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2 July 2018

By email: submissions@afc.org.au

Michael D'Argaville
Legal Counsel
Australian Financial Complaints Authority

Dear Mr D'Argaville

Consultation on Proposed Australian Financial Complaints Authority (AFCA) Rules

Thank you for the opportunity to comment on:

- AFCA Consultation Paper, *Consultation on Proposed AFCA Rules* (1 June 2018); and
- AFCA, *Draft Rules of Complaint Resolution Scheme – June 2018 (Rules)*.

This joint submission has been prepared by Consumer Action Law Centre (**Consumer Action**). The following organisations have contributed to and endorsed this submission:

- Care Inc Financial Counselling Service and the Consumer Law Centre of the ACT
- Consumer Credit Law Centre SA
- Consumer Credit Legal Service (WA) Inc
- Financial Counselling Australia
- Financial Rights Legal Centre

Further information about the contributing organisations is available at **Appendix A**.

In Australia, everyone should be able to easily access a free, fair, fast and effective service to resolve complaints against their lender, insurer or superannuation fund. To ensure that AFCA lives up to its promise of improving the existing dispute resolution framework in the financial system, it is essential to get the AFCA Rules right.

We note and commend AFCA on the many improvements in these Rules by comparison to existing jurisdictional documents, particularly in the short timeframes necessitated by the start date of 1 November 2018.

In establishing AFCA, critical differences between the jurisdiction and processes of the existing schemes—the Financial Ombudsman Service (**FOS**), Credit and Investments Ombudsman (**CIO**) and Superannuation Complaints Tribunal (**SCT**)—must be reconciled. This includes differences in the Rules/Terms of Reference,



Operating Guidelines, and approach documents/position statements. In moving to AFCA, we encourage a 'best practice' rather than 'minimum standards' approach to ensure there is no watering down of existing effective consumer protections, even where these have been inconsistently adopted across the existing schemes. To this end, we strongly support the design principles that have guided the drafting of the Rules, particularly the principles of adopting 'best practice', ensuring 'no material reduction in scope,' retaining provisions that are 'tried and tested', and using 'plain English and accessible' language.

This submission is broadly supportive of the Rules but recommends several important changes to ensure that AFCA Rules are consistent with the design principles. This submission also identifies areas where we consider plain English language could be used or improved.

Our main recommendations are:

- Adopt the CIO's more expansive approach to actions that financial firms must not engage in while a complaint is on foot, including that it must not list a credit default, issue a letter of demand, immobilise a car or threaten enforcement action;
- Retain the existing and more prescriptive approach to the content and process for jurisdictional decisions, Preliminary Assessments (including that it must be in writing with reasons) and Determinations;
- Include the power to vary or set aside a contract as a remedy;
- Amend the thresholds for excluding complaints or deciding to no longer handle complaints, to ensure no denial of access to justice;
- clarify that a complaint can arise from or relate to the failure of a financial firm to provide documents upon request; and
- Introduce a new 'good faith' requirement in light of the ongoing revelations from the Financial Services Royal Commission.

A full list of 17 recommendations is available at **Appendix B**.

Given the short timeframes now involved in the establishment of AFCA, we encourage AFCA to maintain an open dialogue with consumer groups as new issues arise. We suggest that AFCA undertake further consultation on the timeframes for 'refer back' arrangements, in light of the release of ASIC Regulatory Guide 267 since this consultation commenced.

Contents

General feedback	3
Structure and ordering of the AFCA Rules	11
Contact details	12
APPENDIX A: About the Contributors	13
APPENDIX B: Summary of Recommendations	14



1. General feedback

Principles that underpin the scheme (A.2.1(j))

AFCA Rule A.2.1(j) provides that AFCA will promote the continuous improvement of its effectiveness, including by commissioning regular independent reviews of the complaints handling scheme's operations. We support this, and recommend that this principle be expanded to promote continuous improvement across *all* of the EDR Benchmarks—now 'general considerations' under the AFCA legislation¹—being accessibility, independence, fairness, accountability, efficiency and effectiveness.

Consumer advocates strongly support AFCA Rule A.2.1(a) and (b) to promote awareness of the scheme, including by undertaking outreach to vulnerable and disadvantaged communities. This is an important role to ensure accessibility and community confidence in AFCA.

