AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

Legal Counsel

Australian Financial Complaints Authority

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BY EMAIL ONLY

Dear

AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY (AFCA) RULES CHANGE CONSULTATION – AUSTRALIAN RETAIL CREDIT ASSOCIATION (ARCA) SUBMISSION

Thank you for the opportunity to provide a submission in response to the proposed change to Rule A.14.5 of the AFCA Rules.

ARCA supports the adoption of transparency measures by AFCA. However, no information has been provided by AFCA about how the proposed Rule change is a necessary transparency measure, particularly what transparency concern exists in its current approach to the publication of determinations and what positive impact will result for consumers, financial firms, and AFCA's service in making the proposed Rule change. In the absence of any analysis by AFCA, ARCA has strong concerns about the effects of this proposed Rule change. As such, we consider that this proposed Rule change requires more consideration and consultation by AFCA.

For these reasons (which are also outlined further in the submission below), and in the absence of further consideration and consultation, ARCA does not support the proposed Rule change.

Should AFCA decide to proceed with the proposed Rule change, ARCA would request that AFCA:

- Undertake a holistic review of transparency in its processes including considering the consequences of providing little detail for its decisions in its short-form determinations; and

- Create a process for release of determinations which enables a short review period by the parties prior to publication, allowing the ability to address errors in the determination, or to seek to have the determination made confidential where warranted by the circumstances surrounding the decision (including the basis for making for the decision or the confidential nature of the factual scenario).

Who is ARCA?

ARCA is the peak industry association for organisations involved in providing and managing consumer credit in Australia. Our objects include promoting, through education and advocacy, responsible credit assessment and improved/best credit management practices. Our Members include all of the 14 largest banks, large mutuals, and a diverse range of finance companies including the three largest consumer finance providers, specialist auto lenders, and a broad range of established and start-up fintechs. The four national credit reporting bodies are also ARCA Members. Together, our Membership is responsible for well over 95% of all lending to consumers in Australia. All our credit provider Members are licensed under the National Consumer Credit Protection Act, administered by ASIC.

ARCA works closely with its Members to identify issues impacting the credit industry, particularly where those issues affect credit decisions and management.

ARCA is uniquely placed to comment on the operation of the credit assessment and management system, including the impact external dispute resolution (EDR) schemes may have on this system. ARCA played an important role in the establishment of the current consumer credit reporting system (through its role as the developer of the Privacy (Credit Reporting) Code (CR Code), and as drafter of the Principles of Reciprocity and Data Exchange (PRDE), the data sharing rules authorised by the Australian Competition and Consumer Commission (ACCC) and used by industry for the exchange of comprehensive information). Through its information website CreditSmart (www.creditsmart.org.au), ARCA also provides resources for consumers navigating the credit reporting system.

ARCA does not support the proposed Rule change

ARCA does not support the proposed Rule change because:

1. On the face of it, we do not believe it is a necessary step in order to satisfy transparency requirements.
2. AFCA has not provided any supporting material to substantiate how this Rule change is necessary to achieve transparency measures, and what impact this Rule change will have on consumers, financial firms, and AFCA's provision of its service.
3. In the absence of any evidence to the contrary, this Rule change provides limited consumer benefit while causing detriment to financial firms and undermining their dealings with AFCA. As described by one ARCA Member, in this way, the Rule change may prove more sensationalist than useful.

ARCA supports transparency

ARCA has long advocated for transparency within financial services. Indeed, ARCA was created to bring greater transparency to credit reporting, to the benefit of both consumers and industry. As drafter of the CR Code, and developer of the industry rules for sharing credit reporting information (the PRDE), ARCA has championed greater transparency in the dealings between credit providers, credit reporting bodies and their customers, as well as

greater transparency between industry participants through adherence to common rules and standards. The outcomes from our work demonstrate that both consumers and industry benefit from transparency, through better access to information, through greater innovation and competition between industry participants, and through easier access to support and redress if information is incorrect or rules are breached.

Likewise, ARCA supports AFCA's current approach to transparency. Transparency in AFCA's service is already provided by:

- Its publication of de-identified determinations, under the existing Rule A.14.5.
- Regular reporting of statistical comparative complaint data for financial firms as required by the AFCA Rules and the Australian Securities and Investments Commission's (ASIC's) RG267. These reports provide an insight into valuable complaints metrics for identified financial firms.
- Reporting of systemic issues to the Australian Securities and Investments Commission (ASIC). This report may identify the names of the relevant financial firm, and provides ASIC with an opportunity (where necessary) to undertake further enforcement activity against that financial firm.

