Australian Banking Association

13 April 2018

Clare McCarthy
Behavioural Research & Policy Unit
Australian Securities & Investments Commission
GPO Box 9827
Melbourne VIC 3001
By email policy.submissions@asic.gov.au

Dear Ms McCarthy,

ASIC Consultation Paper 298 - Oversight of the Australian Financial Complaints Authority: Update to RG 139

The Australian Banking Association (**ABA**) welcomes the opportunity to comment on consultation paper 298 *Oversight of the Australian Financial Complaints Authority: Update to RG 139* (**consultation paper**).

With the active participation of 24 member banks, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

The ABA has supported the establishment of the Australian Financial Complaints Authority (**AFCA**) as a "one stop shop" for external resolution of consumer disputes across all areas of retail financial services including banking, insurance and superannuation. The rationalisation of the three existing external dispute resolution bodies – the Financial Ombudsman Service (**FOS**), the Credit and Investments Ombudsman (**CIO**) and the Superannuation Complaints Tribunal will promote consistency for consumers and for ABA members. The ABA acknowledges and appreciates the ongoing consultation with industry on how the scheme will operate to ensure appropriate transition arrangements between the existing and future regimes. This will assist to clarify the design and operation of AFCA resulting in a better outcome for consumers.

The ABA notes that the purpose of this consultation is to obtain feedback on ASIC's oversight role regarding the AFCA, including:

- reporting requirements that apply to AFCA, including the time in which reports should be made to ASIC;
- role of the proposed AFCA independent assessor; and
- external dispute resolution (**EDR**) obligations for financial firms.

We provide our comments in response to the ASIC proposals and questions in Appendix 1 below.

Yours sincerely

Justin Mining
Policy Director
02 8298 0434
justin.mining@ausbanking.org.au

Australian Banking Association

Appendix 1 – Response to ASIC proposals and questions

	Proposal / question	Industry position
B1	*We propose to require that:* *(a) the obligation to report will apply to serious contraventions by a financial firm, including a licensee, a representative or an employee; and* *(b) AFCA must make reports within a reasonable time, but no later than 30 days, of:* *(i) becoming aware that a serious contravention has occurred or may have occurred; or* *(ii) identifying a systemic issue.* *In specifying requirements, we will consult with APRA, the Australian Taxation Office (ATO) and AFCA, with a view to harmonising and streamlining reporting arrangements.* *B1Q1 Do you agree with our proposed timeframe for AFCA to report serious contraventions or systemic issues? If not, why not?*	The ABA supports, in principle, an enhanced reporting regime requiring AFCA to report a "serious contravention" or "systemic issue" to ASIC, within a reasonable timeframe, but no later than 30 days. We seek clarification on the following points: **30 day time period** It is unclear from the consultation paper at what point this timeframe commences. Is it from the time that AFCA becomes aware of the conduct which may potentially amount to a serious contravention or systemic issue? Or is it once AFCA has *formed a view* that the conduct is required to be reported? In order to ensure due process for all parties, we believe that the 30 day time period ought to commence from the time AFCA forms a view that a serious contravention or systemic issue has been established. Otherwise, based on our members' experience to date with the FOS process, 30 days will not be a sufficient period of time to allow an investigation to be carried out and for the financial firm to respond. As AFCA will now be identifying the financial firm concerned when it reports to ASIC, the potential regulatory consequences and accompanying reputational damage is much more significant. Our view is that in order to ensure procedural fairness, AFCA needs to have time to conduct a comprehensive investigation and ensure the relevant financial firm can respond to any allegations about its conduct. We note that ASIC's draft *Regulatory Guide 139*[1] (**RG**) requires AFCA to have systems in place to "identify, refer and

[1] Australian Securities & Investments Commission, *Regulatory Guide 139: Oversight of the Australian Financial Complaints Authority (Draft)*, March 2018, 139.184, available at: http://download.asic.gov.au/media/4661720/attachment-to-cp298-published-5-march-2018.pdf