'Handling' of complaints (A.2.1(c) and A.4)

The AFCA Rules use the term 'handle' to describe the role and work of AFCA. Some consumer advocates consider that 'handle' may not be an appropriate way to describe the way in which AFCA approaches complaint-handling. 'Handle' might enable AFCA to operate as a post-box, merely offering shuttle mediation without bring an inquiring mind to the dispute resolution process. To counter this, some advocates suggest that the AFCA Rules use the term 'consider' or 'investigate' which brings with it an inquiring mind to complaints received. 'Consider' might be most appropriate and aligns with the terminology in the existing FOS terms of reference.

Jurisdictional disputes (A.4.6)

To ensure access to justice, the process for objecting to a decision by AFCA that a dispute is outside the jurisdiction of the scheme must be clear, accessible and fair. AFCA Rule A.4.6, which sets out AFCA's process for reviewing an objection to a decision to exclude a complaint, is less prescriptive than the process in the FOS Terms of Reference (**ToR**). FOS ToR 5.3(b)(iii) and (iv) require that all parties be provided with copies of each other's submissions, and that FOS provide reasons for the final jurisdictional decision. Consistent with the design principles, these missing requirements should be replicated in the AFCA Rules.

The threshold for reviewing a decision to exclude a complaint appears to be higher in the AFCA Rules compared to FOS ToR. AFCA Rule A.4.6 states that AFCA will review the decision if AFCA is 'satisfied that the objection *has* substance'. By comparison, FOR ToR 5.3(b) states that FOS will review the matter if FOS is 'satisfied that the Applicant's objection *may have* substance'. The FOS standard is the better standard from a consumer's standpoint and should prevail, consistent with the design principles. Preferably, there would not be *any* threshold to be satisfied before an objection to a strike out decision is considered, at least in relation to a decision that a complaint is 'without merit' (A.8.3) or 'frivolous' (C.2.2), because the decision being reviewed is already about the substance of the complaint. That is, to impose a requirement that the objection has substance is a double-take on the same threshold issue of whether or not the complaint itself has merit.

¹ *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth), s 1051A.



It is important that a final jurisdictional decision is made by a senior, experienced decision-maker who can identify all possible claims. In the interest of transparency, we suggest that the Operational Guidelines detail the seniority or level of decision-makers for different types of decisions, including jurisdictional decisions.

Some advocates have raised concerns about consumers being excluded from FOS during the transition period. We acknowledge that the timelines for transition imposed on AFCA and the existing schemes are problematically short and are putting the existing schemes and their staff under pressure. In an ideal world, this transition would have been achieved over a more sensible timeframe. To the extent that there is a trade-off between preventing complaint backlogs and accepting jurisdiction to hear a complaint (even one with low merits), we strongly encourage the schemes to err on the side of accepting complaints. It would be a perverse outcome if, in the transition to a new scheme designed to improve access to justice, justice was denied to consumers with meritorious disputes.

Another concern that has arisen with respect to excluding complainants has been when consumers contact the ombudsman scheme via the phone and have been told verbally that they cannot lodge or are excluded. This is usually being done by staff who would not fit the description of senior, experienced decision-maker. Whilst we acknowledge it would be impossible to apply the same standards of A.4.6, it ought to be captured in the rules that AFCA will not discourage complaints. AFCA needs to make this clear in its Rules, such as inserting A1.6 or A2.1(k) that AFCA will not discourage people from lodging complaints.

RECOMMENDATION 1: Amend Rule A.4.6 to include requirements on AFCA, in reviewing jurisdictional decisions, to provide all parties with copies of each other's submissions and reasons for the final jurisdictional decision.

RECOMMENDATION 2: Amend Rule A.4.6 to provide that, if a Complainant objects within a specified timeframe, AFCA will review a decision to exclude a complaint if AFCA is satisfied that the objection 'may have' substance.

RECOMMENDATION 3: Insert at A.1.6 or A2.1(j) that AFCA will not discourage consumers from lodging a complaint.

Timeframes for refer back (A.5)

We note that *ASIC Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority (RG267)* was released after this consultation commenced. RG267 requires that:

- where a complaint has not been through (or completed) a financial firm's IDR process, the relevant IDR timeframe as set out in RG 165 will apply to the refer back complaint; and
- where a complaint has been through internal dispute resolution, or the IDR timeframe has elapsed without the complainant receiving a final response, AFCA's refer back arrangements should set out the maximum timeframe for the firm to either resolve the complaint or give its final response, and retain sufficient discretion to identify complaints that are not appropriate to refer back to the financial firm (RG267.197).

