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Mike D'Argaville  
Australian Financial Complaints Authority

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By email: [submissions@afca.org.au](mailto:submissions@afca.org.au)

Dear Mr D'Argaville

**Consultation Paper – AFCA rule changes to identify financial firms in published Determinations**

The Australian Finance Industry Association [AFIA] welcomes the opportunity to provide feedback on AFCA's proposal to change its rules to identify financial firms in published Determinations as outlined in its Consultation Paper [the **Paper**].

**AFIA Background**

AFIA is the voice of a diverse Australian finance industry. AFIA supports our Members to ensure a fair, equitable and competitive market for customers through representation, insights and connectivity.

AFIA is uniquely placed to respond given our broad and diverse Membership of over 100 financiers operating in the consumer and commercial markets (including small-medium business and agri-finance). Many are subscribers to AFCA including both consumer and small business financiers. For some this reflects a legislative obligation (e.g. consumer credit providers). For others (e.g. our Code Compliant Online Small Business Lenders and others looking to differentiate from market competitors on the basis of customer service) it delivers a self-regulatory commitment to provide their small business customers access to an ASIC-approved External Dispute Resolution Scheme as part of a robust complaint-handling process.

More specifically, AFIA Members:

- include banks (major, regional and mutual/community-owned) and non-banks;
- range from ASX-listed public companies through to small businesses providing finance;
- operate via a range of distribution channels including bricks and mortar premises, intermediaries (finance brokers, dealerships, suppliers) through to online / digital access
- collectively operate across all states and territories in Australia in capital cities through to regional and remote areas: the majority operating across at least one border;

- have customers from all demographics, all age groups (legally able to borrow) in support of Australia's diverse and multi-cultural community with:
  - consumers ranging from high to low-income earners (including some whose main income source may be government welfare); many with substantial assets, others with few; single borrowers through to blended families; covering the whole range of employment scenarios, full-time, part-time, seasonal or casual employment.
  - commercial entities ranging from sole traders and partnerships through to the more complex corporates (e.g. trusts, corporate group) and government-entities some with no employees through to others with hundreds (if not thousands) of employees.
- provide a broad range of finance products:
  - consumer: from personal unsecured loans, revolving products (including credit cards and interest free products coupled with lines of credit), loans secured by land or personal property; consumer leases of assets (including household/electrical/IT or cars);
  - commercial: asset or equipment finance (finance/operating lease, secured loan or hire-purchase agreement or novated leases); working capital solutions (online unsecured loans; debtor and invoice finance; insurance premium funding; trade finance; overdrafts; commercial credit cards) together with more sophisticated and complex finance solutions.

To examine this key issue and provide insight to shape AFCA's consideration, AFIA engaged with a significant number of member representatives from a broad range of entity type and mix of consumer and commercial providers (over 40). The outcome is detailed below.

While Members have contributed to inform this, from an organisational view the position being put by AFIA may not reflect their specific position on all the issues. These will get captured through the relevant Member's organisationally-targeted submission.

### **AFIA's Position on the Proposed Change to AFCA's Rule to Identify a Financial Firm in Published Determinations**

At the macro level, AFIA and its Members support the provision of finance to a standard that meets community expectations. Members recognise there will be occasions where a customer will be dissatisfied with the service or product the member has provided. A process to raise, have considered and resolve that issue is seen as an essential component.

In consequence, AFIA and its members support consumer and small business customers having access to a financial complaints-handling process that is robust and has integrity. Fundamental to this is an internal process to provide our Members a customer-service opportunity to resolve areas of concern. Resolution at the internal level to the satisfaction of the customer may not always be possible.

Consequently, Members' support a process that includes an avenue for escalation to an external dispute resolution scheme to provide a further opportunity for an independent entity (like AFCA) to consider the dispute from the position of both parties with a view to working to achieve a fair outcome.

Members acknowledge customer access to the EDRS complaint avenue is impacted by the cost of the service. Free access by the customer removes that inhibitor enabling utilisation. Imposing cost on the complaint respondents coupled with the separate resource/costs they bear to deal with the complaint and, more importantly, risk to brand from customer dissatisfaction, brings with it an effect of incentivising resolution focus at the internal level.

AFIA members would prefer to work with customers to resolve complaints but accept there will be occasions where a customer will remain dissatisfied. AFIA members support access to AFCA to facilitate independent consideration of those complaints from the position of both parties with the objective of a resolving to achieve a fair outcome. An integral part is AFCA's support to encourage complainants to fully utilise AFIA members' internal processes to have the complaint resolved at the earliest possible opportunity. Also, AFCA's encouragement for the customer to maintain some level of repayment, where appropriate, while the matter is being considered to ensure the customer is not disadvantaged if the process ends with resolution in the financial service provider's favour.

