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Via email: consultation@afca.org.au

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The FBAA recognises the very important work performed by AFCA and we acknowledge it is not an easy undertaking to balance the rights of parties, particularly when there is a perception that the commercial party to an AFCA complaint is seen to have an inherently stronger position than consumer complainants based on notions of commercial entities being better capitalised, more experienced, and better able to absorb the costs of AFCA proceedings and payment of determinations.

Many member firms ("Members") that are drawn into AFCA complaints are as inexperienced and financially vulnerable as the consumer complainants. In some cases, complainants are more experienced and have significantly less downside than the Member.

The most inequitable outcome of external dispute resolution is that Members are charged thousands of dollars regardless of fault or merit. This was addressed to some degree through recent changes where Members receive 5 complaints at no cost each year. The introduction of AFCA's merits assessment under Rule A.8.3 has also had some impact in this area (although Members are still charged a case management fee).

Despite the merits review process and the 5 free complaints per annum, the heavy cost burden of defending a complaint through EDR remains. A Member's 5 fee-free complaints can be consumed by trivial matters, leaving them exposed to significant fees for any other complaints during the year – again regardless of fault or merit.

The FBAA will continue to advocate for a fairer system. To this day it remains a situation largely out of the control of the Member as to whether any offer to resolve a complaint is sufficiently adequate to avoid it being taken to EDR.

It is good to see recognition that the EDR regime is open to abuse. It has been exploited by paid advocates and opportunistic complainants for many years. It continues to be exploited despite the rule changes in recent years.

Members are still being charged many thousands of dollars for matters where they are told they did nothing wrong. Members incur AFCA fees even where a complaint is based on a lack of consumer understanding or an unreasonable demand.

By way of example, we have a report indicating that a Member was billed more than $8,000 over a consumer wanting a default listing to be removed from their credit file. The matter proceeded to a hearing where it was determined the Member was entitled to list the default. The EDR system requires further repair and remains open to exploitation while such an outcome is a possibility. Unless Members can be indemnified against incurring costs to defend themselves where they have complied with their obligations, the system will continue to be exploited by people looking to strongarm outcomes they are not entitled to using the threat of EDR fees. The proposed Rule changes are welcome, but they do not go far enough.

The FBAA has previously advocated for several rules it believes would correct situations where Members are unfairly charged fees despite acting lawfully and appropriately. We recognise that a core principle of an EDR system is that genuine complainants must be able to bring a complaint / seek to have a legitimate dispute adjudicated by an independent third party at no cost to them. Our suggestions do not impact that principle.

The two rule changes advocated by the FBAA are:

1. **Where Members are completely exonerated, they should be charged nothing.**
2. **The AFCA costs to a Member to defend a complaint should not exceed the amount in dispute.**
   No Member should be charged thousands of dollars in fees to defend a complaint over hundreds. No Member should be charged AFCA hearing fees for matters relating to removal of credit inquiries or credit defaults unless the Member has made errors.

We recognise there can be legitimate complaints regarding consumer credit files. Inquiries and defaults are often a consequence of consumer behaviour and a complex regulatory framework established by Australian laws. In a fair system, Members should not have to pay AFCA hearing fees over credit file disputes unless AFCA finds the Member has made an inquiry without authority or has made an error in listing. Complying with legal obligations should never form the basis of a complaint that a Member can be charged for, even if a consumer is unhappy with the consequences.

Consultation Paper proposals

Proposal 1: Paid Representatives

The FBAA supports the proposed amendments to strengthen the Rules around excluding Paid Representatives and discontinuing complaints being improperly driven by Paid Representatives. We would like to see the reforms go further and allow AFCA to direct Paid Representatives to pay hearing fees where their conduct has resulted in unreasonable claims being made by, or brought on behalf of, consumers.

Introducing some element of financial risk for Paid Representatives that behave inappropriately is the most direct way to influence behaviour.

AFCA may wish to consider including examples in its Operational Guidelines of the types of behaviour that are unacceptable. The Rules appear to limit AFCA's ability to consider the conduct of a Paid Representative only to its dealing with AFCA (i.e. from the time the complaint is lodged with AFCA). We support the Rules explicitly giving AFCA power to consider the conduct of the Paid

Representative in their initial dealings with Members and prior to the complaint being brought to AFCA. This is because the conduct of the Paid Representative can often be the reason a complaint reaches AFCA in the first place.

We note on page 8 of the consultation paper where it says, "AFCA will not lightly take action to exclude a complaint and that any exercise of the discretion to exclude will only occur after a procedurally fair process has been undertaken". We support AFCA taking a firm line and regularly exercising its discretion to minimise instances of Paid Representative misbehaviour in the future. Strong, early action will benefit all parties to EDR.

We would also like to see the Rules or Operational Guidelines address the cost implications of a complaint being discontinued under these provisions. In our view, Members should not be charged anything where a complaint is discontinued under these provisions.

Proposal 2: Complainants

Inappropriate behaviour of complainants is not only limited to that directed towards AFCA staff. We support AFCA Rules strengthening AFCA's ability to exclude or discontinue a complaint where the conduct of the complainant is unacceptable.

In our view, the Rules could go further to empower AFCA to exclude or discontinue a complaint where the complainant's conduct towards the other party is also unacceptable. At this time the Rules seem unduly limited to AFCA only considering the conduct of a complainant towards its staff.

We also support changes to the Rules to give AFCA more power to act where a complainant is dishonest. We have numerous accounts of Member experiences where complainants provide false information to support a complaint. This includes fabricating information, denying that certain events or communication took place and manipulating documents. Instances communicated to us include where information provided by complainants during case management conferences is clearly shown to be untrue, yet there appears to be little consequence. Other jurisdictions carry penalties for misleading the Court or Tribunal. It is unclear what action AFCA takes against dishonest complainants and whether the Rules give AFCA enough power to adequately deal with them.

Proposal 3: Appropriate settlement offers

We are pleased to see this inclusion. The FBAA supports the introduction of a Rule allowing AFCA to exert more influence over matters where an appropriate settlement offer has already been made.

Proposals 4 to 13

The FBAA supports the proposals and amendments to the Rules and Operational Guidelines as proposed in the paper and have no further comments against proposals 4 to 13.

In concluding, we recognise many of the proposed changes to the Rules and Operational Guidelines require the exercise of discretion by AFCA staff and that such discretion can usually only be exercised after engaging with the potentially affected party. The changes are a very positive steps towards making EDR more efficient and fairer for all parties. They will only be effective if they are enforced. We support AFCA adopting a no-nonsense approach to administering the EDR scheme and to regularly exercising the discretions introduced through these Rule changes. All parties to a dispute should be held to a similar standard of conduct and integrity.

Thank you for the opportunity to make a submission.

Yours faithfully

Peter J White AM MAICD
Managing Director

Life Member – FBAA
Life Member – Order of Australia Association
Advisory Board Member – Small Business Association of Australia (SBAA)
Chairman of the Global Board of Governors – International Mortgage Brokers Federation (IMBF)