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By email: consultation@afca.org.au

Executive General Manager Jurisdiction
Australian Financial Complaints Authority
Address Line GPO Box 3
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Dear General Manager

AFCA Rules and Operational Guidelines – Proposed amendments

Thank you for the opportunity to respond to the proposed amendments to the Australian Financial Complaints Authority's (AFCA) complaint resolution scheme rules (Rules) and Operational Guidelines (Guide). Ensuring AFCA continues to be a fair and accessible dispute resolution body for consumers is of vital importance for consumers. Consumer Action Law Centre (Consumer Action) sees the impact of AFCA's role in both the matters where we represent clients pro-bono in AFCA disputes, as well as through the many more matters where we provide ad-hoc advice to complainants, or financial counsellors assisting their own clients.

We are surprised that the most significant proposed changes to the Rules since its establishment are to primarily expand the circumstances where AFCA can exclude complaints. We have specific concerns about Proposal 2 and 3. We hope AFCA has given significant consideration to also identifying areas of the Rules and Guide that may be negatively impacting complainants' access to justice. We recognise that the amendments have been prompted by the recommendations from the Government's Independent Review of AFCA (Independent Review). However, the link between those recommendations and some of these proposals seems tenuous.

As we pointed out at the ACAP consultation earlier this month, the amendments capture behaviour of a far lower standard than the egregious examples cited in justifying the proposed exclusions. While we were assured the exclusions would only apply to the few worst examples, as the proposed amendments currently read, there is real possibility for their unfair application to exclude the most vulnerable in our community and deny access to justice or compensation.

We make some recommendations below to help address possible risks or grey areas we have identified. We also make recommendations about issues we would like to see addressed that are separate to the proposals, but we consider to be related to the recommendations of the Independent Review. A summary of recommendations is available at **Appendix A**.

Responses to proposals in the Consultation Paper

Proposal 1 – poor conduct by, and unlicensed, paid representatives

We strongly support the amendments to the Rules and Guide under Proposal 1 to expand AFCA's powers to exclude paid representatives that are not acting in the best interests of a complainant, or that are unlicensed. However, we emphasise that it is vital that AFCA does everything in its power to contact a complainant directly and assist them to continue their complaint if the exclusion of a Paid Representative would impact their complaint

being heard, and particularly if it would extinguish the legal rights of the complainant altogether (eg if a claim would become statute barred). It does appear the amendments to the Guide¹ sufficiently clarify this.

Another potential unintended consequence of this reform is that it may impact other clients of these representatives. If a client of an excluded representative is being assisted in a dispute with a financial firm but no complaint has been lodged in AFCA at the time of the representative's exclusion, they may be left in limbo. We have seen debt management firms (in particular) string out arrangements with clients over a long period of time in some circumstances, accruing significant and unjustified fees. Obviously this should not prevent the exclusion of problematic representatives. However, we urge AFCA to consider ways that this risk could be addressed. We suggest exploring whether (for example) ASIC may be able to obtain client records from excluded representatives and inform their other clients of the decision and refer them for free independent advice.

Further, bans for unlicensed representatives should continue indefinitely while the representative continues to be unlicensed (ie for the period of up to 12 months specified, or when the representative obtains the necessary licence, *whichever is longer*).

RECOMMENDATION 1. AFCA should make appropriate referrals to ASIC when AFCA exclude paid representatives.

RECOMMENDATION 2. Bans should continue indefinitely while the representative continues to be unlicensed or otherwise does not meet conduct requirements (ie not for a maximum of 12 months).

Proposal 2 – Exclusion of complainants

We do not think that the proposed new provisions in relation to Complainant conduct achieve the right balance between efficiency and accessibility. We agree that abusive or threatening conduct by a complainant toward an AFCA employee is unacceptable. However, we are concerned that complainants living in vulnerable circumstances will be excluded from AFCA under this rule.

The proposed rule A.8.4(b) enables AFCA to exclude a complaint if the complainant is unreasonable. The term unreasonable is broad and dependant on perspective. Conduct that AFCA may consider unreasonable may be the result of the client's circumstances (for example, disabilities or mental health conditions). Cultural difference can also impact what types of behaviour are perceived to be acceptable. We recommend the word 'unreasonable' is removed.

RECOMMENDATION 3. Remove the reference to unreasonable conduct as grounds to exclude a complaint in the Rules and the Guide.

