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By email: [policy.submissions@asic.gov.au](mailto:policy.submissions@asic.gov.au)

Dear Clare

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

The Australian Finance Industry Association (**AFIA**) welcomes the opportunity to comment on *Consultation Paper 298 Oversight of the Australian Financial Complaints Authority: Update to RG 139 (CP 298)*.

AFIA is well placed to advocate for the finance sector given our broad and diverse membership of over 100 financiers operating in the consumer and commercial markets through the range of distribution channels (including digital access). AFIA is particularly well placed to comment on CP 298 given our mix of smaller, medium-sized and larger financial firm members most of whom will be affected by the new external dispute resolution (**EDR**) arrangements. Further details on our Association are available through: [www.afia.asn.au](http://www.afia.asn.au).

There was strong interest in CP 298 amongst AFIA members. The most pressing issue for members is the extremely narrow lead-time currently proposed in CP 298 and consequently the resourcing and cost that would flow to our members and others to update all their EDR disclosures to meet the 1 November commencement. This issue was of strong concern for small, medium-sized and larger financial firms alike. The reasons are given in Appendix One. There are also member concerns on several other consultative matters which are similarly explained in Appendix One.

Recognising that ASIC will also be challenged with finalising the detail for a 1 November commencement of AFCA, AFIA has proposed solutions to this issues and for ease of reference these are summarised below:

**AFIA recommendations:**

1. AFIA is of the firm view, based on members' feedback, that the currently proposed timeframe is insufficient without expenditure of significant resource and cost by smaller, medium and larger financial firms alike to update all relevant EDR disclosure documents to reflect the change from current arrangements (ie FOS or CIO) to AFCA. AFIA recommends that ASIC should provide transition relief from EDR disclosure obligations for a 12 month period commencing from the date when the detail has been finalised; namely the date ASIC releases amended RG 139 in final form.
2. Given that the details that will be reported to ASIC, and that RG 139.81 gives the term "systemic issue" a specialised meaning different to the ordinary meaning of the term, AFIA recommends:
  - (a) A more appropriate timeframe for reporting by AFCA to ASIC is no later than 30 days from the time of AFCA confirming/satisfying itself that a serious contravention has occurred, or that a systemic issue has arisen, rather than AFCA merely "becoming aware" or "identifying", that a serious contravention has or may have occurred or a systemic issue.
  - (b) In any case of reporting matters to ASIC, under paragraph RG 139.37, AFCA be required to give the financial firm a reasonable opportunity to respond to AFCA's conclusion in relation to these matters before the obligation on AFCA to make a report to ASIC arises.

This is consistent with an obligation on AFCA to confirm its conclusion and the principles of natural justice.

3. AFIA considers that the current broad and opaque approach to AFCA identifying a contravention as serious diminishes ASIC's capacity to exercise enhanced oversight of AFCA. AFIA recommends that:
  - (a) ASIC develop criteria which AFCA must use when determining whether a reasonable person would form the belief that the matter should be reported to ASIC.
  - (b) The "good faith" component of the proposed test for identifying a contravention as serious be deleted as, in practice, it may allow less than serious contraventions to be identified as serious.

If you have any questions regarding this submission please contact me at [helen@afia.asn.au](mailto:helen@afia.asn.au) or via 0419 967 918.

Kind regards

A handwritten signature in black ink, appearing to read 'Helen M. Gordon', with a horizontal line underneath.

Helen Gordon  
Chief Executive Officer

## Appendix One

### Introduction

1. CP 298 consists of three parts. Part A, which is background to the proposals. Part B, which is issues for consultation. Part C, which is two paragraphs concerning regulatory and financial impact. This is then followed by a list of proposals and questions. A draft of updated *Regulatory Guide 139: Oversight of the Australian Financial Complaints Authority (Draft RG 139)* is attached to CP 298.
2. CP 298 does not, though, seek specific feedback on Draft RG 139, except in relation to the targetted consultation questions. The stated reason is because the purpose of the consultation is to support an effective transition to the commencement to AFCA and Draft RG 139 retains long standing policy positions. It is intended that Draft RG 139 will be issued in final form when AFCA starts accepting complaints, which is no later than 1 November 2018.
3. AFIA has consulted with its members on the 6 proposals and 7 questions in CP 298 on which ASIC has requested feedback. Our members would like AFIA to provide ASIC with feedback on questions B1Q1, B2Q1, B6Q1 and B6Q2.

