



AUSTRALIAN COLLECTORS &  
DEBT BUYERS ASSOCIATION

29 June 2018

The Hon. Helen Coonan  
Chair  
Australian Financial Complaints Authority

By email: [submissions@afc.org.au](mailto:submissions@afc.org.au)

Dear Madam

**SUBMISSION IN RESPONSE TO CONSULTATION ON PROPOSED AFCA RULES**

The Australian Collectors & Debt Buyers Association (ACDBA) is pleased to provide the attached Submission in response to the Consultation Paper: *Consultation on Proposed AFCA Rules* issued by Australian Financial Complaints Authority (AFCA) on 1 June 2018.

If any additional information is required in respect to this Submission please don't hesitate to contact the writer.

Yours sincerely,

**AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION**

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AUSTRALIAN COLLECTORS &  
DEBT BUYERS ASSOCIATION

**ACDBA SUBMISSION TO AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY:**

## **Consultation on Proposed AFCA Rules**

**June 2018**

## Introduction

The Australian Collectors & Debt Buyers Association (ACDBA) was established in 2009, for the benefit of companies who collect, buy and/or sell debt - the members of ACDBA (refer Appendix 1) represent the majority of the collection market in Australia.

Our members which purchase debt, each hold an Australian Credit Licence and accordingly will become members of the Australian Financial Complaints Authority (AFCA) upon its commencement of operations.

ACDBA is pleased to provide for AFCA's consideration this submission in response to the Consultation Paper: *Consultation on Proposed AFCA Rules (Consultation Paper)*.

In this submission, ACDBA makes comments and provides responses to questions and matters only in respect to the Rules relating to complaints against Financial Firms generally and not in respect to Complaints involving Superannuation or Traditional Trustee Company Services.

## Responses to consultation questions

### Structure and ordering of the AFCA Rules

1. Do the AFCA Rules achieve a good balance between user-friendliness and detail?

#### Response:

The Rules are in main user friendly and whilst there is detail in some of the Rules, we submit the principal objective for the drafting should be to ensure the purpose, intent and application of the individual rules do not create ambiguity or confusion which might have the unintended but significant consequence for members of AFCA (who bear the costs of complaints) of opening the door for consumers and their representatives to “game” the rules.

Any lack of clarity around specific rules and how they are to be applied also may lead to inconsistent and/or incorrect application of those rules by individual AFCA case officers – this has potentially very serious consequences for the Financial Firms involved given that other than for superannuation complaints, there is no “Rule of Law” appeal for AFCA decisions.

Possibly, the Rules would be enhanced by AFCA creating a document such as *Guidance to How AFCA Works* to accompany the Rules for use by consumers – such a document ideally would be user-friendly and in plain English and would refer the reader to more robust and explanatory detail within the AFCA Rules.

The Rules provide at A.8.1 that AFCA will “*generally try to resolve a complaint by informal methods*” however, the unavoidable reality is resolution of any complaint ultimately comes down to the facts of the financial agreement, the respective dealings and obligations of the parties and the consideration of the complaint by AFCA in accordance with its Rules – it is for this reason, we submit the principal objective for the drafting of the AFCA Rules is to ensure the purpose, intent and application of individual rules do not create ambiguity or confusion.

2. Before the Table of Contents is a “quick guide” summarising the key aspects of the Rules and their location. Is this helpful?

Response:

The “Quick Guide” is not unhelpful but it is unlikely to be required by most who reference the AFCA Rules and may even for casual users prove to be a distraction to reading the actual detail of the Rules.

3. The Rules contain a number of tables (for example, summary tables of the time limits to submit a complaint to AFCA and of the monetary restrictions on AFCA’s jurisdiction and compensation powers). Are the tables helpful in explaining these areas? How could they be improved?

Response:

The tables within the proposed Rules are generally helpful. ACDBA does not have any suggestions for improvement of those information tables.

### **Superannuation complaints**

4. Are there aspects of the Superannuation Complaints Tribunal’s jurisdiction that have not been incorporated into the AFCA Rules?

Response:

ACDBA makes no response to this question.

### **Reporting obligations**

5. Do the AFCA Rules adequately provide for AFCA to meet its reporting obligations under the Corporations Act?

Response:

Whilst the proposed Rules appear to ACDBA to provide for AFCA to meet its reporting obligations, ultimately, this question should more appropriately be addressed to a suitably qualified and experienced legal advisor.

