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## **Response to AFCA's Consultation (Proposed Amendments to AFCA Rules and Operational Guidelines - March 2023)**

Remediation Services Alliance welcomes the opportunity to respond to the proposed amendments to AFCA Rules and Operational Guidelines in light of the November 2021 Independent Review undertaken by the Treasury.

We appreciate the need for AFCA to make changes surrounding its rules to improve the effectiveness of the dispute resolution process.

We have reviewed the consultation paper distributed on 27 March 2023, and would like to provide feedback regarding some of the proposed changes.

### **Proposed Changes to AFCA's Rules**

#### **Proposal 1, Paid Representatives**

We understand that AFCA is proposing to amend its Rules to define the term "Paid Representative" and allow AFCA to exercise discretion not to consider a complaint in certain circumstances due to inappropriate conduct. The proposed amendments would also provide AFCA with the discretion to exclude a Paid Representative for a period of up to 12 months due to perceived inappropriate conduct.

Firstly, we feel the Term 'Paid Representative' has an unbalanced perception and can be viewed under a holistic stereotype, potentially driving a mindset and consideration to coin the phrase "tarring all with the same brush". We would encourage, instead, a more open-minded, balanced view of a Paid Representative, and an acceptance within any perception, that not all Paid Representatives operate the same.

It's our view that a compliant and knowledgeable Paid Representative can add significant value to a consumer outcome and highlight areas of potential consumer detriment due to improper behaviours, conduct or application of onerous procedural barriers blocking the right to complain within a given financial sector.

Our immediate suggestion is that consideration is given to changing the term "Paid Representative" to 'Service Representative', as payment should not be the only determination when considering contribution, value or behaviour.

Being paid to provide excellent service is undoubtedly a good thing. It rewards the service provider for their hard work and dedication and creates a sense of satisfaction and fulfilment in their work.

Continued delivery of service excellence inevitably leads to repeat customers and many positive reviews, resulting in the enhanced reputation of the Service Representative.

Ultimately, being paid for delivering excellent service is a win-win situation for the 'Service Representative' and the consumer. It promotes a healthy and productive relationship based on mutual respect and appreciation.

It's also worth noting that the original 'Paid Representatives' were the financial institutions that benefitted significantly from substantial monetary gain for services that were not always provided or product sales that may not have offered value or suitability - we feel it's necessary to emphasise this point so it is not forgotten or missed.

The proposed amendments would also provide AFCA with the discretion to exclude a Paid Representative for a period of up to 12 months due to inappropriate conduct.

While we understand the rationale behind this proposal, we believe that it raises serious concerns about fairness and impartiality, which are fundamental principles that underpin AFCA's operations.

AFCA's core principles and values are its commitment to being accessible, independent, fair, accountable, efficient, effective, and impartial. AFCA's engagement charter reflects these values and obligations, which sets out its commitment to ensuring that all parties are treated fairly and equally.

AFCA is proposing to exercise discretion to exclude a Paid Representative for inappropriate conduct, measured, determined and judged only to the standard imposed by AFCA. This risks introducing bias and removing impartiality by applying a perceived imbalance in control and leverage over a single party engaged in a complaint.

The proposal to apply a different standard to paid representatives compared to financial firms would not be reasonable or in keeping with AFCA's charter. AFCA is not a regulator, and it's not its role to enforce penalties on financial firms or paid representatives. If a paid representative engages in inappropriate conduct, it is ASIC's role to take appropriate action, not AFCA.

For example, it's inconceivable that AFCA would look to introduce a comparable rule whereby it could prevent a financial firm from defending its position for a period of up to 12 months.

We support the need for AFCA to identify concerns regarding a paid representative who is not acting in the consumer's best interests or preventing AFCA from achieving a cooperative, fair, efficient, and timely resolution of the complaint. Our view is that action should be limited to sharing these concerns with the represented complainant, the paid representative, and, if required, reporting the matter to ASIC.

Further, we support that communication to the represented complainant includes the options to either progress the complaint themselves or choose alternative representation. Likewise, we support the paid representative being given notice and an opportunity to correct the identified concern.

However, should the proposed plans proceed as described within the consultation, further clarity regarding the conduct that would trigger such activity would be required.