Where resolution at the internal stage may not be possible, a customer should be able to raise the complaint with AFCA and AFIA member subscribers commit to the EDRS process. In practice, AFIA members will look to resolve the complaint with AFCA, often taking a commercial rather than strictly legal position to facilitate expedited resolution without necessitating a formal Determination as a matter of customer service, cost minimisation and importantly management of brand. Complaints that end in an AFCA Determination should be viewed in this context.

A proposal to change AFCA's rules to name the Financial Service Provider that is the subject of a Determination has potentially significant detrimental outcomes both for the Member, but more generally for the EDRS process with flow-ons to consumer and small business access to finance. It warrants evidence-based identification of the benefit or need for the specific change and to provide the basis for the design of a proposed solution that should be proportionate to achieve the outcome.

The basis provided in the Paper, AFCA's April Newsletter and in follow up discussions with AFCA on 19 June 2019 – to illustrate as a transparency measure AFCA's commitment as a new organisation to be open, transparent and more accountable to the public – is in AFIA's view not sufficiently detailed to provide the evidence to justify what is a significant and substantial change given the substantial ramifications both for EDRS but more generally customer access to finance that will flow. Nor is justification positioning AFCA with other EDRS (e.g. international EDRS, like the UK FOS). For example, greater transparency through clear disclosure in standard form contracts is designed to assist customer understanding and minimise allegations of unfairness. It is unclear what the objective of transparently disclosing the Financial Firm respondent to a complaint decided by AFCA is designed to achieve. More detailed commentary on these matters is provided in Attachment A. Fundamentally there is an underlying objective sought to be achieved by adopting a transparency measure.

### **Conclusion + Next steps**

In AFIA's view, we encourage AFCA to provide greater detail of what it is endeavouring to achieve by making a material change to its Rule to identify financial firms in published Determinations given the significant ramifications beyond a broad statement of illustrating its commitment to transparency. In its absence, AFIA is challenged to be able to support the change for the detailed reasons provided.

We would welcome the opportunity to work with AFCA as a priority to better understand the basis for the proposed change and collaboratively develop a solution to address that issue while maintaining the integrity of AFCA as an EDRS and, more generally, minimising any detrimental and unwarranted impact to customer access to finance.

If you have any questions, please contact me at [REDACTED] or Karl Turner, Executive Director, Policy and Risk Management at [REDACTED].

Kind regards



Helen Gordon  
Chief Executive Officer

## **Attachment A: AFIA's Feedback - Consultation Paper – AFCA rule changes to identify financial firms in published Determinations**

In the context of the general comments provided in our covering letter, AFIA members have three overarching concerns about the proposed changes outlined in the Paper:

1. existing AFCA members may potentially disengage in what they perceive to be an unfair process – for example, by not contesting AFCA determinations, paying compensation to customers who complain at the internal or external dispute stage, notwithstanding the robust internal controls, contractual rights and remedies and the evidence the Members have. This is not good from an Australian societal perspective as it diminishes the value of the transaction between the customer and the member by potentially removing the personal accountability of the customer to maintain its side of the bargain with flow on impacts more generally for customers that uphold their bargain).
2. new financiers or existing financiers who are not part of AFCA may delay or defer launching products captured under AFCA rules thus creating disparity of approach which impacts the broader financial market consistently understanding and meeting community expectations – AFIA is aware of many examples of this
3. Members who joined AFCA 'voluntarily' (i.e. it was not a requirement of any licence or legislative obligation), may consider exiting the scheme which will impact AFCA's ability to achieve its stated aims of improving standards and practices

Our submission is broken down into 7 areas:

1. need for greater context behind the change
2. the timing of the change
3. does the change satisfy AFCA's transparency requirements?
4. does the change align with AFCA's rules on fairness?
5. an alternate solution
6. do the Operational Guidelines adequately explain how the Rules as amended will apply?
7. any other comments about the proposed change?

### ***Need for greater context***

Our Members would like to better understand the context, purpose and timing of the proposed change. They are concerned that without that additional detail and opportunity for further engagement, which attempts to address the overarching concerns we set out above, the proposed change may in the longer-term lead to restrict access to credit and impact the broader economy<sup>1</sup>.