### **General**

6. Are there any other issues that require consideration?

Response:

We take the opportunity of this question to detail a number of matters in relation to the draft Rules for AFCA’s consideration:

#### **A. Matters with Hearing Dates Allocated**

Proposed Rule A.7.2(d) would allow for a Financial Firm to continue legal proceedings if the Complainant took a step in defending those legal proceedings that went beyond lodging a defence or a defence and counterclaim. This rule is consistent with CIO Rule 17.1 and FOS Rule 13.1(a)(ii).

ACDBA members have observed an increasing number of complainants lodging complaints with the ombudsman on the eve of a final court hearing, in circumstances where barristers have been briefed, witnesses have travelled to attend an interstate hearing and the court has allocated time for the matter to be heard.

This “11th hour” lodgement of a complaint results in considerable wasted costs in relation to the abandoned hearing date and frequently has the effect of increasing the costs order made against the complainant, in circumstances where the complaint is ultimately closed and the matter returned to the court to assign a later hearing date.

Recommendation – we respectfully submit AFCA Rule A.7.2 should be extended to permit the continuation of proceedings in circumstances where, as at the time that the complaint was lodged, a final hearing in a court of tribunal was already listed within 14 days, and where the complainant had been on notice of the proceedings for more than 90 days.

## B. Statutory Declarations Regarding Confidential Information

Rule A.9.2 places a new obligation on parties who are relying on rule A.9.1 (third party confidentiality) to refuse an AFCA requirement for information, requiring them to provide AFCA with a statutory declaration setting out the steps taken to try to comply with AFCA’s request for the information and detailing the reasons they were unable to do so. AFCA may then decide if it is satisfied with those steps and reasons.

This obligation is impractical. If the Financial Firm is a corporation, who would be required to make a statutory declaration on its behalf? If a director or manager of the corporation was required, then in the situation of larger corporations such as banks and insurers, this would be most impractical and likely to lead to time delays and ultimately may involve someone not directly familiar with the specifics of the individual complaint.

This new obligation adds a significant burden which does not presently exist under either of the predecessor scheme rules. The requirement is also at odds with A.8.1 which details AFCA will “*generally try to resolve a complaint by informal methods*”.

The new burden imposed by AFCA Rule A.9.2 will increase the time and associated cost of dealing with complaints and will achieve little benefit. It is more appropriate for this to be addressed in general correspondence, rather than requiring a formal and unreasonably burdensome statutory declaration process.

Recommendation – we submit AFCA should remove draft Rule A.9.2.

## C. Confidentiality

The proposed AFCA Rule A.11.4 appears to create a very broad exception:

*“AFCA must maintain the confidentiality of all information provided to it except:  
a) to the extent reasonably necessary to carry out AFCA’s responsibilities including under these rules or for any incidental purpose...”* [Emphasis added]

This AFCA Rule is largely based on the drafting of FOS rule 13.4(a).

Recommendation – we submit that Rule A.11.4 be amended to remove the words “*for any incidental purpose*” and a list of purposes should be specified, outside of which the permission of the party claiming confidentiality of the information should be required.

It would be reasonable for AFCA to use confidential information for purposes such as:

- resolving disputes;
- addressing systemic issues;
- publishing redacted complaint outcomes;
- reporting complaint volumes; and
- reporting to regulators.

A further concern regarding confidentiality has been raised by an ACDBA member who points out the AFCA Rules generally and also specifically within Rule A.10 makes no reference to how AFCA will deal with protecting “commercially sensitive information” provided by Financial Firms.

Recommendation – we submit the AFCA Rules should provide that AFCA shall protect information claimed to be “commercially sensitive information” by a Financial Firm by only providing to the other parties, copies of information which have been appropriately redacted and provided by the Financial Firm.

#### **D. Systemic Issues**

Rules A.17.1 – A.17.4 deal with systemic issues. Rule A.17.4 grants power to AFCA to require a financial service provider to do, or refrain from doing any act which AFCA considers necessary to achieve certain objectives, including improving industry practice. The formulation of these rules is a substantial change from the existing equivalent FOS rules. Under the existing arrangements, FOS can request a form of remediation but the provider can decline to comply with the remediation and have the matter referred to the relevant regulator for further investigation and enforcement.

The proposed AFCA rules mean that a provider must comply with requested remediation or face expulsion, which will mean license suspension and cessation of business.

This effectively grants AFCA the power to award hundreds of millions of dollars of compensation and impose business-ending conditions on a member. Compensation caps are only relevant to individual disputes, not to systemic issues which may affect thousands of individual transactions.