Our preliminary view is that AFCA should, in complying with RG267.197, set a maximum 'refer back' timeframe of 14 days. However, we recommend that AFCA undertake further consultation before setting this timeframe in the Rules.



Restrictions on Financial Firms during a complaint (A.7.1).

Enforcement action

The CIO Rules have a detailed definition of 'enforcement action', which appears to be more expansive than restrictions on firms during a complaint under AFCA Rule A.7.1. Under CIO Rule 17.1, a financial service provider must not initiate or continue 'enforcement action' while the CIO is dealing with a complaint. Under the CIO Dictionary at Rule 45, 'enforcement action' includes, among other things:

- issuing a letter of demand;
- advertising or arranging property to be sold;
- seeking pre-judgment remedies;
- immobilising a vehicle,² and, importantly;
- threatening enforcement action.

These actions don't appear to be covered, at least explicitly, by the AFCA Rules. Further, under CIO Rule 17.1(d) a financial service provider must not list a default on a complainant's credit file. This is an important temporary protection for consumers, who are incredibly concerned about their creditworthiness as the listing of a default can impact a person's ability to obtain finance (or refinance).

Consistent with the design principles of best practice, no material reduction in scope, and the tried and tested principle, AFCA should adopt the CIO's more expansive restrictions on enforcement action by financial firms while a complaint is active.

Sale of assets the subject of the complaint

We note that AFCA Rule A.7.2(c) allows firms, with AFCA's consent, to 'freeze, preserve or sell' assets the subject of the complaint. By comparison, CIO Rule 17.2(b) only permits firms to 'freeze or otherwise preserve' assets that are the subject of the complaint.

Consumer advocates are particularly concerned about the repossession and sale of cars that are the subject of a complaint. For many of the people our organisations assist, a car is their primary asset, essential for full participation in work and family life. In some cases, including people experiencing homelessness and women escaping family violence, their car is their home. The repossession and sale of the car can have devastating flow-on impacts that money cannot later compensate, and thus should be broached with care. Financial counsellors have reported to Consumer Action that some of their clients have been unwilling to lodge a complaint at FOS if it means they will have to sell their car.

We acknowledge that in some cases, the surrender and sale of the asset may be in the consumer's best interests. This may occur where the prospects of success are low and a secured loan is accumulating high interest and charges while the complaint is on foot, particularly if there are delays in reaching a Determination.

We recommend that the sale of the asset should not be the default position at AFCA. AFCA should only consent to the sale in appropriate circumstances (for example, where the consumer is at risk of being much worse off) and only after consulting with the parties to the complaint. The Operating Guidelines should detail when and

² For an example of the impact of immobilising a vehicle and threatening enforcement action, please refer to Mary's case study in the joint consumer submission to the *Review of the Financial System Dispute Resolution Framework (Ramsay Review) – Issues Paper*, p 34, available at: <https://consumeraction.org.au/wp-content/uploads/2016/10/EDR-Review-Joint-consumer-submission-1.pdf>.



how AFCA will use this discretion. Further informal consultation on AFCA's approach to this issue may be appropriate.

RECOMMENDATION 4: Amend Rule A.7.1 to require that a Financial Firm must not list a default on the complainant's credit file while AFCA is handling a complaint.

RECOMMENDATION 5: Adopt the CIO's more expansive restrictions on enforcement action (that must not be initiated or continued by a financial firm during a complaint), including letters of demand, advertising or arranging property to be sold, immobilising a vehicle, seeking pre-judgment remedies or threatening actions that are restricted while a AFCA is handling a complaint.

RECOMMENDATION 6: AFCA should only consent to the sale of an asset the subject of a complaint under A.7.2(c) in appropriate circumstances, where consumer at risk of being much worse off. Sale should not be the default position. The Operating Guidelines should give guidance on how and when AFCA will exercise this discretion.

Complaint resolution approach / case assessment (A.8.3)

AFCA Rule A.8.3 continues the process described at FOS as a case assessment. Some concerns have been raised about the ability for AFCA to decide 'at any stage' that it is not appropriate to continue to handle a complaint, including where the 'financial firm has committed no error' or the complaint is 'without merit'. It is difficult to see how an AFCA decision-maker could know, at an early stage, that a firm has made no error without actually investigating the complaint. Once a complaint is within jurisdiction and, absent an agreed outcome through negotiation or conciliation, these decisions should only be made *after* a proper assessment of the merits of the dispute, not simply at 'any' stage.