In addition, ASIC, in its review of RG165, is proposing to amend this guidance to require licensees to report internal dispute resolution information to ASIC on an ongoing basis[1].

These existing (and proposed future) reporting lines provide an important insight into overall compliance performance of a financial firm, and identify serious systemic issues about a particular financial firm for the regulator.

Naming financial firms is an unnecessary transparency measure

It is difficult to see what further transparency is achieved by identifying financial firms in individual determinations. It is appreciated that court judgments, for instance, which do identify parties, provide valuable insights into detailed factual scenarios (where these facts are admissible based on rules of evidence) and the application of the relevant law to those factual scenarios. This is necessary because these judgments, particularly when issued by higher courts, will act as binding legal authority and are an important means to ensuring transparency and fairness in the judicial process.

We note that an AFCA determination is not binding legal authority, although may be an influencing factor in AFCA decision-making. AFCA is also not bound by rules of evidence, and, in that way, the information contained in determinations may be untested or not verified.

Further, the short form determination used by AFCA does not provide detailed fact scenarios, and often only limited discussion and analysis of the relevant law and its application to the fact scenario. Detailed facts, including details of particular credit products and their operation (which may provide a means to identify the financial firm) are omitted from these determinations. While it is appreciated that this short form determination is used to promote easy understanding of the outcomes of the dispute by the complainant consumer, it means that limited precedent value exists for third parties reviewing this determination.

[1] See ASIC Consultation Paper 311 "Internal Dispute Resolution: Update to RG165", May 2019

The FOS UK approach provides a useful contrast

The approach proposed by the Rule change should be contrasted with that taken by the United Kingdom's Financial Ombudsman Service (FOS UK). Since it commenced publishing ombudsman decisions in 2012, FOS UK has published the names of financial firms[2]. FOS UK identified the necessity of naming financial firms in its decisions for the following reasons:

> "In many cases, the identity of the financial business is central to the issue in question, and its identity is often clear from the substance of the decision itself. For example, product names, policy wordings and business practices often form a core part of an ombudsman's considerations, which might all point to a specific business.
>
> So if the objective was to protect the identity of the financial business in the same way as we propose to protect the identity of consumers, there would need to be extensive redaction of the decision – often effectively making the decision incomprehensible on publication.[3]"

FOS UK also examined at length the impact the publication of this material would have on the accessibility and transparency of its service[4].

By contrast, AFCA:

- Has not provided any information about how its current publication of determinations has been impacted by not naming financial firms. Given that AFCA determinations appear to be far less detailed, generally, than those published by FOS UK, the issues cited by the FOS UK which justified the identification of financial firms, do not appear to apply to AFCA determinations.

- Has otherwise not provided any detailed information about how its ability to ensure transparency is compromised by de-identifying financial firms in its published determinations.

The 10 April 2019 AFCA Newsletter, referred to in the consultation paper as providing the explanation for this new transparency measure simply states:

> "Changes to our public reporting – One of our main commitments as a new organisation is to be open, transparent and accountable to the public. We already publish regular updates on our statistics and all our decisions. This is currently in an anonymised way, however, **from 1 July this year, after we have amended our Rules, all new decisions will include the names of the financial firms involved.** In addition, we will publish detailed six-monthly reports on our work, the definite systemic issues we're identifying and the firms involved, and comparative tables of the complaints accepted and resolved by financial firms. AFCA plays an important public role and we recognise that transparency in our data is essential to rebuild trust in the financial sector." (emphasis added)

In this publication, AFCA has failed to provide any considered rationale for this transparency measure. Indeed, its publication of this measure makes it clear that this Rule change has

[2] Noting exceptions to identification and publication also apply, including where genuinely commercially sensitive information may be published or exceptional circumstances apply.
[3] FOS UK, "Transparency and the Financial Ombudsman Service – Publishing Ombudsman Decisions: Next Steps", September 2011, pp15 – 16
[4] It should be noted the FOS UK consultation paper on this issue was 27 pages long, with detailed examples and analysis.

already been decided without this analysis (and presumably, regardless of any input received through this consultation process).

ARCA considers that such a significant Rule change requires detailed analysis, both in terms of how transparency measures are currently defective due to the non-identification of financial firms, and what the anticipated impact of such an approach will be on consumers, financial firms and AFCA's service. It is most concerning that this Rule change has instead been treated as a foregone conclusion.