We respectfully submit the ability to impose such conditions is completely outside the scope of competence of an alternative, non-statutory and non-judicial, private dispute resolution body which is not subject to any effective right of appeal and accordingly should be reserved to the relevant regulator.

A regulator's actions are subject to the law, parliamentary oversight and full judicial review, whereas AFCA's actions do not need to comply with the law and can appeal to concepts of fairness and industry practice. Even when AFCA seeks to apply the law, it is not required to do so correctly. There is no effective right of appeal to any court other than in the very limited circumstances of "Wednesbury unreasonableness" (where the decision is so unreasonable that no reasonable decision-maker could come to such a conclusion).

Recommendation – we submit AFCA should revert to the current FOS rule formulation.

## E. Reasonable Offers

We respectfully submit the AFCA rules must encourage the fair, expeditious and inexpensive resolution of complaints.

The proposed AFCA Rules are absent an equivalent to CIO's Rule 20, which works to actively encourage complainants to accept reasonable offers.

CIO Rule 20 reads:

*20.1 Where the scheme reasonably considers that an offer made by a financial services provider to a complainant to resolve a complaint is reasonable having regard to the information before the scheme, the scheme may recommend to the complainant that they accept the financial services provider's offer in full and final settlement of the complaint. Any such recommendation must be done in writing and be accompanied with the scheme's reasons for making the recommendation.*

*20.2 The scheme will only do so after undertaking a review of the complaint to enable it to form a view as to the range of likely outcomes that might be achieved if the complaint were to proceed to determination.*

*20.3 **If the complainant does not accept the offer, the scheme may close the complaint** in the absence of further information from the complainant that would justify the complaint remaining open. If the scheme closes the complaint, it will notify the complainant and financial services provider that it has done so.*

[Emphasis added]

This CIO rule operates to the benefit of all parties. First, it encourages the Financial Service Provider to make offers which are objectively reasonable in all of the circumstances. Secondly, it benefits the Financial Service Provider and the scheme, as it provides a strong incentive for complainants to accept offers which are objectively reasonable.

As noted, there is no equivalent in the proposed AFCA Rules although the mapping table suggests that the equivalent AFCA Rule is to be found at A15.3 - this rule is unrelated to the closure of complaints on the basis of the rejection of reasonable offers.

Without such an AFCA Rule equivalent to CIO Rule 20, complaints will remain open for extended periods, despite situations where the Financial Service Provider has proposed at an early stage to adequately compensate the consumer for any detriment suffered.

Recommendation – we submit that AFCA should adopt the CIO rule in support of the fair, expeditious and inexpensive resolution of complaints.

## F. Limitations for bringing claims for unjust lending

The proposed rule B.4.2 places time limits on complaints brought under the National Credit Code. It closely follows the existing FOS and CIO equivalents (FOS Rule 6.3 and CIO Rule 6.2).

The AFCA rule reads as follows:

### ***B.4.2 Complaints to which the National Credit Code applies***

*B.4.2.1 Where a complaint relates to a variation of a credit contract as a result of financial hardship, an unjust transaction or unconscionable interest and other charges under the National Credit Code, AFCA will generally not handle the complaint unless it was submitted to AFCA before the later of the following time limits:*

- a) within two years of the date when the credit contract is rescinded, discharged or otherwise comes to an end, or*
- b) where, prior to lodging the complaint with AFCA, the Complainant was given an IDR Response in relation to the Complaint from the Financial Firm – within two years of the date of that IDR Response.*

[Emphasis added]

We respectfully submit that the existing equivalent rule is creating unintended results and is allowing complainants to agitate disputes in relation to unjust transactions based on lending decisions that occurred decades ago.

S 76 of the National Consumer Code (NCC) allows a court to reopen a transaction if it is satisfied, on the application of a debtor that, in the circumstances relating to the relevant credit contract, at the time it was entered into or changed (whether or not by agreement), the contract or change was unjust.

The AFCA time limits have their origin in s 80 (1) of the NCC, which reads as follows:

### ***80 Time limit***

- (1) An application (other than an application under section 78) may not be brought under this Division more than 2 years after the relevant credit contract is rescinded or discharged or otherwise comes to an end. [Emphasis added]*

The time limit at s 80(1) of the NCC has the effect of shortening the limitations period which would apply but for its operation, requiring diligent and timely prosecution of claims that arise under the Code in circumstances where the contract has already been rescinded, discharged or has otherwise come to an end.

The time limit at s 80(1) of the NCC does not conflict with, nor prevent the operation of the standard limitations period in which to bring an action before the court under the various state based Limitations of Actions Acts.

