

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

20 May 2023

By email: consultation@afca.org.au

Dear Sir/Madam

CONSULTATION ON PROPOSED AMENDMENTS TO AFCA RULES AND OPERATIONAL GUIDELINES (CONSULTATION)

The Mortgage and Finance Association of Australia (**MFAA**) appreciates the invitation to make a submission to the consultation and also refer to and appreciates the briefing provided by AFCA to the MFAA on 9 May 2023.

As context to this submission, the MFAA is Australia's leading professional association for the mortgage and finance broking industry with over 14,500 members. Our members include mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage and finance broking industry. Brokers play a critical role in intermediated lending, providing access to credit and promoting choice in both consumer and business finance. Brokers facilitate more than two thirds of all new residential home loans¹ and approximately four out of ten small business loans² in Australia.

The MFAA's role, as an industry association is to provide leadership and to represent its members' views. We do this through engagement with governments, financial regulators and other key stakeholders on issues that are important to our members and their customers. This includes advocating for balanced legislation, policy and regulation and encouraging policies that foster competition and improve access to credit products and credit assistance for all Australians.

OUR SUBMISSION

The MFAA has a collaborative relationship with AFCA, with senior staff working constructively with the MFAA, particularly to answer discrete member queries, to share data and information and to build awareness of systemic and emerging issues in relation complaints and dispute management. Our quarterly meetings are constructive, enabling the MFAA and industry more generally to provide AFCA with insight into the operating environment of our members and to keep ahead of emerging trends with respect to complaints, which assists the MFAA to provide insight and education to our members.

¹ [MFAA Industry Intelligence Service Report 15th Edition](#) pg 4

² Productivity Commission research paper [Small business access to finance: The evolving lending market](#) pg 44

The broker channel has experienced significant growth since the commencement of the mortgage broker best interest duty and conflicted remuneration reforms which came into effect on 1 January 2021. Mortgage broker home loan market share has increased from 59.4 percent in the December 2020 quarter to 69.4 percent in the December 2022 quarter highlighting the continued increase in confidence by consumers in the broker channel following the introduction of the mortgage broker best interest duty. Complaints made to the external dispute resolution scheme AFCA in relation to mortgage brokers make up less than 0.5 percent of all banking and finance complaints³ and just 0.3 percent of calls to the financial counselling National Debt Helpline are related to mortgage brokers.⁴

This indicates the best interest duty is well embedded, broker internal dispute resolution (IDR) complaints are well managed and that consumers are happy with the service brokers provide.

Funding model observations

We are also appreciative of the extensive engagement between AFCA and the MFAA on AFCA's new funding model which commenced on 1 July 2022. Our observations are that while the new funding model is working well, we have received some member feedback regarding high complaint fees that were the result of the closure of legacy and long-standing complaints prior to the commencement of the new funding model.

We hope these complaints dissipate over time and understanding AFCA has costs associated with legacy complaints, that AFCA exercises fairness and discretion in applying discounts to fees charged to our small business members for legacy complaints.

Settlements/Conciliations

We recognise that AFCA is operating in an environment where, like many large and complex organisations, staff recruitment and retention continues to be a challenge and the level of complaints into the EDR scheme continues to increase exponentially. We also recognise AFCA strives to continuously refine and improve its processes to drive efficiency and embed a culture of fairness for all participants in the EDR scheme.

Proposal 3 of the Consultation Paper will enhance the efficiency of AFCA's complaint processes and will make the Scheme fairer for all participants – both financial firms and complainants. For the reasons of fairness and efficiency, AFCA's first step should always be to identify if the complaint has merit or substance and if it does not it should close. An effective early triage system is crucial to the efficiency of the EDR scheme, streamline the process and alleviate a lot of time, effort and resource. The early triage process should consider whether there is merit to the complaint (or not), whether AFCA can consider the complaint under its rules and whether the complaint has been lodged against the right party. It is only where the complaint has merit that through an effective and early triage system should there be contemplation of settlement offers by the parties involved.

As an extension, it is important that AFCA does not inadvertently allow for the scheme to be utilised to lodge unmeritorious complaints simply to obtain a settlement offer and that its staff are independent, experienced, and unbiased in managing conciliations and settlements. Member feedback indicates settlement negotiations are incentivised even where there is no evidence of wrongdoing or settlements in excess of what is considered reasonable are recommended, simply to allow for the complaint to close. Not only does this raise questions of fairness to member firms as well as issues of precedent in offering a settlement simply to resolve the matter, but may also impact on professional indemnity policies, which are becoming harder for financial firms (particularly small businesses) to obtain and maintain due to the cost.

We would welcome a roundtable discussion with AFCA and our members on how we can work together to ensure fair and efficient outcomes with regards to conciliations and settlements.

³ AFCA Datacube

⁴ [Financial Counselling Industry Funding Model Discussion Paper November 2022](#) pg 37

Closing comments

Our detailed responses are at **Attachment A**. The MFAA extends its thanks to AFCA for the opportunity to contribute to this consultation. If you require further information, please do not hesitate to contact me at [REDACTED] or Anja Pannek at [REDACTED].