### ***Timing of this potential change***

The Ramsay Review undertook a thorough investigation and consultation on EDR and made a number of recommendations relating to the rules which should apply to a consolidated single EDR scheme. The rules for both predecessor ombudsman schemes (FOS and CIO) provided for the publication of only de-identified determinations and the Ramsay process did not identify the need for any change in this area. Given that the new systemic issues power in section 1052E(4) of the Corporations Act, which requires AFCA to report Members with confirmed systemic issues to ASIC, has been in place for less than 12 months and consequently had limited time to be assessed against achievement of its objectives, Members suggest such a change, without supporting evidence of the need or benefit it will bring to all stakeholders, may be premature. To the extent that AFCA is seeking to improve industry behaviour, section 1052E(4) maybe the most appropriate mechanism to do so as it will draw attention to systemic matters, which have affected significant numbers of customers, rather than highly fact-specific, individual complaints which are considered on a case-by-case basis. It also places the decision to publicly name a Member in the hands of the regulator, ASIC, which Members believe is a more appropriate body to have the responsibility and accountability for the consequences that flow from a decision of this nature.

Finally, Members note that ASIC is currently consulting on proposed revision to Regulatory Guide 165 (which deals with changes to Internal Dispute Resolution (IDR) processes and where ASIC proposes to publish IDR data at both aggregate and firm level). Through this process, Member performance in terms of how they handle customer complaints, and their interaction with AFCA, will become increasingly clearer, which will assist transparency to consumers and the broader public.

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<sup>1</sup> AFCA would be aware that post Royal Commission, tighter lending standards have a led to an economic slowdown - figures released by the Reserve Bank of Australia on 31 May 2019 showed housing credit growth in April slowed to its lowest rate since records began in 1977. ([here](#)) Business credit growth was also flat. This data comes on top of Australian Bureau of Statistics figures on 30 May 2019 showing business investment as a share of GDP fell to 12 per cent in the three months to March 31 - its lowest level since the mid-1990s - while building approvals dropped 4.7 per cent in April. ([here](#))

When this is coupled with the current requirement for AFCA to report to ASIC systemic issues of identified Financial Service Provider respondents, it may well solve the need or concern AFCA is seeking to address through the proposed change to Rule 14.5 and result in a more effective way to get to the root causes. In addition, it should help regulators gain more valuable insights into how non-financial risks are being managed by a Member.

***Does the proposed change satisfy AFCA's transparency requirements?***

At this stage, and until further detail and opportunity for follow up engagement is provided, we do not think this meets AFCA's transparency requirements

- The publication of Determinations is an accountability measure for the scheme. It is unclear as to the benefit the customer may gain, especially when it may be derived from a potentially skewed data set without further, important context.
- As a result, the identification of a Financial Service Provider in published Determinations resolving individual-case specific complaints may create a misleading impression of a Member's overall approach, culture and system of internal controls. Determinations generally will only have taken into account information relating to a single interaction (not potentially systemic issues) without placing what may be an isolated incident in the context of the size of the organisation, its overall record and compliance approach.
- A Determination provides a point-in-time snapshot of a matter but it will not provide any context of the efforts the Member has taken to resolve the matter in favour of the complainant and any consequential action taken by the Member to prevent recurrence.
- Members are also concerned that, as the subject matter of AFCA disputes in a large number of cases can be over relatively minor matters that relate to misunderstandings or poor service, publicly naming the Financial Service Provider for these minor issues creating an inaccurate impression in the community of a broader more systemic issue with the Provider or the industry more generally may undermine industry efforts to rebuild trust following the Royal Commission.
- In a small business lending sense, financiers and investors may also avoid investment in this sector impacting access or cost of small business finance, if following a complaint to AFCA, the legal framework is not clear and contractual rights are not able to be pursued as legally enforceable.
- If AFCA is looking to promote transparency, Members suggest they publish the details of any complaints escalated to the Independent Assessor, including the Assessor's Determination in respect of each such complaint as this would help educate all AFCA and non-AFCA members

***Does the change align with AFCA's Rule on fairness?***

AFCA's Rules explicitly require that 'we provide procedural fairness to **the parties** to a complaint.' – (emphasis added). AFIA understands this concept generally encompasses the customer complainant and the Member respondent.

