



FinTech Australia

AFCA Proposed amendments to Rules and Operational Guidelines - Submission

This Submission Paper was prepared by FinTech Australia working with and on behalf of its 420+ Members

May 2023



About this Submission

This document was created by FinTech Australia in consultation with its members.

In developing this Submission, our Privacy and Compliance Policy Working Group participated in roundtables and calls to discuss key issues and provided feedback to inform our response to the consultation paper.

Fintech Australia and its Members particularly acknowledge the support and contribution of our Policy Partner **K&L Gates** to the topics explored in this Submission.

About FinTech Australia

FinTech Australia is the peak industry body for the Australian fintech sector, representing over 420 fintech companies and startups across Australia. As part of this, we represent fintechs spanning payments, consumer and SME lending, wealthtech and neobanking, the crypto, blockchain and Web3 space, regtech and insurtech, and the consumer data right.

Our vision is to make Australia one of the world's leading markets for fintech innovation and investment. This submission has been compiled by FinTech Australia and its members in an effort to drive cultural, policy and regulatory change toward realising this vision.

FinTech Australia would like to recognise the support of our Policy Partners, who assist in the development of our submissions:

- Cornwalls;
- DLA Piper;
- Gagens;
- Hamilton Locke;
- King & Wood Mallesons; and
- K&L Gates.



Responses to proposals

FinTech Australia welcomes the opportunity to make a submission to AFCA's consultation on proposed amendments to its Rules and Operational Guidelines.

We appreciate the focus of these changes are to address recommendations made in Treasury's 2021 Review of the Australian Financial Complaints Authority and improve the general accuracy and clarity of AFCA's guidance. FinTech Australia Members broadly support the amendments proposed and hope this consultation will form part of an ongoing process of improving AFCA's processes to ensure fair and cost-effective outcomes for both consumers and members.

Specifically, our members note that while AFCA plays an important role as an alternative to a tribunal or court, the cost burden for smaller members can be a significant impost where complaints are not upheld, are vexatious or involve unreasonable behaviour by the complainant. Proposals to restrict Paid Representatives and deter unreasonable behaviour by Complainants are important first steps towards addressing these issues. However, we remain concerned these changes are more focused on improving AFCA's operational efficiency rather than addressing the significant costs these Complainants impose on members or providing fee relief.

We set out below our comments in relation to some of the key issues arising out of the proposed amendments to AFCA Rules and Operational Guidelines.

Proposal 1: Paid Representatives

Our members are of the view that more could be done in relation to Paid Representatives. Some members expressed concern that a Paid Representative may be able to take advantage of a number of consumers before they can be removed. Fintech Australia encourages AFCA to explore additional avenues for removing problematic Paid Representatives.

Definition of Paid Representative

The proposed new definition of Paid Representative appropriately excludes lawyers with practising certificates and provides a clear explanation that a Paid Representative is a person who receives financial remuneration.



Limit on exclusion period

Our members would like clarity on why the "up to 12 month" period has been selected as the exclusion period and how that will be reviewed and/or extended by AFCA.

Our members regard that the additional rule and changes proposed (of limiting it to 12 months) could add complexity to the process and take up AFCA staff time to coordinate and manage. This risks not fully achieving the objective of the independent recommendation to avoid the poor conduct of PRs impacting the efficiency of AFCA's processes.

Our members propose that a longer continuous period or indefinite period would free up AFCA staff time.

Concerning conduct

Our members would like to see additional examples of poor conduct by Paid Representatives included in the Operational Guidelines.

Proposal 2: Complainants

Our members believe that the proposed changes in relation to Complainants are measured and balanced as a proposal.

Our members would like to see that AFCA expand the Complainants rules to include unreasonable behaviour towards Financial Firms during the complaint period.

We would also like clarity:

- on the approach to complaint handling outside of the 12 month period, including whether this means that the Complainant is again re-directed to the Financial Firm; and
- in the Rules on whether the definition of Complainant includes complaints made on behalf of Complainants. We note that this definition does not expressly include representatives or Paid Representatives on behalf of Complainants.



Our members also query whether fee relief should be provided in these circumstances where Complainant behaviour has been unreasonable.

Proposal 3: Appropriate Settlement Offers

Our members are of the view that A.8.3 is appropriately drafted. They regard that it is helpful AFCA will close a complaint where a Complainant has acted unreasonably. Our members have expressed concern around the subjective nature of this terminology and would like clarification on how "appropriate" will be defined. Accordingly, our members would like further guidance on what would be deemed appropriate in terms of the offered remedy or compensation.

To ensure that settlement offers are in fact appropriate, our members would be reassured by a level of reasonable flexibility whereby AFCA considers each complaint on a case-by-case basis. Our members regard that a one-size fits all approach may reduce the likelihood of successfully negotiated settlements.

We would also appreciate clarification as to whether AFCA will be required to give the Complainant reasons or an explanation of why AFCA views the offer as reasonable and appropriate.

If AFCA deems that a settlement offer is not appropriate, our members seek clarification on whether the Financial Firm would have the chance to adjust their offer. Where the Financial Firm does not believe any adjustment is required to such an offer, our members would like clarity on how this would be dealt with by AFCA.