The proposed AFCA Rule B.4.2 will allow a complainant who has failed to take steps to diligently prosecute their claim to agitate it decades after their cause of action would have accrued. Such a delay significantly prejudices a Financial Firm's ability to obtain supporting documents or access witnesses who may have otherwise been available, but for the significant delay.

Apart from the operation of the Limitations of Actions Act, s 76(2) of the NCC provides, in relation to reopening unjust transactions, that "*the court is to have regard to the **public interest** and to all the circumstances of the case.*" [Emphasis added]

Consistent with the purpose of the Limitations of Actions Act, it is clear that it would not be in the public interest to allow a complainant to prosecute a claim decades after the relevant cause of action would have accrued, and in circumstances where doing so would cause significant prejudices to the other party. It would also be inconsistent with the objects of timely, fair and expeditious dispute resolution to adopt a rule which has the effect of extending the time limit for bringing a cause of action beyond the limits available under the law.

Recommendation – we submit the AFCA Rule B.4.2 should be amended so that it is consistent with the law:

- A complaint in relation to unjust transactions should not be accepted by AFCA where 6 years has passed since the transaction occurred, or 2 years after the contract is rescinded, discharged or otherwise comes to an end, whichever is earlier.
- The rule should mirror the wording of the NCC and insert, in relation to unjust transactions, “AFCA is to have regard to the public interest and to all the circumstances of the case”.

## G. Mandatory exclusions

Rule C.1.2 provides in part that AFCA must exclude:

*“...d) A complaint that has already been dealt with by a court, dispute resolution tribunal established by legislation or a Predecessor Scheme, unless the Complainant has requested a stay on the execution of a default judgment on the basis of financial difficulty, the Financial Firm has declined the Complainant’s financial difficulty assistance request, and the request has not previously been dealt with....”*

What is meant by the term “a stay on the execution of a default judgment”?

With a court judgment the debtor may make application to the court for suitable instalment arrangements having regard to the debtor’s financial circumstances. In matters where a complaint only relates to the consumer’s financial circumstances, then the court is more appropriately placed to deal with such a matter given any enforcement actions by the Financial Firm pursuant to the judgment debt are actions through the court.

A related issue here is if AFCA makes a determination relating to financial difficulty, how long is the “stay” for and how, when and in what venue (AFCA or the court) will the financial circumstances of the debtor be reviewed so as to allow the Financial Firm to proceed in respect to the judgment debt?

Further as we note later in this submission, there is a need for the AFCA Rules to include under “Section E – Defined Terms” what is meant by short term financial difficulties and what constitutes long term or ongoing financial hardship.

## H. Defined terms

It would be helpful for all parties including AFCA for “Section E – Defined Terms” to include what is meant by the term “Hardship”. Any definition provided should clearly differentiate between short term financial difficulties and what constitutes long term or ongoing financial hardship.

Similarly, it would be very helpful for both AFCA and its members that “Section E – Defined Terms” include what is meant by “*frivolous, vexatious, misconceived or lacking in substance*” which is referred to in AFCA Rule C.2.2. Possibly it would be useful for Rule C.2.2 to be expanded with some actual examples such as:

- Complaints brought on behalf of consumers by for-profit credit repair firms about adverse credit report listings which are based upon legitimate court default details
- Complaints brought by consumers not paying their debt due to the sole reason of a complaint about an adverse credit listing
- Complaints brought by consumers who raise arguments of being a “sovereign entity”

Recommendation – we submit AFCA should appropriately expand the defined terms detailed within Section E of its draft Rules.

## Contact

Enquiries in respect to this Submission should be directed in the first instance to:

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## APPENDIX 1 - Listing of Members of Australian Debt Buyers & Collectors Association

- ACM Group Ltd
- Axxess Australia Pty Ltd
- Baycorp (Aust) Pty Ltd
- CCC Financial Solutions Pty Ltd
- CFMG Pty Ltd
- Charter Mercantile Pty Ltd
- Collection House Limited (ASX: CLH)
- Complete Credit Solutions Pty Ltd
- Credit Collection Services Group Pty Ltd
- Credit Corp Group Limited (ASX: CCP)
- Credit Four Pty Ltd
- Credit Solutions Pty Ltd
- Dun & Bradstreet (Australia) Pty Ltd
- National Credit Management Limited
- PF Australia Pty Ltd
- Prushka Fast Debt Recovery Pty Ltd
- Shield Mercantile Pty Ltd