	Proposal / question	Industry position
		report…systemic issues". We see the "identify and referral" steps as key parts of this process and suggest that they ought to facilitate AFCA conducting a full investigation of its concerns and the referral of any relevant matters to the financial firm for response before making a referral to ASIC. We support a similar requirement being imposed in relation to "serious contraventions" to ensure a fair, reasonable and consistent process for all parties. We also suggest that the RG should explicitly require AFCA to notify the financial firm that it will be referring a matter to ASIC and provide it with any related documents. **Alignment with self-reporting obligations** In considering the timing of AFCA reports to ASIC, the ABA suggests that ASIC should also take into consideration the range of other self-reporting obligations faced by financial firms. For example, under section 912D(1B), Australian Financial Services Licensees (AFSL) must report to ASIC: *"any significant breach (or likely breach) of their obligations under section 912A (including licence conditions".* The threshold for AFCA reporting a contravention under the draft RG is "if [AFCA] becomes aware that a serious contravention of any law has occurred." The potential difference between what is deemed as constituting a "serious contravention" and a "significant breach" may lead to some issues being reported by AFCA which are not reported by the firm, or some issues being reported by the firm but not by AFCA. Ideally the firm should have the opportunity to self-report a "serious contravention", or likely serious contravention, to

	Proposal / question	Industry position
		ASIC before AFCA commences any investigation. This will avoid duplication of resources by AFCA and ASIC. We note that the AFSL self-reporting obligations, including reporting deadlines, are currently being reviewed and were recently subject to a Treasury review[2] (**ASIC Enforcement Review**). We suggest that ASIC take this opportunity to ensure alignment between the AFSL self-reporting deadlines and AFCA's reporting obligations. This should also apply to any self-reporting obligations that are introduced for credit licensees as a result of the ASIC Enforcement Review.
B2	*We propose to give guidance in draft RG 139 that:* *(a) a contravention will be 'serious' (and therefore reportable by AFCA to ASIC) if there are sufficient facts or information to found an objectively reasonable belief that it is serious. We consider that a reasonable belief will be formed if a reasonable person would expect AFCA to report the matter to ASIC, or if AFCA in good faith forms the view that a serious contravention of the law may have occurred;* *(b) the particulars of the contravention, for the purposes of s1052E, will include the identity of the financial firm, including the licensee, representative or employee; and* *(c) AFCA should consult with ASIC if they are unsure about whether they should refer a matter to ASIC.* *B2Q1 Do you agree with our broad approach to AFCA reporting? If not, why not?*	**Broad definition of 'serious' contravention** The ABA is concerned that the proposed definition of 'serious' lacks clarity. Determining when "a reasonable person would expect AFCA to report [a] matter to ASIC" is highly subjective and doesn't provide sufficient certainty for financial firms to understand that parameters of what will constitute a serious contravention. Similarly, when "AFCA in good faith forms the view that a serious contravention of the law may have occurred" is equally subjective with no obligation on AFCA to have regard to the nature of the conduct or its materiality. Under the current framework for ASIC-approved EDR schemes, the definition of "serious misconduct" to ASIC is "fraudulent conduct, grossly negligent or inefficient conduct, wilful or flagrant breaches of relevant laws, and non-compliance with scheme decisions or processes".[3] The retention of this, or a similar, test would provide greater clarity for and financial firms about the circumstances in which

[2] The Australian Government the Treasury, *Consultation Paper: Self Reporting of Contraventions by Financial Services and Credit Licensees,* available at: https://treasury.gov.au/consultation/self-reporting-of-contraventions-by-financial-services-and-credit-licensees/ (Consultation Paper)
[3] RG 139.38.