### Proposals and questions in CP 298

#### 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?*

B1.1 Draft RG 139 defines a systemic issue at RG 139.181 in the following terms:

“In resolving an individual complaint, or series of complaints, AFCA may identify a systemic issue. This is an issue that may:

- (a) affect more than one complainant – for example, where there is a mistake in how interest is calculated or in how a fee is applied;
- (b) involve many complaints that are similar in nature – for example, where a particular intermediary has mis-sold financial or credit products or services to a number of consumers;
- (c) affect all current or potential complainants at a particular firm – for example, where a firm’s IDR complaints handling processes are poor or inadequate; or
- (d) affect more than one firm.”

B1.2 The relevant ordinary meaning of “systemic” in the *Cambridge Online Dictionary* is:

“A systemic problem or change is a basic one, experienced by the whole of an organization or a country and not just particular parts of it:

*The current recession is the result of a systemic change within the structure of the country's economy.”<sup>1</sup>*

B1.3 Accordingly, it can be seen that the meaning given to the term “systemic issue” at RG 139.181 is different to the meaning of that term as ordinarily understood. For example, a financial firm extends credit to 500,000 persons. In two out of 500,000 instances it incorrectly charges a fee of \$2.50 instead of \$2.00 due to human error. This error will be a “systemic issue” under RG 139.81. AFIA submits that this error would not be a “systemic issue” under the ordinary meaning of the term.

B1.4 Given that RG 139.181 gives the term “systemic issue” a specialised meaning different to the ordinary meaning of the term, AFIA suggests that the more appropriate trigger point for the 30-day notice period is “confirmation” or “satisfying itself”, rather than “identification”, that a systemic issue has occurred. Confirmation/satisfying itself, we submit, would also ordinarily involve AFCA providing the financial firm with a reasonable opportunity to respond to AFCA's concern. Further, if it is reasonable for AFCA to provide an opportunity to respond in relation to a possible “systemic issue” then we think it reasonable that a financial firm also be given an opportunity to respond to a possible “serious contravention”. This line of reasoning also suggests that “confirmation/satisfying itself” is the more appropriate trigger point in relation to a possible “serious contravention”.

#### *AFIA recommendation*

B1.5 Given the details that will be reported to ASIC, and that RG 139.81 gives the term “systemic issue” a specialised meaning different to the ordinary meaning of the term, AFIA recommends:

1. A more appropriate timeframe for reporting by AFCA to ASIC is no later than 30 days from the time of AFCA **confirming/satisfying itself** that a serious contravention has occurred, or that a systemic issue has arisen, rather than AFCA merely “becoming aware” or “identifying”, that a serious contravention has or may have occurred or a systemic issue.
2. In any case of reporting matters to ASIC, under paragraph RG 139.37, AFCA be required to give the financial firm **a reasonable opportunity to respond** to AFCA's conclusion in relation to these matters before the obligation on AFCA to make a report to ASIC arises. This is consistent with an obligation on AFCA to confirm its conclusion and the principles of natural justice.

**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 s 1052E, 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.**

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<sup>1</sup> Definition of systemic, Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/systemic>

*B2Q1 Do you agree with our broad approach to AFCA reporting? If not, why not?*

B2.1 AFIA agrees that serious contraventions should be reported by AFCA to ASIC. B2(a) of CP 298 defines a contravention to be “serious” where it is identified as serious:

- (i) using an apparent objective test, albeit one which appears to lack criteria upon which a reasonable person would form that belief; and
- (ii) by AFCA acting in good faith.