We recommend that AFCA provides further examples and definitions of the conduct that would fit the new rules to avoid any arbitrary or inconsistent application of the rules. Without clear guidelines and additional examples, there may be unfair or unwarranted exclusions of paid representatives.

These guidelines, examples and definitions should be extended to include how conduct may be measured where the circumstances fall outside the control of a paid representative. The ability to "act in a timely manner and in the best interest of the customer" can be hindered by situations that occur where complaints are lodged through correct IDR routes, but timely outcomes and completions are not delivered by the financial institution due to waiting periods within their case management team, and therefore the complaint is referred to AFCA.

We have provided some additional areas below where AFCA may potentially perceive the actions and challenges from paid representatives as inappropriate conduct, and therefore, we feel they need to be clarified and a detailed understanding of AFCA's definition and resolution approach.

- Submitting a generalised complaint (one that takes a 'pro forma' approach without particularising it to the complainant's circumstances) and without the specific information that we need to consider the complaint. (see below)
- Submitting a complaint to AFCA where the consumer has signed the terms and conditions. We have examples of complaints being closed by AFCA on the basis a client had signed T&C's. We would not consider this sufficient to prove the sale was conducted correctly and would look to challenge AFCA to look beyond the ability to evidence a signature had been captured and instead place emphasis on the financial institution's ability to evidence appropriate disclosures, eligibility and suitability had been correctly considered and delivered at the time of sale.
- Submitting a complaint to AFCA that includes allegations considered more likely than not to have occurred. We have examples of complaints being closed by AFCA where we would consider failings occurred or more likely than not to have occurred based on widely reported industry and regulatory investigations. We would look to challenge due to our perception that an unbalanced application of beneficial assumption has been applied, instead determining the client needs to provide adequate documentation or "notes" for which there is an expectation they would have taken at the time of sale.
- Closure of complaints within a period of 7 days following a request for information. We would look to challenge on the basis we consider it fairer to allow 28 days when

there is a requirement for further information. In addition, we would like AFCA to implement wider guidance on timeframe expectations at the case management stage for all parties. There is a need to ensure all parties, including AFCA and the financial institutions, adhere to stricter time expectations similar to those already imposed on Paid Representatives and complainants.

To expand further regarding "Submitting a generalised complaint."

We would ask AFCA to consider updating their downloadable complaint forms for specific products and services which see the highest complaint volumes. This would ensure, should it be necessary, AFCA would receive the level of detail and information required to respond to the complaint whilst driving better quality and a more consistent approach to complaint lodgement and investigation outcomes across the industry. Application of this higher standard and requirement for specific details would likely reduce the requirement for AFCA referral. For example, the financial ombudsman service in the UK created a separate and unique complaint form for PPI-related complaints. Rather than saying what was not acceptable and constructing a methodology to remove parties presenting poor standards, and generic complaints, the ombudsman service set out what information they required in order to assess a complaint efficiently.

Additionally, the proposed amendments state AFCA may exclude a Paid Representative if they fail to promptly remedy the identified matters of concern. There is, however, no explanation or examples provided indicating what constitutes a failure to promptly remedy or expectations regarding timeframes to remedy.

We recommend AFCA provides clear guidance and examples on this point to avoid confusion and uncertainty among Paid Representatives. For example, if there is a time scale required to respond to a question relevant to readily available information, then this would be more achievable than, for instance, where a response requires a complainant to provide further information, which needs to be sought.

On a final note, regarding the exclusion of a Paid Representative due to their perceived inappropriate conduct for a period of up to 12 months. If the proposal is implemented into the rules, we recommend AFCA provide clear guidance regarding the duration of any exclusion for a range of potential misconduct reasons to ensure that the exclusion periods are proportionate to the perceived misconduct. We request this clarity as our view is not all inappropriate conduct would warrant the full 12-month exclusion.

We would like to see the inclusion of cases studies based on AFCA's historical experience of inappropriate behaviours and conduct that sit behind the necessity and justification to introduce the planned changes under proposal one and how these case study examples would be dealt with using the proposed rules if they were in effect.

## Proposal 2, Complainants

While we understand the need for AFCA to address unreasonable complainant conduct, we have concerns about the lack of clarity on how this proposal could impact paid representatives.