	Proposal / question	Industry position
		AFCA may determine that a serious contravention has occurred. **Systemic issues** RG139.181(a) states that AFCA *may* identify an issue as "systemic" where it "affect[s] more than one complainant – for example, where there is a mistake in how interest is calculated or in how a fee is applied". This is a very low threshold and is lower than that set down in part 11.2 of the current FOS Terms of Reference, which defines a systemic issue as something that "will have an effect on people beyond the parties in the dispute".[4] We suggest that ASIC consider including a materiality test (e.g., a "systemic issue" that is material in nature and/or affects a material number of customers). Issues which are minor in nature and only affect a small number of customers may not warrant a report being lodged with ASIC particularly where AFCA is satisfied the issue has been appropriately addressed by the financial firm.
B3	*We propose to clarify in our guidance that the primary role of the independent assessor is to:* *(a) respond to complaints about how AFCA dealt with an individual complaint or series of complaints; and* *(b) identify, address and report on issues affecting the AFCA's complaints handling operations and performance; and*	The ABA supports the appointment of an independent assessor to review complaints about AFCA's service standards in dispute handling. In its consultation paper on the establishment of AFCA, Treasury noted that in finding that a dispute was not handled satisfactorily, "the assessor may recommend that the EDR body take certain actions, including making an apology, providing compensation to the affected user and/or recommending a change to a scheme process or procedure".[5] However, we note that the RG does not stipulate the range of

[4] Financial Ombudsman Service, *Terms of Reference*, as amended 1 January 2015, available at: https://www.fos.org.au/custom/files/docs/fos-terms-of-reference-1-january-2010-as-amended-1-january-2015.pdf
[5] Consultation Paper, p 13.

	Proposal / question	Industry position
	(c) as appropriate, make recommendations about or provide remedies for identified issues in complaints handling operations and performance. *B3Q1 Do you agree with our proposed guidance on the primary role of the independent assessor? If not, why not?*	actions or recommendations available to an independent assessor. We are concerned that there is a risk that the independent assessor may become a 'proxy' for a further level of appeal from the AFCA process. We believe it is an important principle of EDR that decisions are not automatically subject to merits review. An ABA member bank has recently had an experience where the FOS independent assessor, who appears to have the same limitations as proposed under the AFCA model, determined that insufficient compensation had been paid to a customer and calculated the shortfall amount. This decision was brought to the member's attention by FOS and although not directed to do so, the bank agreed to pay the amount to the customer.
B4	*We propose to clarify in our guidance that it is not the role of the independent assessor to:* *(a) undertake a merits review of an AFCA decision, including a jurisdictional decision; or* *(b) re-open a complaint or the outcome of a complaint.* *B4Q1 Do you agree with our proposed guidance on what is outside the role of the independent assessor? If not, why not?*	The ABA supports the proposed guidance in emphasising that it is not the role of an independent assessor to undertake a merits review of AFCA decisions. However, we believe the guidance should clearly state that the independent assessor is only able to review complaints about service standards in dispute handling. We question whether the independent assessor, having determined that AFCA did not follow an appropriate process in dealing with a complaint, ought to then determine whether the award of any compensation made by AFCA was appropriate in the circumstances. This effectively serves to re-open the outcome of the complaint and undermines the prohibition in the draft RG.[6] In relation to complaints about service standards, where the independent assessor has identified an inappropriate

[6] RG 139.190.

	Proposal / question	Industry position
		outcome, or series of outcomes, it would be beneficial if the assessor required AFCA to address the root cause so that similar outcomes do not recur.
B5	*We also propose to require that that the independent assessor must:* *(a) be appointed by the AFCA Board, with its role and functions set out in the AFCA terms of reference;* *(b) have sufficient powers and resources to perform its functions;* *(c) be independent, with appropriate qualifications and experience;* *(d) accept service complaints from all users of the scheme;* *(e) identify, address and report on issues affecting AFCA's complaints handling operations and performance;* *(f) make recommendations, as appropriate, to the Chief Ombudsman and to the AFCA Board;* *(g) identify any issues that may benefit from further review or analysis—for example, in an independent review;* *(h) make quarterly reports to the AFCA Board and ASIC; and* *(i) make annual public reports on:* *(i) complaints received;* *(ii) findings or recommendations made; and* *(iii) outcomes achieved as a result of recommendations made.* *B5Q1 Do you agree with our proposed requirements for the independent assessor? If not, why not?*	It is vital that the assessor is independent, appropriately qualified and is also appropriately resourced to undertake this important role. From both a customer and industry perspective, this will ensure that the independent assessor can deal with matters in a timely manner and bring about a streamlined dispute resolution process. We support the requirement for the independent assessor to accept complaints from all users of the scheme, including consumers and financial firms. However, we believe that the independent assessor should be able to decline to accept service complaints that do not meet a materiality threshold. This is to ensure that the assessor is not required to deal with frivolous or vexatious complaints. We also consider the guidance should make it clear that a "service complaint" includes AFCA's management of a serious contravention investigation and/or report to ASIC.

