Your Choice, Your Voice

Clare McCarthy
Behavioural Research & Policy Unit
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001
DX 423 Melbourne

5th April 2018

email: policy.submissions@asic.gov.au

Dear Ms McCarthy,

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

The FBAA welcomes the opportunity to make a submission in response to Consultation Paper 298.

Established in 1993, the FBAA is the leading professional industry body to finance and mortgage brokers, nationally representing over 8,200 members and additionally some 13,000 industry stakeholders.

We acknowledge the very important position occupied by external dispute resolution in the consumer credit and financial services regimes. The impact and influence of EDR on licensees has been growing strongly over the past few years. We are interested to ensure a balance is maintained between consumers and licensees and for EDR to remain as an independent external dispute resolution scheme serving the interests of both licensees and consumers.

We recognize that Consultation Paper 298 is confined to quite a narrow range of issues and we provide a concise submission in response.

Please do not hesitate to contact me if you have any questions.

Peter J White CPFB FMDI MAICD
Executive Director

Consultation Paper 298 - Issues B1 to B6

B1

Proposal	Feedback
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?

FBAA Response to B1Q1

The FBAA supports this timeframe and has no further issues to raise against this proposal.

B2

Proposal	Feedback
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?

FBAA Response to B2Q1

The FBAA supports this approach and has no further issues to raise against this proposal.

t: 1300 130 514 f: 07 3041 0350
Level 1, 116 Ipswich Road, Woolloongabba Qld 4102
PO Box 234, Stones Corner Qld 4120
www.fbaa.com.au ABN: 22 094 784 040

B3

Proposal	Feedback
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 (c) (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?

FBAA Response to B3Q1

The FBAA supports this guidance.

B4

Proposal	Feedback
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) (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?

FBAA Response to B4Q1

We believe the independent assessor should be able to hear complaints by member firms about the merits of an AFCA decision.

Under present EDR rules, member firms have no recourse against decisions they feel are inappropriate or incorrect. EDR determinations are binding on member firms and not on consumers. The cost of contesting consumer complaints is becoming more expensive. Even a simple complaint has potential to cost member firms thousands of dollars when the

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scheme costs are added to the costs of internal staff. These costs rapidly escalate where external assistance is required from legal or compliance services.

We have seen examples where member firms are powerless to prevent an EDR scheme from initiating action (which a member firm views as excessive or unnecessary) and then passing the cost on to the member firm. Examples include:

- systemic issue investigations that are commenced off the occurrence of a single instance. Where the investigation fails to identify a systemic issue, the member firm is still issued with a sizeable invoice;
- investigations undertaken on matters outside of a scheme's jurisdiction. Despite the member explaining to the scheme why it was outside its jurisdiction, the scheme undertook significant work to ultimately determine it had no jurisdiction then billed the member for more than $3,000.

Member firms are almost prohibited from defending bogus claims below a certain monetary threshold because it costs them more to defend than the amount in dispute.

They also have no recourse against unnecessary actions or excessive charges by the scheme itself.

Finally, a member firm has no ability to challenge the breadth of an EDR determination. The extent of potential remediation orders cannot be challenged.

None of these are fair outcomes of EDR. An ability to have such conduct escalated to an independent assessor would provide some support to member firms and maintain some balance in the role of EDR.

We do not advocate for a system that allows a member firm to appeal any decisions against it, however we see significant merit in providing a mechanism for an independent assessor to consider the individual merits of an EDR decision.

B5

Proposal	Feedback
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;	**B5Q1** Do you agree with our proposed requirements for the independent assessor? If not, why not?

(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.

FBAA Response to B5Q1

The FBAA supports these requirements and has no further issues to raise against this proposal.

B6

Proposal	Feedback
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 (i) 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?

FBAA Response to B6Q1 and B6Q2

The FBAA recommends a modified approach to this proposal.
We support longer transitional relief for licensees to completely change references from existing EDR schemes to AFCA. Where this creates any concern of extended transitional periods causing licensees to leave obligations until the last moment, ASIC could require licensees to demonstrate that they have acted reasonably in transitioning within a

reasonable timeframe.

Businesses can incur significant costs making even small modifications to system-generated documents because often they will need to have changes made via external service providers. Just the impact of the Credit and Investments Ombudsman changing its name from COSL was significant.

A complete response requires licensees to update a substantial amount of information, well in excess of that identified at paragraph 35 of the CP including:

- internal operating documents such as compliance manuals and operating procedure manuals;
- websites;
- NCCP and Privacy Act disclosure documents such as:
    - Information statements
    - Credit guides
    - Template letters relating to handling of disputes and hardship
    - Default notices

Some licensees also hold significant stores of printed material. As FOS and CIO will continue to operate handling run-off matters, we think financial firms should be given a longer period of time to be able to continue to disseminate existing printed material even if it refers to FOS or CIO. Considering the worst-case scenario of this approach, a consumer would submit a complaint to the old schemes which would in turn refer the complaint to AFCA. To this end, we suggest a transitional period to **1 July 2019** as an appropriate timeframe for printed material.

We expect that most website and electronic disclosure should be changed by 1 November 2018 however if firms have stockpiles of already printed material they should be able to continue to use it.

END