B2.2 As ASIC notes this is a broad approach to AFCA reporting, but it is also an opaque approach. There are no objective criteria specified to assist AFCA in forming a view whether a contravention is serious. The absence of objective criteria similarly makes it difficult for ASIC, financial firms or consumers to assess whether AFCA has correctly assessed a contravention to be serious. We also note this is compounded should the issue involve representatives or key employees and their responses should be facilitated and taken into account through this process. This minimises the risk of a representative, for example, being named in a published report but not had an opportunity to respond prior.

B2.3 Given it will be difficult for AFCA to objectively determine if a contravention is serious, AFIA considers that AFCA will tend to place reliance on the good faith test when deciding whether or not to refer a contravention to ASIC. This is because the good faith test imposes a much lower threshold to determining whether to report a matter as a serious contravention. This low threshold is helpful to the AFCA staff deciding whether or not to report a contravention as serious. However, it is less helpful for ASIC because it makes it much more difficult for ASIC to exercise enhanced oversight.

*AFIA recommendation*

B2.4 AFIA considers that the current broad and opaque approach to AFCA identifying a contravention as serious diminishes ASIC’s capacity to exercise enhanced oversight of AFCA. AFIA therefore recommends that:

1. ASIC develop and state the criteria which AFCA must use when determining whether a reasonable person would form the belief that the matter should be reported to ASIC.
2. The “good faith” component of the proposed test for identifying a contravention as serious be deleted as, in practice, it may allow less than serious contraventions to be identified as serious.

**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.*

- B6.1 AFIA agrees with the ASIC expressed view in paragraph 36 that “these disclosures and other consumer-facing communications play an important role in raising awareness about access to dispute resolution.”<sup>2</sup>
- B6.2 However, as at the time of writing [6 April 2018] the only publicly known thing about AFCA, from a legal disclosure and consumer communication perspective, is its name. An important aspect of awareness raising is communicating details as to AFCA’s telephone number(s), office address(es), web address(es) and other relevant details. Without knowledge of this additional information a consumer may be made aware of AFCA, but they will not be made aware of how to “access” dispute resolution through AFCA. Therefore knowledge of these as yet unknown details is critical in terms of awareness raising amongst consumers.
- B6.3 Knowledge of these crucial contact details *within a sufficient lead time* is also critical to our credit providing members being able to update all their legal disclosures and other consumer communications.
- B6.4 The amount of time which is “a sufficient lead time” will vary with the type of communication and the character and complexity of the organisation.
- B6.5 In relation to the type of communication the three types referred to in B6 are final response or written reasons to a consumer about an IDR dispute, online information and forms, and personalised disclosures. However, from a sufficient amount of lead time to implement perspective the more relevant distinction is between:
- manually produced documents (eg a personalised letter to a customer concerning an IDR, such as the final response or written reasons); and
  - system generated documents.
- B6.6 Manually produced documents can generally be updated for the as yet unknown AFCA contact details relatively quickly due to their personalised, often bespoke, nature. These documents are written by a person to a person. In many instances this will be a simple two-step process: the case officer writes the letter or other personalised document; the supervisor then reviews the document to confirm that it complies with entity procedures and the document is sent. In other instances, for example where the issue is simple and low value, and resolution of the issue falls within delegated authority it will be a one-step process only.
- B6.7 System generated documents, in contrast, need a relatively longer lead time. This is because amending system generated documents is a multi-step or multi-stage process. To update system generated documents involves scoping and identifying all affected documents in the entity’s system (but more usually multiple systems), manually updating, reviewing and approving, recoding the documents in the system(s), then testing these changes in a beta environment before going live. Further, where the amended documents are to be distributed in printed form to customers, directly or indirectly, there will be further lead times in printing and delivering these documents so that they can be displayed and made available to consumers in person.
- B6.8 In the case of system generated documents because of its multi-stage nature a blow-out in time at any particular stage might blow out the whole implementation project timeframe. For example, in the case of a smaller financial firm they typically outsource their coding to an external coder. However, there are only a limited number of suitably qualified external coders in Australia. If all the smaller financial firms seek their services at the same time, due to a short implementation timeframe, then what might ordinarily be a six-week turnaround time might blow-out to a three-month turnaround time or longer.