	Proposal / question	Industry position
B6	*Our proposed expectations for financial firms are that, by commencement (no later than 1 November 2018):* *(a) any final response or written reasons financial firms give to a consumer about a dispute at IDR will refer to AFCA;* *(b) financial firms will update online information and forms to refer to AFCA, as appropriate; and* *(c) personalised disclosures, including periodic and exit statements, will refer to AFCA.* *B6Q1 Is this is a sufficient timeframe for financial firms to update all of their legal disclosures (as set out in paragraph 35) and other consumer communications? If not, why not? Please provide specific detail in your response.* *B6Q2 Should we provide transitional relief from external dispute resolution disclosure obligations in the lead up to AFCA commencement? If so, please provide reasons.*	**Commencement date** The ABA believes that the proposed commencement of disclosure obligations from 1 November 2018 will not allow sufficient transition time for necessary IT changes and to ensure a smooth transition for customers. In our view, a relief period of 12 months is warranted due to the following factors: • the complexity of the disclosure changes required across the industry – for some banks this covers thousands of online references and printed documents; • the uncertainty for industry given that it is currently unclear when AFCA's contact details will be provided so banks can begin updating relevant disclosure documents and customer communications; • the need to also potentially implement a range of other disclosure changes across much of the same material (e.g., a new Banking Code of Conduct, if approved); and, • the significant cost and burden of preparing updated material, especially in relation to hard copy printed documents. The implementation burden on financial firms will be significant. For example, an ABA member has provided feedback on how it may be impacted in relation to its superannuation products. The bank is currently updating the product disclosure statements for many of its superannuation products in readiness for a 1 July 2018 release date. These updates need to be completed and signed-off for publishing by the end of April to be ready for distribution on 1 July 2018. As

	Proposal / question	Industry position
		the required information about AFCA is not available yet, it is unrealistic for the disclosure statements to again be updated before the commencement of AFCA. **Transitional relief** The ABA notes that representatives of the AFCA transition team have previously indicated in meetings with the ABA and the Joint Working Group that transitional relief would be granted for compliance with EDR disclosure obligations. A transitional relief period of up to 12 months, after the 1 November commencement, would be sufficient for those changes requiring considerable turnaround or cost, such as updating pre-printed documents (e.g., product disclosure statements). The burden on financial firms would be significantly eased if these changes were able to be incorporated during scheduled document reviews. As well as transitional relief in terms of timing, we ask that a short 'grace period' of 3 months be allowed both before and after the implementation deadline as there may be some initial system errors due to the complexity of the changes required. We also assume that other measures will be put into place by regulators and existing EDS schemes such as having systems in place to automatically refer consumers for at least a 12-month period.
RG 139.51	*If the parties to a complaint made under the AFCA scheme agree to a settlement of the complaint and AFCA thinks the settlement may require investigation, AFCA may give particulars of the settlement to one or more of APRA, ASIC or the Commissioner of Taxation: see s1052E(3).*	The obligation for AFCA to refer settlements to APRA, ASIC or the ATO where "the settlement may require investigation" isn't raised in the consultation paper but is included in the draft RG at 139.51 and stems from the obligation at 1052E(b) in the Corporations Act. In our view, the RG ought to include more guidance about where a settlement "may require investigation" such that it warrants referral to a regulator. The list in draft RG 139.52

	Proposal / question	Industry position
		indicates that AFCA will “oversee settlement arrangements” to ensure that they are appropriate (which is in line with FOS’ current guidelines around settlement agreements). However, there is nothing to clarify that it will be a failure to meet the list of requirements in 139.52 that will be the trigger for a report to the regulator on the basis that “the settlement may require investigation”. Further clarification and guidance on this point would be useful.