Yours sincerely

Naveen Ahluwalia
Head of Policy
Mortgage & Finance Association of Australia

Attachment A

Proposal	Question	MFAA Response
<p>Proposal 1: AFCA proposes to amend its Rules to define the term “Paid Representative” following recent law reform, and to allow AFCA to exercise discretion not to consider a complaint in certain circumstances due to inappropriate conduct. The proposed amendments would also provide AFCA discretion to exclude a Paid Representative due to their inappropriate conduct for a period of up to 12 months. Additional amendments will be made to the Operational Guidelines to explain how the discretion will be exercised and to provide examples of its use. These changes are designed to give effect to Recommendation 4 of the Treasury Review Report regarding poor conduct by Paid Representatives.</p>	<p>Question 1: Do you think that the proposed Rules amendments in relation to Paid Representatives appropriately respond to Recommendation 4?</p>	<p>We are supportive of this proposal. For the purposes of consumer protection, where AFCA has determined to exclude dealing with a Paid Representative for a period of 12 months, we recommend AFCA make this decision public. This ensures that the Paid Representative is precluded from holding out it provides a service to represent customers in dealing with AFCA.</p>
<p>Proposal 2: AFCA proposes that its Rules provide a more comprehensive ability to address unreasonable Complainant conduct.</p>	<p>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?</p>	<p>We support this proposal. Unreasonable conduct can come in many forms, including:</p> <ul style="list-style-type: none"> • abuse or threats of violence which are not appropriate in any circumstances. • lodging multiple complaints and with no basis to those complaints (ie serial complainants),

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		<p>lodging complaints with no evidence of loss or damage ie unmeritorious complaints, and/or</p> <ul style="list-style-type: none"> • lodging complaints simply to extract settlement monies. <p>We therefore also support AFCA's proposal to implement discretion to exclude complaints where the nature and the subject matter of the complaint is substantively the same as a previous complaint. We would welcome examples of where AFCA is likely to exercise this discretion.</p> <p>In terms of abusive behaviour, MFAA questions whether the change should be limited to conduct against AFCA staff only, or if this exclusion should also apply if such behaviour is also demonstrated against the financial firm during the complaint resolution process (or before the complaint is lodged with AFCA).</p> <p>We have seen evidence of inappropriate behaviour towards financial firms during the IDR process which has a significant impact on the staff dealing with the complaint and that conduct extends when the complainant lodged a complaint with the EDR scheme. As such, we consider that evidence by financial firms both of abuse taking place prior to the complaint being lodged with AFCA and throughout the AFCA</p>

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		<p>process should also be taken into consideration in making a determination to exclude.</p> <p>Further to that, the financial firm should be notified where a complainant is excluded and will need to be informed as to whether the complaint will be automatically closed.</p>
<p>Proposal 3: AFCA proposes to amend Rule A.8.3b) and to introduce a new Rule A.8.3d) to provide AFCA with the discretion to close a complaint if an appropriate offer of settlement has been made but has not been accepted by a Complainant</p>	<p>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?</p>	<p>We are supportive of the proposal. We are aware of matters where a preliminary decision has been made by a case manager, a reasonable offer of settlement is made and is then rejected by the complainant in favour of progressing the matter to Determination in the hope that a larger settlement can be extracted.</p> <p>The term ‘appropriate’ will be key to the way in which AFCA considers whether closure is warranted, and it would be helpful if AFCA provided guidance (including examples) on what AFCA considers to be ‘appropriate’ – in particular with respect to non-financial loss, or loss that cannot be easily calculated. In considering the reasonableness of an offer, AFCA needs to consider offers made during IDR.</p> <p>We have seen many instances where complainants have made complaints where there has been no loss, however have sought significant compensation only for the complaint to be</p>

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		<p>determined in favour of the financial firm (without penalty) and the financial firm has then borne significant complaint case fees. Commercial settlements should be considered in these circumstances to indicate an appropriate and reasonable offer of settlement.</p> <p>It is also important that AFCA does not inadvertently allow for the scheme to be utilised to lodge unmeritorious complaints simply to obtain a settlement offer. We have had members raise with us that AFCA case managers try to influence the financial firm to make a settlement offer where there is no evidence of wrongdoing, simply to allow for the complaint to close.</p> <p>Such conduct is not only unfair on financial firms that have done no wrong and do not want to set a precedent of offering a settlement to the majority of complaints simply to resolve the matter, but may also impact on professional indemnity policies, which are becoming harder for financial firms to obtain and maintain due to the cost.</p> <p>We also note that this behaviour has been observed within conciliation forums.</p>
<p>Proposal 4: AFCA proposes to amend Rule C.2.2 to include previously settled disputes as a ground</p>	<p>Question 4: Do you think that the proposed new Rule C.2.2g) and the Operational Guidelines</p>	<p>We support this proposal.</p>