The proposed Rule B.6.3 regarding bans of complainants is also drafted quite broadly compared to the description of its intended use in the Consultation Paper (simply citing 'misconduct or abuse of AFCA's process'). We urge AFCA to consider whether this could be expressed more precisely. The Guide offers some useful context to the rule, but is still less specific than it could be. For example, the Consultation Paper refers twice to AFCA's work to support access to the scheme by people experiencing vulnerability and that the use of this power will take into account such matters, yet the Guide does not clarify this. We recommend that under the 'Complainants' subheading on page 48 of Attachment 5, a sentence be included that specifically clarifies that AFCA will consider any issues and impacts of vulnerability before using this power.

We also urge AFCA to consider introducing a provision that would allow it to consider reopening a complaint excluded under A.8.4(b) after an (up to 12 month) ban of a complainant has been lifted. Examples of such situations may be if the complainant can demonstrate that they have undertaken counselling to address the problem

¹ Attachment 5 to consultation paper, Draft Guide, at A.8.4, page 48

behaviour or have engaged a representative and will not contact AFCA themselves, or where they were experiencing acute difficult personal circumstances, such as:

- Family or domestic violence
- Terminal illness of a direct family member
- Significant personal physical or mental health problems.

RECOMMENDATION 4. Provide greater specification in the Rules about the types and serious nature of conduct by complainants that may warrant their exclusion. Specify in the Guide that before exercising this power, AFCA will give reasonable consideration to the impact of any form of disadvantage or vulnerability a complainant may be experiencing.

Proposal 3 – Appropriate settlement offers

We are concerned that the changes to Rule A.8.3 as part of Proposal 3 risk unfairly pre-empting the outcome of a complaint. If a complainant has rejected an offer of compensation and lodged a complaint, it is clear they do not consider the offer to be fair. That’s why they have gone to AFCA – for their complaint to be properly assessed by an independent expert.

Proposal 3 could amount to AFCA making a fast track assessment of a complaint, but without taking the usual steps required to appropriately assess the merits of the complaint. It seems complaints could be excluded if the offer is deemed ‘fair enough’ on their preliminary interpretation, without fully reviewing the matter. The merits of a complaint can look very different upon an initial review compared to after proper analysis. This is especially the case where a complainant is unrepresented and experiencing vulnerability, and could have trouble articulating their complaint appropriately. A good example arises in our scams casework. We have seen various examples of the recommendation made by the original AFCA worker to be entirely changed on determination by the ultimate decision-maker. AFCA’s complaints handling process is supposed to ensure that people can have their complaint fairly heard, even where they are unrepresented. We specifically urge AFCA to ensure that changes have regard to the first sentence of the Independent Review’s analysis that led to Recommendation 5:

“AFCA needs to make sure it has enough information about the facts of a complaint and the issues involved before making a decision about whether to exclude a complaint.”²

The Review also specifically stated that it **did not** consider there to be a need for a reasonable offer rule, which is quite close to what this Proposal would introduce.³ This proposed amendment appears aimed squarely at efficiency instead of the fundamental purpose of AFCA determining complaints fairly.

RECOMMENDATION 5. Reconsider proposal 3.

Proposal 4 – Previous settlement agreements

We support the content of the Guide on page 160 that addresses the interpretation of the proposed Rule C.2.2(g). However, AFCA should consider expanding Rule C.2.2(g) so that AFCA may consider complaints if a settlement was obtained by unfair conduct on the part of the Financial Firm, as well as the other circumstances listed.

While the Rule as drafted allows for settlements to be revisited if a Financial Firm has engaged in a range of forms of unlawful conduct, there are often bars that can be difficult for consumers to prove and in practice allow firms to get away with a range of unethical conduct. The ACCC has been calling for the introduction of an economy wide unfair trading prohibition for years,⁴ and there are signs the Government is considering its introduction.⁵

² Independent Review, para 4.101

³ Ibid, para 4.106

⁴ See, for example: <https://www.accc.gov.au/about-us/media/speeches/acccs-enforcement-and-compliance-policy-update-2022-23-address>

⁵ See, for example: <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/articles/opinion-piece-making-it-fairer-all>

Delivering fairness is a fundamental purpose of AFCA. If AFCA decides a Financial Firm has acted unfairly when entering a settlement with a complainant, the inability of the complainant to demonstrate this unfair conduct also meets a higher legal standard should not prevent AFCA from re-considering the issue. There should be similar amendments made to the paragraph addressing this issue in AFCA's approach to terms of settlement guide.⁶

RECOMMENDATION 6. Expand Rule C2.2(g) to allow AFCA to also consider complaints despite there being a full and final settlement between the parties if the complainant can show that the Financial Firm acted unfairly in obtaining the settlement.

