur without an adequate consultation process which provides the opportunity for stakeholders to provide their feedback to the proposed measures.

If you have any questions about this submission, please feel free to contact me on [REDACTED] or [REDACTED].

Yours sincerely,

Mary Vancea

General Manager - Legal & Policy

Australian Retail Credit Association