Proposal 4: Previous Settlement agreements

Our members are of the view that the proposed new Rule C.2.2(g) is appropriately drafted and that the outline of what is to be included in the Operational Guidelines has been well considered.

Proposal 5: Sophisticated investor or professional investor complaints

Our members consider that the proposed amendments to Operational Guidelines appropriately respond to Recommendation 6 of Treasury's 2021 Review of the Australian Financial Complaints Authority.



Proposal 6: Forward looking review mechanism

Our members consider that the proposed changes to the Operational Guidelines are appropriately drafted and in keeping with Recommendation 9 of Treasury's 2021 Review of the Australian Financial Complaints Authority.

Our members regard that the proposals with regards to the forward looking review mechanism will improve the accessibility of the process as well as the transparency. Our members believe it will be valuable to view requests made by other bodies, including consumer groups to analyse how these are responded to by AFCA.

Proposal 7: Complainant non-acceptance of Determination

Our members consider that the new Rule A.15.3(b) is appropriately worded and provides clarity about the effect of a determination not being accepted by a Complainant.

Questions are outstanding as to how the process continues if the Complainant does not accept the determination. Our members would like clarification from AFCA on what steps are able to be taken by both the Complainant and the Financial Firm to understand how the ruling was applied and how to change the outcome.

Proposal 8: Accidental error in a Determination – slip rule

Our members regard that the new Rule A14.6 is appropriately drafted and provides clearer guidance and transparency about the existing slip rule.

Proposal 9: Consistency of language about AFCA's monetary limits

The proposed changes regarding consistency of language about AFCA's monetary limits enhance consistency and do not change the effect of the rule.

Proposal 10: Clarifying the objection process for rule A.8.3

We note that the rules currently do not set out in full the objection process available to the Complainant where AFCA determines not to continue to consider their complaint under Rule A.8.3.



Our members note that where AFCA decides not to consider a complaint because of Paid Representative or Complainant conduct and the Complainant objects to this decision, AFCA will not provide the Financial Firm with the opportunity to make a submission. We would like to see AFCA keep the Financial Firm informed as to the outcome of the objection and the reasons for that outcome.

Proposal 11: AFCA Banking and Finance Panels

Our members would like to see additional detail as to the range of decisions that can go to the AFCA Panel.

Our members note that the Operating Guidelines provide examples of clarity in the decision making process for general insurance, life insurance, investments and superannuation complaints, but not banking and finance or small business complaints. Our members would appreciate additional examples tailored to a banking and finance or small business context.

Additionally, our members express concern that this process could involve AFCA setting quasi-industry standards, whereas this should occur through more a formal rule/instrument making process, for example through Treasury or a relevant regulator.

Our members seek further clarification of why particular issues fall within the remit of the AFCA Panel. For example, complaints that "involve new issues pertaining to consumer behaviour" appears to be a very broad categorisation. References to complex or novel issues that impact good industry practice are also very broad. It is unclear why this type of complaint could not be resolved outside of the Panel. It would be our members recommendation that case studies be used to provide an accurate picture of the circumstances in which AFCA would consider it appropriate for a complaint to be decided by an AFCA Panel.

Proposal 12: Definition changes and Proposal 13: Annual reporting

Our members do not have specific comments on the definition changes or the proposed changes to annual reporting.



Other Matters

Our members have expressed concerns that the following recommendations from Treasury's 2021 Review of the Australian Financial Complaints Authority have not been adequately addressed in the Proposals put forward by AFCA.

- Recommendation 3 - AFCA should not advocate for, nor act in a manner that otherwise advantages, one party such that the impartiality of the complaints resolution process is compromised.
 - » Our members hold concerns that Recommendation 3 has not been fully addressed in the proposals.
- Recommendation 8 - AFCA should improve the transparency of its fees for Financial Firms and how the fees are being used to support AFCA's activities.
 - » Our members would like to see how fees for Financial Firms are being used to support AFCA's activities.
- Recommendation 10 - Complaints about AFCA's service should remain the responsibility of the Independent Assessor. AFCA should improve the Independent Assessor's visibility as part of its communications with parties to a complaint.
 - » The visibility of the Independent Assessor has not been addressed in any of the Proposals.
- Recommendation 11 - AFCA should ensure consultation is undertaken on each Approach Document prior to final publication
- Recommendation 12 - Where a systemic issue has been referred to ASIC or another regulator, AFCA should cease its investigation of the systemic issue. ASIC and other regulators should advise AFCA of the outcomes of the referrals they receive. However, AFCA should continue to resolve any relevant individual complaints.
 - » Our members support the referral of systemic issues to ASIC. This does not appear to have been addressed in the Recommendations.
- Recommendation 13 - AFCA should be more transparent in its public reporting of systemic issues, including on a de-identified basis as appropriate. This would encompass factors such



as the industry to which the systemic issues relate, the nature of the complaints, the number of affected consumers, total value of remediation and reporting to the regulators.

- » Our members would like to see improved public reporting of systemic issues on a de-identified basis.
- Recommendation 14 - The National Consumer Credit Protection Act 2009 should be amended to no longer require authorised credit representatives to be members of AFCA.
 - » While this has not been addressed in the Recommendations, we presume this is a matter to be addressed by the Government rather than AFCA.