Naming financial firms will have adverse consequences

ARCA's view is naming of financial firms will have adverse consequences for consumers, financial firms and AFCA's service.

To begin, as noted above, the naming of a financial firm in a determination will have limited benefit to consumers including the complainant. Because determinations are made on a case-by-case basis, and the short form determination provides limited detail, it is unlikely that other consumers reviewing this determination who may have a dispute with the same financial firm would derive any greater insight into the approach or likely outcome for their own dispute.

This does not mean that organisations will not seek to exploit the information made available in determinations which name financial firms. In particular, credit repair organisations tend to operate in an exploitative fashion encouraging consumers to lodge disputes with financial firms with little or no consideration of the factual scenario faced by the consumer, and whether the consumer's dispute has any merit. In this context, credit repair organisations are likely to use the publication of financial firm names to identify which financial firms it can target with certain disputes. This will occur irrespective of the inevitable 'mismatch' between referred consumer and the case which was the subject of the published determination. This leads to poor outcomes for consumers (who will pay significant fees to credit repair organisations) as well as both financial firms and AFCA (who will be required to dedicate resources to responding to these often unmeritorious disputes).

AFCA recently gave evidence about the impact of these credit repair organisations (described as 'debt management firms') to the Senate Economics Reference Committee in response to its inquiry into Credit and financial services targeted at Australians at risk of financial hardship[5]. AFCA's Chief Ombudsman stated to the Committee:

> "We're definitely seeing debt management firms offering cleaning, fixing, repairing, washing away of default listings on credit reports, which consumers can do themselves. And we're seeing fees charged, sometimes concerning levels of fees charged, with regard to some of these sorts of services as well. The issues that we are most concerned about really are the charging of high up-front fees for services that provide little or no value. Poor, inappropriate services… really, we believe, can leave consumers worse off in terms of actually negotiating a settlement. And we have seen misleading and sometimes, I think it's fair to say, predatory behaviour of consumers in this space as well."

[5] Senate Economics Reference Committee inquiry into Credit and financial services targeted at Australians at risk of financial hardship, transcript of hearing dated 24 January 2019, David Locke and Philip Field

It would appear incongruous for AFCA to potentially fuel this industry by taking the approach proposed by this Rule change, particularly in the circumstances we have cited above, where no detailed analysis of the necessity or impact of this transparency measure has occurred.

Further, there is real concern that, appreciating the adverse consequences that may flow from publication of the determination (identifying the financial firm), this introduces an element of unfairness into the AFCA process. A financial firm, if faced with an adverse recommendation, would now need to consider whether it is prepared to proceed to determination, appreciating that in doing so it may be 'named and shamed'. This outcome would undermine the operation of AFCA's service, as applying commercial pressure to achieve potential improper outcomes is inconsistent with the provision of a fair and independent dispute resolution service.

In that regard, an ARCA Member has raised the concern that often decisions are made not to contest AFCA matters because of the time, expense or commitment of resources required to contest a claim. Given rules of evidence do not apply to AFCA decisions, it can mean the facts in determinations may be untested. With publication of financial firm names, it enables the media and others to potentially damage the reputation of named financial firms, relying on facts and assertions that have not been tested or contested and which may be false or misleading. In circumstances such as these, given AFCA determinations are binding on financial firms, there may be little recourse available for the financial firm.

For the ARCA Member who raised this concern, it was particularly of concern that this impact may be felt more by smaller financial firms (who may not have the same availability of resourcing when it comes to AFCA disputes).

If AFCA proceeds with the Rule change, process changes should occur

If AFCA decides to proceed with the proposed Rule change, ARCA would request that AFCA:

- Undertake a holistic review of transparency in its processes including considering the consequences of providing little detail for its decisions in its short-form determinations. This review would need to consider how best to ensure that the detail in published determinations provides true precedent value, and enables distinctions to be easily made for relevant factual scenarios; and
- Create a process for release of determinations which enables a short review period by the parties prior to publication, allowing the ability to address errors in the determination, or to seek to have the determination made confidential where warranted by the circumstances surrounding the decision (including the basis for making for the decision or the confidential nature of the factual scenario). The proposed review period should be at least seven days.

We are happy to further discuss this submission either with AFCA or ASIC, as required. Please contact Elsa Markula, Legal & Regulatory Affairs Manager to discuss further.

Yours sincerely,

Mike Laing

Chief Executive Officer, ARCA