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20 June 2019

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By email to: submissions@afca.org.au

To whom it may concern

## Submission on AFCA's Rules Change Consultation

The Mortgage & Finance Association of Australia (MFAA) is pleased to have the opportunity to comment on AFCA's Rules Change Consultation outlined in AFCA's consultation paper dated 31 May 2019.

### 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.

### Introduction

The MFAA considers that the proposed rule change should be reconsidered by AFCA for the reasons set out below.

The MFAA strongly supports the principles of openness and transparency in the external dispute resolution (EDR) process. These principles, importantly, must be achieved in a way that ensures procedural fairness between all parties to a dispute, which will in turn support positive consumer outcomes. The MFAA is of the view that the proposed rule change will not promote openness and transparency within EDR, for the reasons outlined in this submission.

We believe there is a risk that the proposed rule is so wide in application that it will defeat this objective and is unfair for financial firms (FFs), and risks FFs feeling pressured to settle claims which are more appropriate to progress to the Determination stage of the EDR process. This unintended but likely outcome is not beneficial for either industry or consumers. We note that this change was not suggested in the 2017 *Review of the financial system external dispute*

*resolution and complaints framework* by Prof. Ian Ramsay, despite this review making a number of significant recommendations including the shift to a single EDR scheme.

In a post-Royal Commission context, the industry's focus is to restore consumer trust in the banking and financial services sector and to deliver improved customer outcomes. Publishing AFCA Determinations, without context relating to negotiations that occurred before the Determination was made and what the compliance culture is of the relevant FF (particularly when the Determination relates to past conduct), may further erode consumer trust at a time when industry is making changes which are positive for consumers. It would be disappointing for this progress to be sacrificed to a regime of public naming, especially in what may, at times, be minor matters or misunderstandings.

The MFAA therefore considers that the proposed rule change should be reconsidered by AFCA. Further detail on our reasoning is set out below.

**The proposed change will not increase transparency**

Merely naming FFs in Determinations, in the absence of useful contextual information about the process leading to that particular Determination, the FF or the complainant, does not aid transparency or accountability. Doing so instead would provide a one-sided view of a single complaint. Given the lack of context, there is little that either consumers or industry could learn, and would therefore be unable to make an informed choice about an FF by reading a Determination in these circumstances.

We are concerned that publication in the absence of context may create a misleading impression of an FF's approach to disputes and of their compliance culture and systems. It is unfair for an FF to be judged on the basis of a single complaint without the context of what came before the Determination and prior efforts the FF may have taken to settle the dispute to the customer's satisfaction. It also ignores any action the FF may have taken to avoid such a dispute arising again for other customers.

Larger FFs may be named more often than smaller FFs due simply because they interact with a greater number of customers and do so more frequently. This may again lead to an inaccurate impression of the FF's compliance record.

**The proposed change will increase pressure on FFs to settle**

The threat of being named in a Determination is likely to result in FFs being unfairly pressured to accept AFCA recommendations with which they do not agree, or settle complaints on terms which they do not consider fair, to avoid the risk of being named in that Determination. This is particularly relevant to smaller FFs that may face increased insurance costs, or face the prospect of financially crippling their business, if they do not accept settlements regardless of whether they consider them to be unreasonable in the circumstances. This may result in FFs needing to increase their charges to consumers to cover increased costs such as higher insurance premiums, and may, in time, lead to reduced competition.

Further, vexatious customers may be encouraged to make frivolous claims, or not accept reasonable settlements, in the hope that an FF will offer a larger settlement to avoid being named in a Determination.

**No right of appeal to an AFCA Determination**

We do not believe that AFCA's findings should be disclosed in the same way as a regulator, legislator or court. This is because AFCA, as an EDR scheme, does not hold the same powers as a regulator or legislator. Similarly, evidence reviewed by AFCA does not have to pass the

same scrutiny as a court, nor is AFCA subject to the same rules as a court, and as such, its findings should not be disclosed in the same manner. With the exception of complaints relating to regulated superannuation funds, FFs do not have the right to appeal a Determination directly through AFCA. With this in mind, we believe it is procedurally unfair for FFs to be named in public Determinations which they cannot appeal and which may lead them to suffer reputational and financial damage extending beyond any loss directly attributable to a single Determination.

**Systemic issues should be referred to ASIC**

The MFAA considers it appropriate for AFCA to refer systemic issues to the Australian Securities and Investments Commission (ASIC), which can investigate and take necessary action. Importantly, we strongly believe that ASIC is the most appropriate regulator to publicly identify FFs that have breached a relevant law or regulation. This is because ASIC has the power to consider material issues of non-compliance on a wider scale than AFCA, as ASIC is not bound by similar rules. Further, while AFCA is an independent body, ASIC remains subject to government oversight and is therefore more accountable. The right to appeal an ASIC decision is permitted through the government ombudsman and via the Administrative Appeals Tribunal (AAT), and with ASIC's new mantra of 'why not litigate', ASIC, when it litigates, will be accountable through the traditional court system as the court will have the opportunity to review ASIC's interpretation of the law. ASIC is therefore the regulator most appropriate to publish breaches by FFs, rather than AFCA.

**Issues to consider if AFCA proceeds with the proposed change**

If AFCA proceeds with the proposed rule change, we consider that the following points should apply.

*Possible retrospective application*

AFCA proposes that the ability to identify an FF in published Determinations will commence after the rule takes effect. This has potential retrospective effect in practice, because at the time the conduct occurred, the FF was not aware that AFCA would have the power to name them in a published Determination. Such an outcome does not accord with AFCA's objective of fairness. The new rule, if made, should only apply to determinations regarding conduct that occurred *after* the new rule is made. Disclosure relating to conduct occurring before the proposed rule change would be in breach of existing rule 14.5. FFs are entitled to have relied upon this when conducting business.

*What is a 'Determination'?*

It is vital that any matters or complaints that are resolved by agreement are not classified as a 'Determination' and must not be published without the consent of the FF.

AFCA rule 12.3 provides that a Determination occurs if 'the Financial Firm fails to accept AFCA's preliminary assessment within the timeframe specified by AFCA; or either a Complainant or Financial Firm requests that the complaint proceeds to Determination, and provides reasons for disagreeing with the preliminary assessment, within the time specified by AFCA'. Any resolution to a complaint other than a Determination as defined by the AFCA rules must not be publishable.

*Which Determinations are publishable?*

Given the potentially significant negative impact on an FF by identifying them in a Determination, AFCA's rules should set objective criteria for deciding which Determinations to make public. We suggest that the criteria should be set by reference to:

a) the dollar value of the sum required to be paid as part of the remedy under the Determination (which should be material as compared to, for example, the size of a loan);
b) the frequency of the type of conduct by the FF; and
c) the seriousness of the type of conduct by the FF.

*Ability to challenge a Determination*

Should the proposed rule change proceed, FFs should be entitled to challenge a Determination that they can demonstrate is grossly unfair, otherwise, FFs will be subject to being named in Determinations, which will negatively impact their business, without a right of reply or appeal.

**Consultation paper questions**

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

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

For the reasons stated above, no.

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

Yes, but we maintain that the proposed rule change will operate unfairly in practice unless amendments are made as outlined in this submission.

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

See above.

**Conclusion**

The MFAA appreciates the opportunity to provide input on this very important issue and looks forward to ensuring that procedural fairness in the AFCA decision making process is maintained, and that good consumer outcomes are not impacted by any unintended consequences of this proposed rule change.

Yours sincerely

**Mike Felton**
Chief Executive Officer
Mortgage & Finance Association of Australia