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<sup>2</sup> Paragraph 36, Page 15, CP 298.

- B6.9 This issue is not necessarily any easier for larger financial firms with internal IT departments. In this situation the issue is obtaining a slot on the IT project work program. These are normally largely set 12 months, or more, in advance of a system change because of the large number of regulatory and operational changes which need to be made to IT operating systems. Therefore, for larger financial firms in this situation if they knew all the relevant information as at the time of writing [6 April 2018], which they don't, it would likely take until April 2019 to implement the changes.
- B6.10 This issue is particularly acute for financial firms at the moment, given the larger number of regulatory changes that either have happened or will happen in the near future. For example, one of our larger members has advised us that updating Product Disclosure Statements (PDS) and Financial Service Guides (FSG) in one business line will practically take 12 months at least from when ASIC updates RG 139 (which CP 298 contemplates will be on the date AFCA commences).
- B6.10 It is theoretically possible to move timelines forward by paying a premium for IT and other services. But, the underlying resource constraint for both small and larger financial firms alike means that any reduction in the delivery timeline will likely be slight but result in a significant increase in cost, particularly for smaller financial firms.
- B6.11 Turning to the matter of character and complexity there are differing types of financial firms. For example, it will likely be an easier, although not necessarily a quicker, exercise to update EDR details in a single product firm. However, in a financial firm which provides credit cards, personal loans, motor loans and insurance each with their own suite of products there will be a vast amount of collateral documents which need updating including PDS, FSG, website, contract, welcome letter, complaints guide and letter templates. It should also be remembered that call centre scripts will need to be updated and tested to ensure the new information is provided in an accessible manner.
- B6.12 It is also noted that "complexity" does not just refer to the size of the financial firm. It also refers to the complexity of any particular financial firm's internal systems. It is seldom the case that a financial firm will have a single system and all one has to do is "flick the switch". More usually there will be multiple systems, including legacy systems, manual work arounds which have been developed over the years to ensure that the systems communicate effectively with one another and generate needed information. This situation is as often the case for a smaller financial firm as it is a larger financial firm.
- B6.13 AFIA also notes that most IT system upgrades are done on weekends to minimise disruption. This means that as at the time of writing [6 April 2018] there are at most 25 weekends within which to implement these changes, and the details are still not known. For most financial firms for system generated documents this timeframe is simply insufficient to make the changes.
- B6.14 AFIA notes that when the Financial Ombudsman Service (FOS) changed their contact details, members were given a year to update all the different communications, publications, websites and other collateral documents from the date when all the changes were known.
- B6Q2 Should we provide transitional relief from external dispute resolution disclosure obligations in the lead up to AFCA commencement? If so, please provide reasons.*
- B6.15 AFIA is of the firm view, based on member feedback and for the reasons given in B6.1 to B6.14 that ASIC should provide transitional relief from external dispute resolution disclosure obligations in the lead up to AFCA commencement.
- B6.16 Further guidance or clarification with respect to complaint matters already on foot with FOS or CIO at the 1 November 2018 AFCA commencement would also be appreciated. For example, how will these be dealt with by FOS or the CIO or will they be transitioned to AFCA should one of these entities become approved as AFCA? Will these matters be assessed according to

AFCA criteria, rules and guidelines or will AFCA ensure that these matters will be assessed in accordance with the FOS or CIO criteria, rules and guidelines?

*AFIA recommendation*

B6.17 AFIA is of the firm view, based on members feedback, that the currently proposed timeframe is insufficient to allow smaller, medium and larger financial firms alike to update all relevant EDR disclosure documents and that ASIC should provide transition relief from EDR disclosure obligations for a 12 month period commencing from the date on which all relevant information is publicly known, which date is likely to be the date on which ASIC releases amended RG 139 in final form.

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