Gathering relevant information (A.9)

Procuring documents from third parties

Rule A.9 does not require the production of documents that the financial firm can procure, or even a document that the firm has access to or control over. This could arise when a document is held by the firm's agent, such a debt collector. By comparison, CIO Rule 16.3 provides a higher standard by requiring the firm to procure, to the extent it is reasonably able to, another person to give the CIO the information or documents requested.

RECOMMENDATION 7: Amend Rule A.9 to require a firm to procure, to the extent it is reasonably able to, information and documents not in its possession or control.

Redact confidential aspects

A document ought not be withheld from production if the confidential aspect can be redacted, which is the usual rule of evidence. We recommend that Rule A.9.1(a) be amended to reflect this.

RECOMMENDATION 8: Amend Rule A.9.1(a) or specify in the Operational Guidelines that a document must not be withheld from production if the confidential aspect can be redacted.

Adverse inferences

The drawing of adverse inferences by predecessor schemes has been an area of concern for consumer advocates. Firms often hold or can procure information, such as call recordings and file notes, that can substantiate a consumer's claims. Where the firm refuses to provide information, the drawing of an adverse inference is essential to avoid the consumer's claim being prejudiced by the firm's failure to comply.



Consumer advocates therefore support Rule A.9.5, which requires that AFCA will proceed on the basis that an adverse inference 'will generally be drawn' from a party's failure to comply with a request for information, unless special circumstances apply. We hope that consumers will see a practical difference in the application of this rule in the new scheme.

Expert advice

AFCA Rule A.9.6 permits AFCA to recover from a financial firm a maximum of \$5,000 per complaint for towards the cost of expert advice. We note that the CIO Rules do not have a cap on the contribution towards expert reports. As some expert reports may exceed this cost, we suggest no cap or, alternatively, a cap of \$10,000.

The relationship between A.9.6 and D.5.1 regarding contributing to the legal or other professional costs should be clarified. Consumers who seek their own expert advice (rather than AFCA choosing to do so) should be able to be reimbursed for these costs. As drafted, superannuation complainants are not able to recover their costs even if it were necessary and special circumstances applied. Unfairness may arise where a consumer in a superannuation complaint expends (or potentially borrows) money to obtain expert reports by their medical practitioners that are necessary for AFCA to make a decision.

The operational guides should also step out the meaning of 'special circumstances' and whether there will be material different usage of the words. Whilst we agree, for flexibility, the terms should not be defined in the Rules, there should be a link to the Operational Guidelines as to the current approach, especially where depending on where it is used there is a different set of 'exceptional' or 'special' circumstances.

Confidentiality (A.11)

While confidentiality serves a useful purpose in the resolution of complaints, we consider that AFCA Rule A.11.1 and A.11.2 are too broad. The requirement to maintain confidentiality of all information provided to a party through the course of a complaint should have the following additional exceptions:

- a. where the information or document is already in the public domain (CIO Rule 33.2(b));
- b. where the party providing the information or document consented to its disclosure (CIO Rule 33.2(a)); and
- c. where the party is entitled to the information or document under a law (for example, a credit contract under the *National Consumer Credit Protection Act 2009* (Cth)).

RECOMMENDATION 9: Amend Rules A.11 to include exceptions to the requirement to maintain confidentiality of all information provided during the complaint: a) for information in the public domain; b) where the other party consents; and c) where the party is entitled to the information under a law.

Preliminary Assessment (A.12)

The AFCA Rules are far less prescriptive about the content and form of a Preliminary Assessment (and Determinations) by comparison to the FOS ToR. At present, FOS ToR 8.7 requires that each Recommendation and Determination: must be in writing; may reach a conclusion about the merits or a view that it is not appropriate to reach any conclusion and set out reasons for this conclusion or view; specify any remedy; and must be provided to all parties.

There is no requirement that we can find in the AFCA Rules for a Preliminary Assessment to be in writing with reasons. Rule A.12.1 merely provides that 'AFCA may choose to provide the parties with a preliminary assessment of the complaint with a recommendation as to how the complaint should be resolved.'



For a consumer to progress to a Determination, they must under Rule A.12.3(b)(ii) provide reasons for disagreeing with a Preliminary Assessment. It may be difficult for some consumers to give such reasons—particularly during times of stress or for those with particular health issues—based on their recall of a phone conversation. Similarly, it is often more difficult for consumer lawyers to later advise complainants on the merits of progressing to a Determination, and how best to frame their arguments, in the absence of written reasons for the lawyer or advocate to review.

