

9 April 2019

Mike D'Argaville
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Email: submissions@afca.org.au

Dear Mr D'Argaville

AFCA Rules Change Consultation

The Customer Owned Banking Association (COBA) appreciates the opportunity to provide a submission to AFCA on its consultation on proposed changes to its Rules, which would expand AFCA's jurisdiction to deal with eligible complaints about conduct dating back to 1 January 2008. COBA understands that AFCA's expanded jurisdiction would operate for a period of 12 months from 1 July this year.

COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies). Collectively, our sector has \$118 billion in assets, 10 per cent of the household deposits market and 4 million customers. Customer owned banking institutions account for around three quarters of the total number of domestic Authorised Deposit-taking Institutions (ADIs) and deliver competition and market leading levels of customer satisfaction in the retail banking market.

COBA recognises that AFCA's proposals follow the Government's 4 February 2019 announcement in response to the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, in which it also committed to expand AFCA's remit to "award compensation for successful claims going back 10 years, consistent with the period examined by the Royal Commission"¹. COBA notes that the Government, also in February this year, changed AFCA's authorisation conditions to allow AFCA to make the proposed changes to its Rules.

COBA notes that the revised authorisation conditions require AFCA to deal with complaints about conduct by financial firms (who are current compulsory members of AFCA) dating back to 1 January 2008, which AFCA, its predecessor schemes, courts, or tribunals have *not* dealt with.

COBA notes that for AFCA to meet the revised authorisation conditions and deal with any eligible complaints, AFCA is proposing to change its Rules to add a new 'Section F – Legacy complaints'.

COBA appreciates that the new Section F would impose numerous requirements to limit the scope of eligible legacy complaints. We note, in particular, that AFCA would not consider a legacy complaint:

- in relation to which a decision or determination has been made by a court or tribunal
- in relation to which a decision or determination about the merits of the complaint has been made by a Predecessor Scheme or AFCA, or
- that has previously been finally settled by the complainant and the financial firm to whom the complaint relates.

¹ Commonwealth Government joint [media release](#) of 4 February 2019, 'Restoring trust in Australia's financial system'.

Commissioner Hayne, in the Final Report of the Royal Commission, clearly emphasised that “there would be no merit in allowing further access to redress in any case where the consumer or small business concerned has already resorted to dispute resolution by a court, tribunal or external dispute resolution body or has settled the dispute”². COBA agrees with Commissioner Hayne’s view.

COBA notes that AFCA’s draft amendments to its Operational Guidelines, to support the proposals, has clearly acknowledged the evidentiary issues inherent in dealing with historical conduct matters, where this may make establishing a position difficult.

COBA also notes that the draft amendments point out that certain laws require financial firms to retain documents for a set period of time, adding, as an example, that Section 286 of the *Corporations Act 2001* requires companies to retain financial records for 7 years after the transactions covered by the records are complete. As AFCA would appreciate, this may make it very challenging for financial firms to either substantiate or defend a potential legacy complaint.

In this context, COBA appreciates AFCA’s position set out in the draft amendments that it “will not generally draw an adverse inference if a party is unable to provide information that it is no longer required to be held”. COBA also notes AFCA’s helpful suggestion that financial firms “revisit their documentation practices in light of the requirement to respond to legacy complaints”.

Furthermore, COBA notes that AFCA may also modify some of its processes for dealing with legacy complaints, such as allowing more time for a financial firm to respond to a complaint, conducting a greater number of conciliation conferences and referring complaints more directly to a decision.

COBA appreciates AFCA’s recognition of the potential challenges associated with dealing with legacy issues and AFCA’s careful consideration of how this may be approached by AFCA in practice. We encourage AFCA to provide further detail in its final Operational Guidelines on the identified processes that AFCA may modify to deal with eligible legacy complaints.

If you have any questions or comments in relation to any aspect of our submission, please contact Tommy Kiang, Senior Policy Manager, on [REDACTED] or at [REDACTED]

Yours sincerely



MICHAEL LAWRENCE
Chief Executive Officer

² Final Report of the Financial Services Royal Commission, [Volume 1](#), Chapter 8, page 487.