Specifically, we would like to raise questions about what happens if a paid representative unknowingly represents a complainant who AFCA has considered to have acted unreasonably. The proposed amendments do not provide any guidance on this issue, which may leave paid representatives uncertain about their obligations and potential penalties under the new rules.

Given the potential risks surrounding penalties for paid representatives, we would like to see proposals to protect them from penalties for actions that are outside their control. In situations where a complainant acts unreasonably despite the best efforts of the paid representative to manage the situation, we consider it unjustifiable to penalise the representative for circumstances beyond their control.

While the proposed amendments focus on the conduct of the complainant, it is unclear whether and how the paid representative would be affected in such situations of unknown conduct at the time or previously.

We would like to request AFCA provide clear guidance and protections to paid representatives and ensure that they are not unduly penalised for actions outside their control. Clarity on how the proposed amendments would impact paid representatives is essential to ensure that they are able to fulfil their duties without fear of unfair repercussions.

### Proposal 3, Appropriate Settlement Offers

While AFCA's proposal to introduce discretion to close a complaint if an appropriate offer of settlement has been made but has not been accepted by a complainant seems reasonable on the surface, it is essential to ensure that there is clarity around the application of this rule to avoid any unfair treatment of complainants or inadvertently encourage harmful and detrimental lowering of offer levels made by financial institutions.

In particular, it would be beneficial for AFCA to provide specific examples of what constitutes "appropriate compensation" and what the range of likely outcomes would be if the complaint were to proceed to a determination. This would help to provide more transparency and clarity for complainants, particularly those who may be unfamiliar with AFCA's processes.

Additionally, AFCA's proposed approach to decide not to pursue a complaint poses potential concerns about any incentive for financial firms to offer inadequate compensation to complainants without fear of repercussions. For instance, what happens if a financial firm offers compensation without any admission of liability, meaning they have not considered or included compensatory or associated interest? In this case, it may not be appropriate for AFCA to close the complaint without further investigation.

Similarly, what if a financial firm offers a refund but the refund is only a proportionate percentage of the amount that was actually charged? It may be appropriate for AFCA to consider the reasonableness of the refund offered and whether it adequately compensates the complainant for any losses incurred.

We strongly feel this proposal needs further clarity to avoid any unintended consequences which would arise as a result of its application.

#### Proposal 4, Previous Settlement Agreements - Amendment to Rule C.2.2.

We agree, in principle, the need for AFCA to exercise its discretion to exclude complaints that have already been settled. However, we have a concern that the proposed changes do not adequately protect complainants who may have settled under duress.

The concern is in relation to situations where a financial firm offers a refund as a gesture of goodwill on the condition that the settlement is full and final. If the complainant rejects the offer, there is no protection to prevent the financial firm from removing their offer. This creates a situation of duress, as the complainant can only afford to or is likely to progress the case with AFCA with the reassurance that AFCA would protect the gesture of goodwill settlement offered by the financial firm, even if AFCA decides not to pursue the complaint or change the goodwill amount.

We request that AFCA provide further clarity and expand protection for complainants in situations where duress may be relevant but not currently considered duress by AFCA. For example, AFCA could consider adding a provision that requires financial firms to disclose in writing, when making the offer, any conditions that would constitute its removal, thereby documenting their intentions and enabling AFCA to assess if its definition of duress is triggered.

#### Proposal 8, Accidental Error in a Determination – Slip Rule - Introduction of Rule A14.6

We see no concerns with this proposal to implement the new rule as its written, so long as its use is confined within its intentional boundaries. Our concern is the new rule has insufficient control measures to avoid misuse or deterioration in the quality of determinations.

To ensure the rule is limited in its use and remains auditable to maintain the quality of determinations, we ask the rule change include reporting, visibility, and accessibility.

We would like to see any determination that has been subject to alteration to be labelled as such. The alteration detail showing both the before and after should be recorded and a reporting log should be created.

We would ask further that a report of alterations be made publicly available showing volume, category of alteration and date. The detail of alterations made should be made available upon request.

Ensuring rule A14.6 has total transparency and accountability will ensure this understandably necessary rule inclusion is confined to the limited use as it was initially intended.

Sincerely,  
Remediation Services Alliance.