3 April 2018

Behavioural Research & Policy Unit
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

Attn: Clare McCarthy
Via email: policy.submissions@asic.gov.au

Dear Ms McCarthy

Re: CONSULTATION PAPER 298 - Oversight of the Australian Financial Complaints Authority: Update to RG 139

We refer to Consultation Paper (CP) 298 and the draft replacement Regulatory Guide (RG) 139 released in March 2018 for comment. As the legal and compliance representative of numerous financial services providers, we have been asked to provide feedback regarding the proposals contained in CP 298, and certain paragraphs in the proposed revision of RG 139.

Firstly, we would like to note that our clients consider the formation of AFCA, in replacement of the previous schemes, to be a positive step forward. However, we consider that a number of material issues arose during the operation of the currently approved schemes, which have not been properly addressed in the AFCA proposals.

1. Accountability & Fairness

As mentioned throughout CP 298, the proposed Part 7.10A of the Corporations Act 2001 (Cth) imposes a mandatory requirement of "fairness" and "accountability". It has been an unusual and singular facet of the External Dispute Resolution Scheme (EDRS) system imposed on financial services providers (FSPs) to date, that there has been no accountability by EDRSs whatsoever.

As a condition of acquiring and retaining their licence, FSPs are mandated to

(a) be a member of an EDRS (with few choices available to date, and shortly just one); AND
(b) pay for such membership; AND
(c) fund the entirety of the external dispute resolution process, regardless of the outcome or validity of the complaint, at significant cost (usually between $10,000-20,000) which is a huge financial burden on a small FSP; AND
(d) defend themselves in a forum that does not recognise the rule of law, apply the rules of evidence, nor adhere to the principles of natural justice; AND
(e) then bear the burden of the EDRS's decision, with no right of appeal or independent review.

As far as we are aware, there is no other body that is granted such enormous power, with so little restriction or accountability. ASIC's decisions are subject to a right of appeal at the Administrative

Appeals Tribunal (AAT). We respectfully suggest that, given that a single EDRS determination can potentially bring down an FSP, particularly given the ever increasing claim thresholds, accordingly FSPs must be afforded a pathway to appeal AFCA's decisions going forward. This would also assist in ensuring AFCA keeps its objective of fairness in decision-making at the forefront of its approach, and adopts a more appropriately rigorous evidentiary standard than its predecessors.

There are numerous references to the importance of fairness of AFCA decisions, for example, RG 139.23 whereby ASIC undertakes to support AFCA to deliver independent, timely and **fair decisions for** consumers **and financial firms**. Much as we support the sentiment, we query how ASIC anticipate that genuinely fair decisions can be reached in the absence of applying the rules of evidence and natural justice, given such deficiencies have led to notably unfair and unsupportable (and un-appealable) determinations by EDRSs to date, in our view.

In RG 139.22, you note that stakeholder confidence in the independent and effective operation of AFCA is supported by a **robust and transparent accountability and governance framework**. We consider this statement extremely important, however the truth of it can only be demonstrated by the implementation of an appropriate independent review and appeals mechanism for AFCA members.

2. Independent Assessor

Regarding Proposal B4, we have no comment on the responsibilities to be ascribed to the Independent Assessor, except that they do not go far enough in our view. We query why it is proposed that the independent assessor NOT undertake merits reviews of decisions or be authorised to re-open a complaint or outcome. If not the independent assessor, then who? The AAT? As per above, the current EDRS system has already demonstrated that it is untenable, and effects a denial of natural justice, due to the absence of accountability or an appeals process in place for FSPs.

Accordingly, we do not support ASIC's proposed limitations on the independent assessor, unless an alternate avenue of appeal/review is created with the AAT or like. At paragraph 32, you state that the independent assessor will play an important role in supporting AFCA's quality assurance and accountability, however, in the absence of authority to undertake merits reviews, it appears their role in this regard will be minimal.

It further seems somewhat inaccurate to state (paragraph 33) that the independent assessor will close an important feedback loop for ASIC, given that one of the biggest issue FSPs have had to date (complaining to ASIC regarding flawed EDRS determinations to no effect) will remain unresolved.

3. ASIC oversight

The draft RG 139 (at paragraph 4) notes enhanced accountability and new ASIC oversight powers in conjunction with AFCA. We would welcome both of those, but the evidence supporting these statements is not immediately apparent within the proposals.

RG 139.14 notes that part of ASIC's responsibilities include providing oversight of AFCA. Again, we would welcome such oversight, which has been minimal to date in relation to the EDRS regime. We submit that ASIC is well (and best) placed, given its expertise in the industry, to act as the appeals body

to AFCA determinations. However, if resourcing is an issue, the AAT is presumably the appropriate body to fulfil this role.

4. Eligible complainants

The Table 1 in RG 139.16 sets out the key definitions applied in the RG. We note that an eligible category of complainant is noted to be a small business with less than 100 employees. This does not quite accord with the definition of retail vs wholesale client (small business with more than 20 employees, unless a manufacturing business), and may cause some confusion when it comes to determining AFCA's jurisdiction regarding a certain complainant. We submit that this definition should simply refer to the retail vs wholesale client definition currently in use, to ensure consistency of understanding between AFCA and FSPs.

5. AFSL Authorised Representatives

We submit that in line with the imposition of AFCA membership on Credit Representatives, the same reasoning and rule should apply in respect of Authorised Representatives of AFS Licensees. This would also assist in ensuring that complainants take action directly against the relevant party at first instance, rather than commencing their action against the FSP, who may be legally responsible as per s917B of the Corporations Act 2001 (Cth), but is often neither practically nor ethically responsible.

6. Settlement arrangements

With regard to RG 139.52, we submit that it is neither practical nor appropriate for AFCA to oversee settlement arrangements in any respect. AFCA are mandated to act as an independent body, and not as the legal representative of a complainant. Their role is to adjudicate disputes that cannot be resolved between the parties. Accordingly, we consider it would be significantly outside their mandate to provide any of the suggested input in (a)-(e), which essentially amounts to legal review and advice to a complainant in relation to a settlement offer. That is the role of a complainant's legal representative/professional adviser, not the role of an independent dispute resolution body.

Thankyou for the opportunity to provide feedback on these proposals. We would be happy to discuss these matters or provide further information if it would be of assistance.

Yours faithfully

Gina Block

Gina Block
Director, Block Legal & Compliance

An Australian legal practitioner within the meaning of the Legal Profession Uniform Law (NSW).

Liability limited by a scheme approved under Professional Standards Legislation.