We appreciate the trade-off between speed and formality of dispute resolution and acknowledge that the Fast Track at FOS has been working well. Nevertheless, we recommend that written reasons be required or, alternatively, the Rules include an ability to request the written reasons for a Preliminary Assessment within a reasonable time—we would suggest 14 days.

If AFCA does not accept this recommendation, it may be helpful to give guidance on what types of disputes will receive a verbal Preliminary Assessment (and why), and when it will typically provide written reasons.

Similarly, we note that FOS ToR 8.5 gave the parties a reasonable opportunity to make submissions prior to FOS making a Recommendation and specifies timeframes for requesting a Determination. These useful requirements appear to be missing from the AFCA Rules.

RECOMMENDATION 10: Replicate FOS ToR 8.5(a) and 8.7 in the AFCA Rules to provide clarity on process for making and content of a Preliminary Assessment, including:

- that parties be given reasonable opportunity to make submissions and provide information about the matters in dispute before AFCA makes a Preliminary Assessment;
- that it may reach a conclusion about the merits or a view that it is not appropriate to reach any conclusion, and must set out reasons for this conclusion or view;
- specify any remedy that AFCA considers fair and appropriate;
- that the Preliminary Assessment should be in writing with reasons to all the parties or, alternatively, that a party can request written reasons within a reasonable time; and
- timeframes for requesting a complaint proceed to a Determination.

Determination (A.14)

Similarly, much of the detail about the form and content of a Determination is missing from the AFCA Rules. Rule A.14.4 simply requires that ‘a Determination must be in writing with reasons.’ We recommend that the detail from FOS ToR 8.7 be replicated in the AFCA Rules.

RECOMMENDATION 11: Replicate FOS ToR 8.5 and 8.7 in the AFCA Rules to provide clarity on the process for making and content of a Determination, including:

- that parties be given reasonable opportunity to make submissions and provide information about the matter in dispute before AFCA makes a Determination;
- that it may reach a conclusion about the merits or a view that it is not appropriate to reach any conclusion, and must set out reasons for this conclusion or view;
- specify any remedy that AFCA considers fair and appropriate.

Independent Assessor (A.16.1)

From time to time, our organisations receive feedback from consumers about service problems, even where we are not acting on the consumer’s behalf. This may occur through telephone advice services, or feedback



from financial counsellors and other advocates. Where we identify trends or emerging problems, we often make representative or group complaints to relevant fora, including raising issues through consumer liaison functions.

Some consumer advocates suggest that the Operational Guidelines clarify whether or not the Independent Assessor will be able to accept representative complaints from consumer groups about service issues. If the Independent Assessor is not able to accept such complaints, AFCA should clarify how consumer groups can raise systemic or repeat service issues with the scheme.

Systemic issues (A.17)

Consumer advocates strongly supports the inclusion of the powers at A.17.4. It is critical that AFCA can effectively investigate systemic issues and provide redress and prevent foreseeable loss to affected people.

Complaints about failure to provide documents (B.2.1)

An ongoing problem for consumers is getting access, or timely access, to documents that Financial Firms are required to provide to the consumer under a relevant law or industry code, such a copy of a consumer lease or statement of account under the National Credit Code or an insurance policy. The failure to provide these documents impedes the consumer's ability to evaluate their position and resolve their dispute. The CIO Position Statement 9 on Access to Documents³ is clear that a consumer can make a complaint to the CIO purely based on the firm's failure to provide requested documents, and that compensation can be awarded for breach of the applicable timeframes.

AFCA Rule B.2.1 should clarify that the provision of a financial service also includes the mere provision of documents so that a complaint can be raised purely where a financial firm fails to provide documents upon request.

RECOMMENDATION 12: Amend Rule B.2.1 to clarify that a complaint can arise from or relate to the failure of a financial firm to provide documents upon request.

Extension of time limits (B.4.4)

The AFCA Rules do not expressly allow an extension of a relevant time limit by agreement between the parties, as per CIO Rule 6.4. Although it may be covered under the general Rule A.4.7, in the interest of clarity, we recommend that the AFCA Rules explicitly allow an extension of time limits by way of agreement between the parties. At the very least, a cross-reference to Rule A.4.7 should be included in section B.4.4 of the Rules.

We suggest that the online version of the Rule B.4.4 contain a cross-reference and hyperlink to Rule A.21.3, so that a person searching for extension of time rules can quickly find this general rule, which may also apply.

