

20 June 2019

Mike D'Argaville
Legal Counsel
Australian Financial Complaints Authority

By email: submissions@afca.org.au

Dear Mr D'Argaville,

Australian Financial Complaints Authority (AFCA) Rules Change Consultation – Naming Financial Firms in Determinations.

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the proposed changes to identify financial firms in AFCA's published decisions.

This submission responds to:

- AFCA Rules Change Consultation Paper dated 31 May 2019;
- Draft amendments to the Rules;
- Draft amendments to the Operational Guidelines.

Consumer Action strongly supports AFCA's move to name financial firms in its published determinations. It is hoped that this will go some way towards holding firms accountable for the conduct exposed by the Banking Royal Commission.

"...The Australian community expects, and is entitled to expect, that if an entity breaks the law and causes damage to customers, it will compensate those affected customers. But the community also expects that financial services entities that break the law will be held to account. The community recognises, and the community expects its regulators to recognise, that these are two different steps: having a wrongdoer compensate those harmed is one thing; holding wrongdoers to account is another."¹

In this submission we highlight the importance of ensuring that these determinations be linked to AFCA's bi-annual complaints reporting.² This is important as not all complaints proceed to become determinations, and determinations are likely to flesh out the conduct by the firm that was problematic. Linking complaints to determinations also ensures that data on determinations is easy

¹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report Volume 1* (February 2019) p 3. Available at:

<https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>

² Consumer Action Law Centre, Proposed AFCA arrangements for comparative reporting of complaint data (May 2019) Available at: <https://consumeraction.org.au/20190503-afca-comparative-reporting/>

to find. It is important that data on determinations be made easily searchable, by filtering for financial firm or franchisor, product or specific issue.

About Consumer Action Law Centre

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Question 1: Does the proposed change satisfy AFCA's transparency requirements?

Yes. The proposed changes satisfy AFCA's transparency requirements as they will enable determinations made by AFCA to be available to the public in a transparent and meaningful way. While these determinations do not function as binding precedents, their publication will showcase the expected standards of good industry practice and act as a deterrent to bad behaviour.

In addition to this, it is hoped that this practice will enable financial firms to compare themselves with other firms within the sector, incentivising them to improve their internal dispute resolution schemes before it reaches AFCA to be determined.

Question 2: Do the Operational Guidelines adequately explain how the Rules as amended will apply?

Yes, they generally explain how the amended Rules will apply. However, the section allowing parties to make requests that details be changed requires more clarification. The following details could be fleshed out more:

- who the parties should contact to fulfil the request;
- on what basis determinations can be further de-identified, or removed;
- what constitutes a compelling reason for a determination not to be published, aside from identification of the complainant or third party.

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

We make the following general comments about the scheme and reporting of complaints.

Exclusion from publication

The possibility of determinations being removed from publication on request raises some concerns for the transparency and accountability of financial firms. We recommend that even when excluding determinations from publication, reasons for exclusion should be given, with short details of the substance of the complaint published and publicly accessible. Borrowing from the predecessor scheme, the Credit & Investments Ombudsman and its style of reporting, the following list headings (non-exhaustive) would be the minimum details of the complaint: poor customer service, financial

hardship, failure to act with due care, skill and diligence, breach of privacy, credit reporting, conduct during the applications process, misrepresentation or misleading conduct.³

While this has not been detailed anywhere in the Consultation Paper or the Operational Guidelines, we recommend also that those determinations excluded from full publication still be included in the count of a determination made against a financial firm.

Linkages to comparative reporting of complaint data

It is important that these determinations be linked to the firms that are the subject of the complaint. This ties in with previous consultations on the biannual reporting of complaint data by AFCA.⁴ This would give consumers, consumer advocates and firms a method of comparing services, driving improvements through the identification of systemic issues and informing stakeholders' understanding on how AFCA resolves such issues.

Other than naming the financial firm, we also strongly encourage AFCA to name the associated advisor and franchisor relating to the complaint which was determined by AFCA. This is important because consumers often do not make the distinction between an overall company brand and a particular franchisee. It would also incentivise franchisors to ensure that their franchisees maintain good business practices and comply with the law.

In relation to financial advisors, where a complaint is made about a third-party working for, or on the commission of a firm, linking them together will incentivise firms to put in place checks to prevent misconduct occurring. This was an issue examined by the Banking Royal Commission, and we believe that AFCA's reporting arrangements could play a part in exposing this misconduct and help to ensure increased supervision of third-party distributors.⁵

"The evidence given to the Commission showed how often those retained to give financial advice to a client resolved conflicts between their duty to the client and their interests (or the interests of some related entity) in favour of their own financial interests or those of the entity they represent, and against the interests of the client."⁶

Accessibility

Determinations should be made easily searchable. It should be possible to search and filter by trade name or brand name, product and the specific issue. The goal is to make this data easy to navigate, to promote transparency by making data available to those who wish to access it. To ensure these

³ Credit & Investments Ombudsman, *Annual Report on Operations 2018*, p 7, available here:

<https://www.cio.org.au/assets/36897397/ARO2018.pdf>

⁴ Consumer Action Law Centre, *Proposed AFCA arrangements for comparative reporting of complaint data submission* (May 2019) Available at: <https://consumeraction.org.au/20190503-afca-comparative-reporting/>

⁵ Consumer Action Law Centre, *Submission to the Royal Commission Part 2* (2018), p 6. Available at:

<https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/02/180205-Consumer-Action-Sub-to-Royal-Commission-Part-2-FINAL.pdf>

⁶ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report Volume 1* (February 2019) p 74, 164. Available at:

<https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>

aims are met, we propose that consumer testing be carried out to ensure that the search function is user-friendly.

Determinations should also remain available online for an indefinite period and be classified into six-month periods following the frequency of the reporting of complaint data. This will be useful for tracking AFCA's approach to resolving complaints on different product issues, identifying systemic issues through long-term data sets and informing consumers who wish to bring a complaint on a financial firm to AFCA.

For further information, please contact Rachel Wong, policy researcher at Consumer Action Law Centre at [REDACTED] you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive style with a large, sweeping initial 'G'.

Gerard Brody
Chief Executive Officer