Proposal 5 – Sophisticated and professional investors

We support Proposal 5, however urge AFCA to undertake a brief check of the basic details of complaints involving sophisticated or professional investors for risk of mis-classification as standard practice, even if it is not raised by the complainant. Where the facts of the dispute indicate a risk of mis-classification, AFCA should explicitly advise the complainant of the right to dispute their classification as an investor of these types.

Proposal 6 – Forward looking review mechanism

We support the changes to the Guide to:

- 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
- Include publishing the outcome of a review.

However, there is a change to the Guide regarding resourcing of the cost of the review. A.15 of the Guide currently states that where an industry body seeks the review, AFCA may require:

"...an undertaking to enter a Costs Contribution Agreement with AFCA to, for example, cover reasonable costs incurred by a consumer organisation in commenting on the body's legal advice."

The Amendments to the Guide delete this provision and state instead that:

"The organisation requesting the review may be asked to contribute to the cost for AFCA of undertaking the review."

Consumer organisations have limited resources. This change is likely to impact the ability of consumer organisations to use the formal review process and to respond to reviews requested by industry. Specifically, these reviews can be incredibly resource intensive and track over months and years.

RECOMMENDATION 7. Retain the ability for AFCA to require industry bodies to enter a Costs Contribution Agreement to cover the reasonable costs incurred by a consumer organisation making a submission to a review requested by an industry body. Exempt consumer bodies from contributing to the cost of AFCA undertaking a review.

Proposal 12 – Financial Service definition

While we support the amendment to recognise AFCA's jurisdiction covers financial services involving debt management assistance (**DMA**) and credit reporting assistance (**CRA**), the decision to strictly link the definition of these terms to the definition used in the National Consumer Credit Protection Regulations 2010 (**NCCP Regs**) unnecessarily restricts the scope of appropriate matters for AFCA to consider. We understand the definitions of

⁶ On page 11.

DMA and CRA in the NCCP Regs to only apply to matters where the underlying debt is a regulated credit contract or a guarantee.⁷

AFCA should at least seek legal advice about whether it is open for it to expand the scope of its oversight of debt management or credit repair services where the underlying debt or credit listing was related to another form of debt, such as telecommunications or energy bills. We have raised this issue with AFCA previously via the Consumer Advisory Panel, and have been disappointed to see AFCA take a conservative approach to date.

The current Guide explicitly clarifies that AFCA's definition of financial service is broader than the same in the *Corporations Act 2001*, and that it may consider complaints about services provided outside of the scope of those necessarily provided under an Australian financial services licence (AFSL).

Debt management and credit reporting assistance firms are notorious for giving poor value and often harmful advice to people in financial hardship. Consumer Action has seen this advice lead to dire consequences, and it hasn't been fully addressed by the introduction of a licensing regime. Further, whatever the underlying debt is, the consequences can often be the same and the problems that arise are normally similar regardless of the source of the debt (or credit listing). This is an area in desperate need of better dispute resolution accessibility. It is exactly the kind of area where AFCA should be considering whether it can assist people to achieve better outcomes.

RECOMMENDATION 8. If legal basis to do so, AFCA should expand the definition of financial services in the Rules so that it can hear reasonably relevant complaints about AFSL holders providing debt management assistance and credit repair assistance related to debts regardless of the origins of the relevant debt or listing.

Proposal 13 – AFCA's Annual Report

We support the amendments to Rule 20.1. We agree that ASIC's RG 267 already requires that AFCA publish the specific points proposed to be deleted from Rule 20.1.⁸ However, we urge AFCA to start publishing the figures on complaints data in terms of 'complaints per 100,000 policies'. Presenting this information by business size makes it significantly more difficult for consumers or others to make use of this information. A stakeholder using the Datacube is not able to intuitively determine the worst performers without this ratio analysis.⁹

Other issues related to recommendations from Independent Review

Non-financial Loss Cap

Under Rule D.4, the maximum threshold for the award of non-financial loss is \$5,400 per claim. In contrast, a person who has experienced distress or humiliation from a course of conduct of prohibited debt collection practices could seek compensation in a court or tribunal of up to \$10,000.¹⁰ We recommend that the threshold for non-financial loss be increased to at least \$10,000 per claim.