We support the wording in AFCA Rule B.4.4.2 that AFCA may handle a complaint submitted after the relevant time limit if 'special circumstances' apply (instead of 'exceptional circumstances'). It would be helpful to give

³ CIO, *Position Statement 9: Access to Documents*, available at: <https://www.cio.org.au/assets/27887070/PS%20-%20Access%20to%20Documents.pdf>.



some examples of special circumstances in the Operational Guidelines, given it is used in multiple locations whether it will have a single definition or not.

RECOMMENDATION 13: Amend Rule B.4.4 to allow extension of a relevant time limit by agreement between the parties.

Exclusions applying generally – professional accountancy services (C.1.2(h))

Under the Rules, complaints about professional accountancy services are excluded unless they are provided in connection with, variously, section 766A of the *Corporations Act*, section 12BAB of the *ASIC Act*, credit activity as defined under the *National Consumer Credit Protection Act 2009*, or tax (financial) advice services under the *Tax Agents Services Act 2009*. Although we have not seen the AFCA Operating Guidelines, we note that the FOS Operating Guidelines do not fully or helpfully explain the same exclusions that exist in the FOS ToR. Unless more specific guidance is given, consumers will be forced to look up four different pieces of legislation to understand what is excluded and what may be included within AFCA's jurisdiction. Does it include, for example a fee or billing dispute? It is not clear on the face of the Rules nor the current FOS Operating Guidelines.

RECOMMENDATION 14: Provide in the Rules (or, alternatively, in the Operating Guidelines) clear guidance in plain English on what types of complaints about professional accountancy services are within AFCA's jurisdiction.

Discretion not to handle complaints (C.2.2(d))

We refer to our concerns about jurisdictional disputes and case assessments above. AFCA will play a critical role in providing access to justice for consumers of financial services. Such consumers may not necessarily spell out their complaint in legalese. As we have seen through the Royal Commission and other scandals, misconduct in the financial services sector is rife. Often, information needed to substantiate a valid complaint is held by the firm, and not available to the consumer in the early stages of their complaint. Indeed, even obtaining copies of the contract the firm is enforcing can provide difficult and time-consuming. In this context, it is more important to err on the side of inclusion when assessing the merits of a complaint, particularly at an early stage before the consumer and AFCA have had the opportunity to obtain all relevant documents.

We note that AFCA Rule C.2.2(d) permits the scheme to exercise a discretion to exclude a complaint that is 'lacking in substance'. In our view, whether or not a complaint lacks substance is not a jurisdictional issue. By its nature, it is a decision and should be made in accordance with the normal process of deciding the merits of the dispute.

RECOMMENDATION 15: Remove 'lacking in substance' from Rule C.2.2(d).

Test case (C.2.2(f))

At present, if a firm wishes a FOS dispute to be treated as a test case, the firm must give FOS a written notice setting out its reasons under FOS ToR 10.1. We note that this requirement has not been replicated in the AFCA Rules.

Remedies (D.2.1)

We welcome the addition of an apology to available remedies at AFCA.



The list of remedies for non-superannuation complaints in AFCA Rules D.2.1 does not include an express power to vary or set aside a contract. The ability to vary a contract is very different from the ability to forgive or waive a debt, or the power to rectify a contract. We strongly recommend that the power to vary or set aside a contract be expressly included in the AFCA Rules. It is an essential remedy to ensure fair outcomes for consumers.

One failure of the current EDR framework is in ensuring that consumers have fair and affordable arrangements after the determination of a complaint, particularly complaints about maladministration and responsible lending. As outlined in Consumer Action's submission to the Round 3 Hearings in the Royal Commission into Misconduct in the Banking, Finance & Superannuation Sectors,⁴ the effect of EDR determinations can be to effectively accelerate repayment of amounts subject to the determination. In these types of disputes, we consider that the scheme should not leave the parties to come to agreement about repayment. Instead, AFCA should facilitate resolution of the complaint by determining fair arrangements for repayment, including the term of the repayment. We note that AFCA will have the capacity to make such forward-looking assessments in hardship disputes and it should use similar processes to resolve irresponsible lending disputes.

RECOMMENDATION 16: Amend Rule D.2.1 to expressly include the power to vary or set aside a contract as a remedy for non-superannuation complaints.

Introduce a 'good faith' requirement

Revelations emerging from the ongoing Financial Services Royal Commission suggest the need to introduce a new good faith requirement into the AFCA Rules. The EDR framework is premised on trust, which is in shorter supply than ever before. When AFCA requests all relevant documents to assist it in making a determination, we trust that banks and other financial firms will, in good faith, provide the requested information, and act in good faith in negotiations. To help restore trust, and ensure that financial firms act appropriately, we suggest that the AFCA Rules include a new 'good faith' requirement.

