

12 April 2019



Mr David Locke
Chief Ombudsman and Chief Executive Officer
Australian Financial Complaints Authority
GPO Box 3
Melbourne VIC 3001

By email to: submissions@afca.org.au

Dear David

Submission and comments on AFCA consultation on Rules amendments

Introduction

The Mortgage & Finance Association of Australia (MFAA) appreciates the opportunity to comment on the proposed changes to AFCA rules to permit AFCA to deal with complaints about conduct by financial firms (who are current members of AFCA) dating back to 1 January 2008. This expanded jurisdiction will operate for a period of 12 months from 1 July 2019.

Our comments are limited to matters relating to credit activities – whether regulated by the National Credit Code or unregulated and, in general terms, focuses on finance brokers and their licensees.

About the MFAA

With more than 13,500 members, the MFAA is Australia's leading professional association for the mortgage broking industry with membership covering mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage broking industry. The stated purpose of the MFAA is to advance the interests of our members through leadership in advocacy, education and promotion. To achieve this aim, the MFAA promotes and advances the broker proposition to a range of external stakeholders including governments, regulators and consumers, and continues to demonstrate the commitment of MFAA professionals to the maintenance of the highest standards of education and development.

Responses to consultation paper questions

Generally, we consider the rules are appropriate. In respect of the three questions raised in the consultation paper we respond as follows:

1. Does the proposed change satisfy the requirements of the new authorisation conditions?

Yes.

2. Do the Operational Guidelines adequately explain how Section F will apply?

Yes, but we have some concerns about this. See our comments below under 'Applicable standards' and 'Application of the rules'.

3. Do you have any other comments about the proposed change?

Yes. See our additional comments.

Applicable standards

A key issue is whether the requirement to apply AFCA's rules as at 30 June 2019 might be confused with applying 2019 standards to 2008 conduct which is quite a different thing and has potentially much broader impact. It is not appropriate (nor has it been mandated by government) that today's standards are applied retrospectively.

This is particularly important in relation to responsible lending. It is important to recognise that the responsible lending provisions in the *National Consumer Credit Protection Act 2009* commenced in 2010. Since that time there have been a number of changes to community expectations and guidance issued by ASIC. Members conduct should be assessed by reference to the law and industry standards that applied at the date of the relevant activity.

Application of the rules

The draft Section F on page 2 states that complaints can be lodged about entities that are current members of AFCA. There should also be a requirement that the entity was a compulsory member of AFCA, or of a predecessor scheme, at the date the conduct complained about occurred.

Length of time during which AFCA will decide legacy complaints

AFCA's remit to receive legacy complaints is limited to one year – complaints must be submitted between 1 July 2019 and 30 June 2020. This does not answer the question of how long it will take AFCA to hear and resolve those complaints.

AFCA has indicated in its consultation that it will start hearing complaints as soon as they are received following 1 July 2019. In circumstances where complaints can be submitted up to 30 June 2020, it is clear that AFCA will subsequently be hearing those complaints for at least some period of time. That period of time may very possibly be substantial if the volume of complaints received is high. This means that members will be likely to have to respond to AFCA about legacy complaints after the remit period.

It does not appear that AFCA has set a deadline to deal with legacy complaints lodged within the remit period. The resolution time frame may be insufficient because of the inability to quantify how many legacy complaints will be received. However, AFCA has indicated that it may modify any of its Rules (on a case by case basis) when dealing with legacy complaints in the interests of maximising efficiency (Rule F.1.3).

Some of the modifications AFCA has anticipated are:

- varying the referral back timeframe when [AFCA] first receives a legacy complaint and refer it to the Financial Firm;
- conducting a greater number of conciliation conferences; and
- referring legacy complaints more directly to decision, if they cannot be quickly resolved by agreement.

The MFAA seeks assurance from AFCA that it will give priority to the resolution of legacy complaints, will do so promptly and will only refer legacy complaints directly to decision where the licensee fails to respond, or the response does not address the issue adequately or appropriately.

Reporting on systemic issues and serious breaches

Rule F.1.3 sets out that Sections A to E of AFCA's usual rules apply to legacy complaints unless excluded and to the extent of any inconsistency (in which case the draft rules will apply).

Our understanding of this is that it appears legacy complaints will be subject to AFCA's usual reporting obligations in relation to systemic issues and serious breaches.

This raises a number of issues, including:

1. whether or not AFCA will report on historical systemic issues (i.e. systemic issues that no longer exist because they have been redressed or for some other reason), or will restrict its reporting to current systemic issues that happen to be identified through a legacy complaint. In this respect, it would seem somewhat counter-intuitive to report on historical systemic issues. We note that the AFCA Rules make clear that systemic issues are not limited to ongoing, current issues as they refer to implementing measures to prevent reoccurrence of concluded systemic issues.
2. In the event that AFCA reports on historical systemic issues:
 - a. the types of remedial action that AFCA would expect firms to take; and
 - b. how AFCA will exercise its power to direct a firm to engage in, or refrain from engaging in, certain conduct, and what kind of direction it would expect to issue.

In our view, historical systemic issues may be difficult to respond to because, as per the usual rules for systemic issues, AFCA is required to report to the regulator as soon as practicable, but in any case within 15 days, and is not required to consult with the member first. This means that licensees wishing to be heard on an issue need to respond to the notification within a maximum of 15 days.

However, where this requires investigation into issues dating back as far as 2008 (and where the volume of material that may be relevant would no doubt be far greater than in relation to a specific legacy complaint), this could take substantially longer.

Similar considerations apply when considering how the legacy complaint scheme may identify serious breaches by a firm, which AFCA is required to report to ASIC. We are unable to see where AFCA has provided any guidance in the draft rules or the draft operational guidelines regarding the reporting and management of systemic issues and serious breaches and seek further clarity on this.

Interest

AFCA Rules D.6 indicate that AFCA may decide interest is payable on any compensation awarded in a complaint (Rule D.6.1), and that typically, interest will be calculated from the date of the cause of action or matter giving rise to the claim (D.6.2(b)(i)).

Noting that this is entirely discretionary, as AFCA has the discretion to not award interest at all, or to calculate it in any way it sees fit having regard to the circumstances (D.6.2(b)(ii)), one issue is how AFCA will deal with interest in the context of legacy complaints. Interest awards could be significant in circumstances where, for some claims, the cause of action would date back to 2008. Additionally, this concern is heightened when it is noted that interest awards are not capped (Operational Guidelines D.6).

It may be the case that AFCA will exercise its discretion not to award interest, given the circumstances. However, AFCA has not made any comment on interest awards in the draft rules or the draft operational guidelines. The MFAA also seeks clarity in relation to this issue.

The MFAA extends its thanks to the Chief Ombudsman for the opportunity to respond to this consultation paper. Should you require further information to supplement this submission, please do not hesitate to contact me on [REDACTED] [REDACTED] [REDACTED] or by emailing [REDACTED]

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mike Felton', written in a cursive style.

Mike Felton
Chief Executive Officer
Mortgage & Finance Association of Australia