AFCA Rules Change Consultation 31 May 2019
Submission by Australian Finance Group Ltd ACN 066 385 822
20 June 2019

Australian Finance Group Ltd (**AFG**) welcomes the opportunity to respond to the *AFCA Rules Change* consultation paper issued on 31 May 2019 (the **Consultation Paper**) and makes the following comments in response to the proposed changes to the rules.

AFG supports openness and transparency in circumstances where the disclosure is appropriate and not materially prejudicial. AFG strongly disagrees with the proposed change.

AFCA proposes that the AFCA Rules will be amended so that AFCA has the ability to name the financial firm in published determinations issued after the new rule takes effect. This will also have retrospective effect. AFG is of the view this change fundamentally breaches the principal of procedural fairness. If the new rule is made, it should only apply to determinations regarding **conduct** that occurred after new rule is made. Disclosure otherwise is in breach of the existing rule A.14.5, which financial firms are entitled to have relied upon when conducting their business.

It is unfair and unreasonable for legislation or regulatory guidance which came into being after a specific activity, to be applied retrospectively. For example, a lending decision should not retrospectively be subject to obligations or restrictions that did not exist at the time the lending decision was made.

1. The fact that some other schemes disclose the identity of the financial firms;

   (a) does not justify the potential retrospective operation of the new rule as discussed in paragraph 1 above; and

   (b) is not relevant when comparing with different industry types such as energy and water companies.

2. It is not appropriate for credit licensees to be named in the way proposed on the following basis:

   (a) Finance aggregators, such as AFG, have many credit representatives and other members operating under them, numbering in the thousands. A dispute relating to one of those credit representatives will usually be conducted in the name of the aggregator, even though the aggregator may have had no involvement in the transaction other than the supply of business level services. It may lead to an inaccurate perception by the public of aggregators involvement in any conduct and unfairly prejudice aggregators.

   (b) The subject matter of AFCA disputes are often quite minor issues, and often relate to misunderstandings or poor service that are resolved quickly and without substantial detrimental impact to any consumers. We submit that there is little public benefit in disclosing these minor issues.

   (c) The appropriate entity to publicise proven poor conduct is ASIC. We believe ASIC's current practice of naming serious bad behaviour that has been investigated thoroughly is appropriate. Given that generally financial firms have no right of appeal for decisions made by AFCA, it is not appropriate or fair for AFCA to have this additional power to damage the reputation of small business operators.

3. ASIC has issued consultation paper 311 (**CP311**) for the industry to comment on the proposed updates to ASIC's Regulatory Guide 165 Licensing: Internal and external dispute resolution (**RG 165**). ASIC expects to issue a legislative instrument setting out its IDR data reporting requirements in December 2019. The proposed new requirement as set out in CP311 is that all relevant financial firms will be required to report to ASIC against a set of prescribed data variables for each complaint received. This includes status with the EDR scheme and outcome. As such this mechanism would be the more appropriate forum to report complaints and for ASIC, as the financial services regulator, to determine if any conduct breached the relevant obligations and if found to be the case, should be publicised.

4. The consultation paper asks three questions to which we respond below.

   (a) Does the proposed change satisfy AFCA's transparency requirements?

   AFG believes that naming financial firms in all determinations will defeat the objective of transparency. Transparency occurs when meaningful information is imparted. The sheer volume and minor nature of many determinations is neither fair nor informative.

   In addition, the fact that consumers are not named in the determination (even vexatious consumers who may make many frivolous complaints) also fails the transparency test.

   (b) Do the Operational Guidelines adequately explain how the AFCA Rules as amended will apply?

   Yes, but we maintain that the rule change is unfair, unnecessary, and does not assist transparency.

   (c) Do you have any other comments about the proposed change?

   Notwithstanding that Rule A.14.2 states that an AFCA Decision Maker must do what the AFCA Decision Maker considers is fair in all the circumstances having regard to legal principles, Rule A.14.3 states that an AFCA Decision Maker is not bound by rules of evidence. In general, rules of evidence attempt to ensure that a process is fair for the parties involved. Therefore, if the rules of evidence are not taken into account, there is a risk that the process will not be inherently 'fair' for a party.

   In the context of AFCA's proposed changes to Rule A.14.5 to empower AFCA to identify financial firms in its determinations, the risk is therefore heightened that damage to the reputation of the financial firm will occur without due process having been afforded to the financial firm.

Please do not hesitate to contact AFG if you require any further detail about the matters raised in this submission.