RECOMMENDATION 17: Require parties to an AFCA complaint to act in good faith.

2. Structure and ordering of the AFCA Rules

Question 1. Do the AFCA Rules achieve a good balance between user-friendliness and detail?

Yes, the AFCA Rules achieve a balance between user-friendliness and necessary detail. To improve the ease of use, we suggest that the Rules contain cross-references and, for online versions, hyperlinks to other relevant sections of the Rules, operating guidelines, legislative references and other external documents. For examples, hyperlinks to defined terms are very helpful.

On the numbering style, we note that some sections go to three numbers before starting on letters and then roman numerals (for example, B.4.5.1(a)(i)), while others only go to 2 numbers before starting on letters (for

⁴ Consumer Action Law Centre, Submission to the Royal Commission on misconduct in the banking, superannuation, and financial services industry, *Submission on Round 3 hearings – Loans to small to medium enterprises* (12 June 2018), available at: <https://financialservices.royalcommission.gov.au/public-hearings/Documents/Round-3-written-submissions/Consumer-action-law-centre-written-submission.pdf>, 6.



example A.7.1(a)(i)). AFCA may wish to harmonise these styles. For ease of reference, we also suggest removing the period between the first letter and number (e.g. B4.5).

Question 2. Before the Table of Contents is a 'quick guide' summarising the key aspects of the Rules and their location. Is this helpful?

A one-page summary to help users navigate to the correct section of the AFCA Rules is a good idea. The draft Quick Guide could be improved by using less technical language. For example, the difference between 'preconditions' and 'exclusions' may not be clear to all readers and thus not as helpful in navigating the Rules. The use of the word 'other' is meaningless to those consumers coming cold to the Terms of Reference, as is the phrase 'certain type of relationship.' The Quick Guide could be improved by use of a Plain English expert.

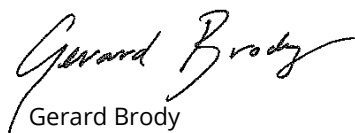
Question 3. Are the tables helpful in explaining these areas? How could they be improved?

The inclusion of tables is another great idea to help clarify the different timelines and requirements that apply to different types of disputes. One difficulty is that, due to the volume of information that is being conveyed, the tables are very detailed and in small font when printed to A4. The use of colour and directional arrows may also assist comprehension. It would be helpful for each type of matter or claim be separated out into its own table or flowchart, whether in the Rules or in accompanying guidance on the AFCA website. For example, a person with a superannuation claim could then refer to the superannuation flowchart, without needing to look at detailed information that is not relevant to their claim.

3. Contact details

Please contact Cat Newton, Senior Policy Officer at Consumer Action Law Centre, on 03 9670 5088 or at cat@consumeraction.org.au if you have any questions about this submission.

Yours sincerely



Gerard Brody
CEO

Consumer Action Law Centre



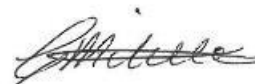
Karen Cox
Coordinator

Financial Rights Legal Centre



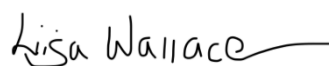
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Consumer Credit Legal Service (WA) Inc



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**Care Inc. Financial Counselling Service
& The Consumer Law Centre ACT**



David Ferraro
Managing Solicitor

Consumer Credit Law Centre SA



APPENDIX A: About the Contributors

About Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer law and 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 and representation, and policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

About Care Inc Financial Counselling Service and the Consumer Law Centre of the ACT

Care Inc. Financial Counselling Service has been the main provider of financial counselling and related services for low to moderate income and vulnerable consumers in the ACT since 1983. Care's core service activities include the provision of information, counselling and advocacy for consumers experiencing problems with credit and debt. Care also has a Community Development and Education program, provides gambling financial counselling, outreach services in the region and at the Alexander Maconochie Centre, and operates the ACT's first No Interest Loans Scheme, established in 1997, and makes policy comment on issues of importance to its client group.

About Consumer Credit Law Centre SA

The Consumer Credit Law Centre South Australia was established in 2014 to provide free legal advice, legal representation and financial counselling to consumers in South Australia in the areas of credit, banking and finance. The Centre also provides legal education and advocacy in the areas of credit, banking and financial services. The CCLCSA is managed by Uniting Communities who also provide an extensive range of financial counselling and community legal services as well as a large number of services to low income and disadvantaged people including mental health, drug and alcohol and disability services.