- Based on the information contained in the AFCA April Newsletter and our conversation yesterday, we understand the intention is for the proposed change to Rule 14.5 is to be prospective but would appreciate confirmation.
- In addition, it may lead to a poorer customer outcome as potentially, a Member who previously accepted a Determination because it provided a better experience for their customer, even though they did nothing technically wrong, may now have to defend their position (possibly vigorously) because the outcome carries a greater reputational consequence.
- Further Members believe that their naming does not meet this Rule as:
  - Only one party to the complaint is named
  - Members should be able to defend frivolous or vexatious complaints without being overshadowed by concerns around the potential to be named in a final published Determination
  - An approach that seeks to marry the significance of the level of the complaint (e.g. those where Members have done something materially or systemically wrong and AFCA has Determined in the customer's favour) with a significant outcome of being identified in the Determination should be adopted (subject to the other concerns raised)
  - Determinations relating to historic complaints may not reflect a Member's current compliance settings and may present an inaccurate position of how it is now treating its customers, compared to what met standards and expectations at the time
  - There are concerns among the membership that a Determination may be able to be made without procedural fairness being offered to a Member – we would appreciate being able to explore this issue in more detail
  - There are concerns among the membership that Determinations may be based on and include erroneous information, due to a perceived desire to quickly resolve the large volume of complaints that have been received, without potential adequate training and supervision – we would also appreciate being able to explore this issue in more detail
  - Many complaints revolve around 'grey aspects' of the Law and Regulation which are open to interpretation, noting that AFCA does not have a legal or regulatory decision-making power but its Determinations effectively act as measure against which to benchmark compliance
  - Evidence received by AFCA is not tested in the same way as a transparent and robust court process



- Members have no apparent right of appeal or review of an AFCA Determination on its merits; even the ability to challenge the process is complex and costly
- Determinations that relate to delays in resolution of complaints by Members may in part be due to lack of clarity of the timeframe that AFCA commits and adheres to – this is another area that we would appreciate being able to explore in more detail
- Larger Members may have more Determinations made involving them simply because they have a much larger customer base. We note that the publication of complaint statistics provides a fairer and more balanced view of the standards and culture within as they allow consumers to assess the incidence of complaints against the size of the organisation so as to provide a more complete picture for comparative purposes. The statistics also provide an indication of a member's approach to dealing with complaints, by identifying those complaints resolved by agreement
- The decision to name does not take into account efforts made by Members to rectify the problem and promptly compensate the customer. As a result, the publication without this additional context does not provide the complete picture, may unfairly damage reputation, undermine confidence and only present a very partial picture of the Financial Firm respondent to the public

### ***Alternate solution***

- Members believe that if there is systemic misconduct, the appropriate entity to publicise that and deal with it should continue to be ASIC (or any other relevant regulator), not AFCA, for the reasons set out below.
  - Using its investigation and evidentiary powers, ASIC will consider action following a proper review of a Determination and, in particular, will focus on material compliance issues that fall within the Scheme Rules – e.g. 'serious contraventions and breaches' under the credit laws.
  - ASIC is subject to greater accountability measures, such as government oversight, Freedom of Information access together with the potential for action through the government ombudsman and the Administrative Appeals Tribunal
- Members note that the UK Financial Ombudsmen does publish named determinations. However, it is different to AFCA as it is a statutory entity, with directors appointed by the regulator – the Financial Conduct Authority. Furthermore, as a statutory entity, it is subject to Government transparency measures such as the Freedom of Information Act.

***Do the Operational Guidelines adequately explain how the Rules as amended will apply?***

For the reasons outlined above, we are yet to fully understand the need and objective of identifying Financial Firm respondents in published Determinations.

Until further engagement and dialogue occurs, we do not think it timely to comment on the guidelines other than to ask AFCA to consider:

- providing more information on what ‘compelling reasons’ mean when a Member requests that a determination is not published. Ideally this would include situations in which publication of the determination would not reveal confidential Member information, or information which would make the Member vulnerable to exploitation of a system fault
- defining ‘determination’ in plain English so consumers, small business owners and other key stakeholders have a consistent and agreed position about what it means and also, what it does not mean and:
  - ensuring the definition only relates to fully adjudicated matters – not decisions which have been made at any early stage e.g. a written decision that a matter is “outside rules” because it is an excluded complaint or the decision maker otherwise exercises their discretion not to consider a complaint, as such reporting would inflate the number of matters reported in respect to a Member and the reporting may not present the complete picture
  - reviewing the categorisation of complaints to ensure a consistent understanding of, for example, what is ‘complex?’

***Do you have any other comments about the proposed change?***

As a procedural matter, we note concerns around the timeframe provided for commentary on what is a material change may be counterproductive to AFCA’s comments to the final report on the Royal Commission that ‘AFCA will continue to work with our members to improve standards and minimise disputes, improving practices and achieving fair, timely outcomes for consumers and small businesses’ ([here](#)) and AFIA’s objective of Financing Australia’s future through a fair, equitable and competitive market for customers.

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