Proposal	Question	MFAA Response
for AFCA to consider in the exercise of its discretion to exclude a complaint.	discussion of settlement agreements is appropriately drafted?	
<p>Proposal 5: AFCA proposes to clarify how its existing discretion under Rule C.2.2j) to exclude complaints in respect of wholesale clients will be applied as regards sophisticated or professional investors. The changes are to the Operational Guidelines and give effect to, Review Recommendation 6.</p>	<p>Question 5: Do you think that the proposed amendment to the Operational Guidelines appropriately responds to the Review Recommendation 6?</p>	<p>We support this proposal on the basis that AFCA intends to or has adopted the definition of sophisticated investor in section 761GA of the Corporations Act, and a professional investor as defined in section 9 of the Corporations Act.</p>
<p>Proposal 6: The Operational Guidelines regarding the Forward-Looking Review Mechanism will be amended to enhance its visibility, accessibility and independence. The Operational Guidelines changes will:</p> <ul style="list-style-type: none"> • 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. 	<p>Question 6: Are the proposed changes to the Operational Guidelines appropriately drafted and in keeping with Recommendation 9 of the Review Report?</p>	<p>We support the removal of the requirement to provide legal advice to support the request for a formal review. However, we are challenged to accurately respond to this proposal in the absence of guidance on how to apply for a review. While it is likely that industry associations and consumer groups will likely raise matters with AFCA informally prior to accessing the formal review model, it would be helpful to get more detail on how to access that mechanism, how and what information will need to be submitted with the application and the parameters around who will conduct that review.</p> <p>We also note it is important that any review is required not only to consider legal errors, but errors relating to fundamental and established industry practice. As the first avenue of complaint, AFCA's views are often used by financial firms</p>

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		when looking at their policies and procedures. AFCA does not have jurisdiction to make or create laws, but it can create precedent in the form of Determinations. As such, it is vital that the right of review is flexible and overseen not just by AFCA, but by industry participants.
<p>Proposal 7: AFCA proposes to replace Rule A.15.4 with A.15.3b), to clearly specify that, if a Complainant does not accept a Determination made by AFCA, neither the Complainant nor the Financial Firm is bound by the Determination</p>	<p>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?</p>	<p>We support this recommendation however recommend that AFCA provide the complainant with clear guidance on what it means not to accept a determination ie that AFCA closes the complaint and the complainant is precluded from bringing the same or similar complaint to AFCA again.</p>
<p>Proposal 8: AFCA proposes to introduce a new Rule A14.6 to govern when a Determination may be re-issued because of an accidental slip or omission. This change mirrors the current wording with what is already in AFCA's Operational Guidelines.</p>	<p>Question 8: Do you think the Rules wording is appropriately drafted and provides clearer guidance and transparency about the existing slip rule?</p>	<p>The wording of the proposed change is imprecise. We recommend the wording to be amended to make it clearer that the re-issuing will only apply to:</p> <ul style="list-style-type: none"> - Minor typographical errors and descriptions, and - errors unrelated to law, industry practice or guidance (ie descriptions). <p>If the error results in a change in the Determination, the error should be raised with the parties for comment prior to re-issuing of the Determination.</p>
<p>Proposal 9: Rule D.4 sets out the monetary limits (compensation caps and monetary restrictions on AFCA's jurisdiction) for complaints other than Superannuation Complaints. The existing wording</p>	<p>Question 9: Are there other areas in the AFCA Rules that you consider require similar administrative or minor changes?</p>	<p>None come to mind.</p>

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<p>around monetary limits in Rule D.4.1 and the heading in the table are inconsistent in the language used. AFCA proposes to amend Rule D.4.1 to remove this inconsistency and align the table content with Rule D.4. This means that both the Rule and the table will state that compensation amount limits apply per claim.</p>		
<p>Proposal 10: AFCA proposes to amend Rule A.8 to include details of the objection process that is available to a Complainant where AFCA decides under Rule A.8 not to continue to consider their complaint. Currently this is only outlined in Rules A.4.5 and A.4.6</p>	<p>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?</p>	<p>There is currently a typo in the proposed Rule A.8.6 – the word ‘with’ needs to change to ‘within’.</p> <p>The time frames for making an objection should not be lengthy so that financial firms have more certainty when AFCA intends to close a complaint.</p> <p>We also expect that AFCA would identify what reasonable grounds would necessitate the review of AFCA’s decision and to communicate those grounds clearly to all parties.</p>
<p>Proposal 11: AFCA proposes to amend the Operational Guidelines to include examples of banking and finance complaints or small business complaints that might be decided by an AFCA Panel.</p>	<p>Question 11: Are there additional assessment criteria that AFCA should consider adopting to meet the stated objective?</p>	<p>There are some matters because of their complexity or because knowledge of industry practice would be valuable that would benefit from the expertise of a panel as opposed to a lone ombudsman. It is not clear when a matter will go before a panel vs an ombudsman. In certain circumstances a financial firm should be able to request a complaint come before a panel if certain criteria is met for example if it is a novel issue, if the matter concerns a request for a compensation</p>

Proposal	Question	MFAA Response
		amount that is significant or for complex matters that would benefit from the skills and expertise of panel members.
Proposal 12: AFCA proposes to amend the Schedule E definition of “Financial Service” to include debt management assistance and credit reporting assistance.		N/A
Proposal 13: AFCA proposes to amend Rule A.20.1 to specify that AFCA’s annual public reporting must meet AFCA’s obligations to regulators.		N/A