The Independent Review was completed prior to the onset of the substantial increase in inflation and cost of living crisis, its views on the appropriateness of monetary caps in this regard are already out of date. AFCA recently publicly consulted on its approach document to non-financial loss. Some of the case studies in the draft approach demonstrate the absolutely devastating impact beyond the financial that extremely poor conduct by financial firms can have on the lives of individuals. \$10,000 still would not be sufficient compensation in these circumstances, but it is far more appropriate than the meagre \$5,400 current limit.

⁷ *National Consumer Credit Protection Regulations 2010* (Cth) 4B and 4C

⁸ ASIC Regulatory Guide 267, paras 267.74-79, available at: <https://download.asic.gov.au/media/veydmskt/rg267-published-2-september-2021.pdf>

⁹ More commentary on this issue available in our submission to the AFCA Independent Review, p31-32: <https://consumeraction.org.au/review-of-the-australian-financial-complaints-authority>

¹⁰ Section 45, *Australian Consumer Law and Fair Trading Act 2012* (Vic)

RECOMMENDATION 9. Increase the threshold for non-financial loss to at least \$10,000 per claim.

Debt recovery the subject of a complaint

AFCA Rule A.7.1(c)(i) says that while AFCA is considering a complaint a financial firm must not take any action to recover a debt which is the subject of the complaint, including enforcement of a default judgment obtained in court. However, AFCA will not require a Financial Firm to stop a garnishee order it has issued prior to a complaint being lodged, even where the complainant may have a strong case for a set aside application. We made this point in our joint submission to the Independent Review,¹¹ but it was not addressed at all in the Review report.

In our view, this is inconsistent with the broader operation of this section of the Rules, the overarching goal of delivering fairness and Recommendation 2 of the Independent Review. We recommend that AFCA amend the Guide to specifically require Financial Firms to seek the consent of AFCA to continue collecting on a garnishee order relevant to the complaint. This would allow AFCA to consider the impact of the order and appropriateness of its continued operation while the dispute is being considered.

RECOMMENDATION 10. Amend the commentary in the Guide that applies to Rule A.7.1 to clarify that Financial Firms must obtain AFCA's consent to continue collecting on a garnishee order that is directly related to the subject matter of the complaint.

Meaning of 'considering a complaint'

Additionally, AFCA should clarify what 'considering a complaint' means in Rule A.7.1(c)(i). It is not clear when this comes into effect. Is it once a complaint has been lodged, when the firm is made aware of the complaint, or later? We recommend that this obligation should commence from the earlier of the dates the financial firm becomes aware of the complaint, or the date it is registered by AFCA (if they are different).

RECOMMENDATION 11. Clarify that Rule A.7.1(c)(i) applies from the earlier of the dates that the financial firm is made aware of the complaint, or the complaint is registered with AFCA.

Family law disputes unreasonably excluded

Considering that a significant number of AFCA's proposals impact the ability to exclude complaints, we urge AFCA to also consider revisiting the guidance around its approach to matters where a family law property settlement or order may have considered the conduct of an ex-partner in relation to credit.

Specifically, we urge AFCA to consider revising the example at the bottom of page 144 of the existing Guide¹² to specifically acknowledge that a Family Law property settlement or court orders do not preclude any complaint being made to AFCA regarding the conduct of a Financial Firm but may be relevant to the determination of loss and compensation. Our concerns are detailed further in our joint submission to the Independent Review,¹³ but in essence we are concerned the current approach can lead to the unreasonable exclusion of victim survivor claims, and further entrench disadvantage and continue perpetration of economic abuse. This is again inconsistent with Recommendation 2 and the ability of AFCA to consider what is fair in all the circumstances.

RECOMMENDATION 12. Specifically acknowledge that a Family Law property settlement or court orders do not preclude any complaint being made to AFCA regarding the conduct of a Financial Firm but may be relevant to the determination of loss and compensation.

¹¹ See page 27-28, available at: <https://consumeraction.org.au/review-of-the-australian-financial-complaints-authority/>

¹² <https://www.afca.org.au/about-afca/rules-and-guidelines/afcas-operational-guidelines>: "If a Family Law property settlement or court orders are obtained between the Complainant and their spouse or de-facto partner before we have finished our consideration of a complaint, it may not be possible to continue with the complaint. This is because of the possibility that the allocation of assets and/or liabilities in the property settlement has taken into account the benefit obtained by the other party Australian Financial Complaints Authority because of the Financial Firm's error, and additional compensation through our Determination would not be appropriate."