About Consumer Credit Legal Service (WA) Inc

Consumer Credit Legal Service (WA) Inc. (CCLSWA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of credit, banking and finance, and consumer law. CCLSWA also takes an active role in community legal education, law reform and policy issues affecting consumers. In the 2016/2017 financial year, CCLSWA provided 2677 pieces of legal advice to 1088 new clients.

About Financial Counselling Australia

FCA is the peak body for financial counsellors. Financial counsellors provide information, support and advocacy for people in financial difficulty. They work in not-for-profit community organisations and their services are free, independent and confidential. FCA is the national voice for the financial counselling profession, providing resources and support for financial counsellors and advocating for people who are financially vulnerable.

About the Financial Rights Legal Centre

The Financial Rights Legal Centre 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. Financial Rights took close to 25,000 calls for advice or assistance during the 2016/2017 financial year.



APPENDIX B: Summary of Recommendations

1. Amend Rule A.4.6 to include requirements on AFCA, in reviewing jurisdictional decisions, to provide all parties with copies of each other's submissions and reasons for the final jurisdictional decision.
2. Amend Rule A.4.6 to provide that, if a Complainant objects within a specified timeframe, AFCA will review a decision to exclude a complaint if AFCA is satisfied that the objection 'may have' substance.
3. Insert at A.1.6 or A2.1(j) that AFCA will not discourage consumers from lodging a complaint.
4. Amend Rule A.7.1 to require that a Financial Firm must not list a default on the complainant's credit file while AFCA is handling a complaint.
5. Adopt the CIO's more expansive restrictions on enforcement action (that must not be initiated or continued by a financial firm during a complaint), including letters of demand, advertising or arranging property to be sold, immobilising a vehicle, seeking pre-judgment remedies or threatening actions that are restricted while a AFCA is handling a complaint.
6. AFCA should only consent to the sale of an asset the subject of a complaint under A.7.2(c) in appropriate circumstances, where consumer at risk of being much worse off. Sale should not be the default position. The Operating Guidelines should give guidance on how and when AFCA will exercise this discretion.
7. Amend Rule A.9 to require a firm to procure, to the extent it is reasonably able to, information and documents not in its possession or control.
8. Amend Rule A.9.1(a) or specify in the Operational Guidelines that a document must not be withheld from production if the confidential aspect can be redacted.
9. Amend Rules A.11 to include exceptions to the requirement to maintain confidentiality of all information provided during the complaint: a) for information in the public domain; b) where the other party consents; and c) where the party is entitled to the information under a law.
10. Replicate FOS ToR 8.5(a) and 8.7 in the AFCA Rules to provide clarity on process for making and content of a Preliminary Assessment, including:
 - that parties be given reasonable opportunity to make submissions and provide information about the matters in dispute before AFCA makes a Preliminary Assessment;
 - that it may reach a conclusion about the merits or a view that it is not appropriate to reach any conclusion, and must set out reasons for this conclusion or view;
 - specify any remedy that AFCA considers fair and appropriate;
 - that the Preliminary Assessment should be in writing with reasons to all the parties or, alternatively, that a party can request written reasons within a reasonable time; and
 - timeframes for requesting a complaint proceed to a Determination.
11. Replicate FOS ToR 8.5 and 8.7 in the AFCA Rules to provide clarity on the process for making and content of a Determination, including:
 - that parties be given reasonable opportunity to make submissions and provide information about the matter in dispute before AFCA makes a Determination;



- that it may reach a conclusion about the merits or a view that it is not appropriate to reach any conclusion, and must set out reasons for this conclusion or view;
 - specify any remedy that AFCA considers fair and appropriate.
12. Amend Rule B.2.1 to clarify that a complaint can arise from or relate to the failure of a financial firm to provide documents upon request.
 13. Amend Rule B.4.4 to allow extension of a relevant time limit by agreement between the parties.
 14. Provide in the Rules (or, alternatively, in the Operating Guidelines) clear guidance in plain English on what types of complaints about professional accountancy services are within AFCA's jurisdiction.
 15. Remove 'lacking in substance' from Rule C.2.2(d).
 16. Amend Rule D.2.1 to expressly include the power to vary or set aside a contract as a remedy for non-superannuation complaints.
 17. Require parties to an AFCA complaint to act in good faith.