¹³ See page 26, available at: <https://consumeraction.org.au/review-of-the-australian-financial-complaints-authority/>

Expert reports

There is a power imbalance between complainants and firms in obtaining evidence. This is particularly so in relation to insurance disputes, where insureds often face declined claims due to insurer procured expert evidence and no way to counter this where they cannot afford to pay for a report upfront. In many circumstances, AFCA will find at determination that an insurer is required to pay the complainant's expert's fee, which we consider is often a fair and reasonable outcome. However, this does not assist those who cannot afford to pay for the expert upfront resulting in inequality of outcomes depending on a person's financial circumstances.

Financial firms are well resourced and connected. Whilst AFCA has the power to require a financial firm to obtain an independent expert or, in exceptional circumstances, require the firm to pay for the complainant's expert report, in our experience this is not common. Consequently, consumers are often less able to provide sufficient medical evidence, expert building or car assessments. This is further compounded by experts being unwilling to assist consumers as they do not want to interfere with their relationship with the insurer. AFCA should consistently and proactively apply these benefits and to have relationships with independent experts to ensure that consumers are not unfairly impacted. This would be consistent with doing what is fair in all the circumstances, under Recommendation 2 of the Independent Review.

RECOMMENDATION 13. Ensure that AFCA makes use of its discretion to find that a financial firm must fund an expert report and its discretion to seek its own expert advice to ensure access to justice for complainants. The process could be improved by amending the Guide¹⁴ to include a complainant's ability to afford their own expert report as a relevant factor, and specifically outlining that AFCA may still require this where a financial firm has obtained their own expert report.

Please contact Policy Officer **Tom Abourizk** at **Consumer Action Law Centre** on [REDACTED] or at [REDACTED] if you have any questions about this submission.

Yours Sincerely,

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.

Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We are the voice for the financial counselling profession and provide support to financial counsellors including by sharing information and providing training and resources. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.

¹⁴ At Rule A.9.3

APPENDIX A - SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. AFCA should make appropriate referrals to ASIC when AFCA exclude paid representatives.

RECOMMENDATION 2. Bans should continue indefinitely while the representative continues to be unlicensed or otherwise does not meet conduct requirements (ie not for a maximum of 12 months).

RECOMMENDATION 3. Remove the reference to unreasonable conduct as grounds to exclude a complaint in the Rules and the Guide.

RECOMMENDATION 4. Provide greater specification in the Rules about the types and serious nature of conduct by complainants that may warrant their exclusion. Specify in the Guide that before exercising this power, AFCA will give reasonable consideration to the impact of any form of disadvantage or vulnerability a complainant may be experiencing.

RECOMMENDATION 5. Reconsider proposal 3.

RECOMMENDATION 6. Expand Rule C2.2(g) to allow AFCA to also consider complaints despite there being a full and final settlement between the parties if the complainant can show that the Financial Firm acted unfairly in obtaining the settlement.

RECOMMENDATION 7. Retain the ability for AFCA to require industry bodies to enter a Costs Contribution Agreement to cover the reasonable costs incurred by a consumer organisation making a submission to a review requested by an industry body. Exempt consumer bodies from contributing to the cost of AFCA undertaking a review.

RECOMMENDATION 8. If legal basis to do so, AFCA should expand the definition of financial services in the Rules so that it can hear reasonably relevant complaints about AFSL holders providing debt management assistance and credit repair assistance related to debts regardless of the origins of the relevant debt or listing.

RECOMMENDATION 9. Increase the threshold for non-financial loss to at least \$10,000 per claim.

RECOMMENDATION 10. Amend the commentary in the Guide that applies to Rule A.7.1 to clarify that Financial Firms must obtain AFCA's consent to continue collecting on a garnishee order that is directly related to the subject matter of the complaint.

RECOMMENDATION 11. Clarify that Rule A.7.1(c)(i) applies from the earlier of the dates that the financial firm is made aware of the complaint, or the complaint is registered with AFCA.

RECOMMENDATION 12. Specifically acknowledge that a Family Law property settlement or court orders do not preclude any complaint being made to AFCA regarding the conduct of a Financial Firm but may be relevant to the determination of loss and compensation.

RECOMMENDATION 13. Ensure that AFCA makes use of its discretion to find that a financial firm must fund an expert report and its discretion to seek its own expert advice to ensure access to justice for complainants. The process could be improved by amending the Guide to include a complainant's ability to afford their own expert report as a relevant factor, and specifically outlining that AFCA may still require this where a financial firm has obtained their own expert report.