

Review of ePayments Code

ASIC Consultation Paper 310

AFCA submission

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Introduction

The Australian Financial Complaints Authority (AFCA) is the new independent external dispute resolution (EDR) scheme for the financial sector. It replaced the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal.¹

AFCA's purpose is to provide fair, independent and effective solutions for financial complaints. It does this not only by providing complaint resolution services, but also by working with financial firms to improve their processes and industry standards of service, thereby minimising complaints.

More broadly, AFCA will play a key role in restoring trust in the financial services sector.

In addition to resolving individual financial complaints, AFCA has responsibilities² to identify, resolve and report on systemic issues and to notify the Australian Securities and Investments Commission (ASIC), or other regulators, of serious contraventions of the law.

On 23 April 2018, AFCA was authorised pursuant to the *Corporations Act 2001*. The AFCA Rules, which govern our operations, were approved by ASIC in September 2018. We began to receive complaints under these rules on 1 November 2018.

AFCA welcomes the opportunity to provide feedback in response to *Consultation Paper 310, Review of the ePayments Code: Scope of the review* released by ASIC in March 2019 (CP 310). We note that ASIC is determining the scope of the review at this stage and plans to consult about proposed code amendments later in 2019.

This submission³ draws on the experience of AFCA and its predecessors – organisations that have handled banking complaints for more than 25 years.

AFCA believes the review should address the following matters:

- Mistaken internet payments
 - > Definition

AFCA recommends changes to the definition of mistaken internet payment (MIP) in clause 2.6 of the code to:

¹ The Appendix provides a brief overview of AFCA. For comprehensive information about AFCA, see our website www.afca.org.au.

² See [ASIC's Regulatory Guide 267](#) *Oversight of the Australian Financial Complaints Authority*.

³ This submission has been prepared by the staff of AFCA and does not necessarily represent the views of individual directors of AFCA.

- clarify that the definition covers payments made where the user selected incorrect payee account details from a ‘Pay Anyone’ payee list
- include an invoice scam scenario as an example.

> On-screen warnings

AFCA believes clause 25(1) should require sending ADIs that process ‘Pay Anyone’ transfers using only the BSB and/or account numbers to warn users that the recipient account name will not be used.

> ‘Reasonable endeavours’ to retrieve funds

AFCA suggests an example be added to clause 32.1 to indicate that, to use reasonable endeavours, a receiving ADI must take action that includes:

- changing the unintended recipient’s account to ‘deposit only’
- freezing the balance of that account and returning its balance (along with any future deposit up to the amount of the MIP) to the sending ADI.

> Complaints

AFCA believes clause 34.4 should outline that AFCA may make the sending ADI liable to compensate the user where the MIP process fails because of the receiving ADI’s conduct. Our alternative suggestion is to require the receiving ADI to allow the user to make a complaint about its handling of the MIP through internal dispute resolution (IDR) procedures, with access to EDR.

> MIP process

To improve outcomes for consumers by specifying MIP process requirements in more detail, AFCA considers that the code should:

- outline the information that an ADI should obtain from a user who reports a MIP
- state the timeframe within which the sending ADI must determine whether a MIP has occurred
- for each MIP reported, require the sending ADI to prepare a report on action and outcomes.

● Small business access to code provisions

AFCA recommends that all of the consumer protections provided in the code should be extended to small businesses. Reasons for this recommendation include:

- > Small businesses have the same need for consumer protection as individuals in regard to electronic payments.
- > The approach of extending the code to small business would be consistent with approaches taken in other relevant areas.
- > The code contains provisions that could be particularly helpful for small businesses.

We consider that the code should define small business to mean:

A business, including a primary production business as defined in the *Income Tax Assessment Act 1997*, with fewer than 100 employees.

- **Unauthorised transactions**

We consider that, if a code amendment suggested recently by the Productivity Commission proceeds, it should apply only to account aggregators that are members of AFCA.

- **Complaints handling**

AFCA supports Chapter F being the sole provisions for handling code complaints.

- **Non-subscribers**

AFCA supports the code being made compulsory for all banks, credit unions, building societies, card issuers and other providers of electronic payment facilities.

If the code is not made compulsory, AFCA would welcome a statement by ASIC to the effect that the code represents good industry practice.

1. Mistaken internet payments

1.1 Definition

1.1.1 Selecting the wrong account from a 'Pay Anyone' payee list

When the code was introduced, there was some initial confusion about whether the MIP provisions apply to internet payments made where the user has paid an unintended recipient because the user wrongly selected account details from a Pay Anyone payee list.

In April 2013, ASIC, FOS and the Australian Payments Clearing Association (now Australian Payments Network Ltd) agreed that the MIP provisions do apply to the situation where the user selected incorrect payee account details from a payee list.

AFCA suggests this agreement be reflected in the definition of MIP in clause 2.6 of the code.

1.1.2 Fraud

In cases where a user has been tricked or scammed into transferring money to a fraudster, we have seen a number of ADIs not treating the payments as MIPs (and not using the MIP process). This may occur, for example, if a fraudster changes an account number on an invoice from the user's builder. ADIs have characterised this scenario as a fraud rather than a mistake. However, the transfer falls within the definition of MIP.

To ensure the MIP provisions apply as intended, AFCA suggests that an invoice scam scenario be included in the definition of MIP as an example.

1.2 On-screen warnings

Before processing a Pay Anyone transaction, the sending ADI will require a user to insert the receiving account name. However, in AFCA's experience, all sending ADIs process a Pay Anyone transfer using only the BSB and/or account numbers. For the sending ADI to be able to disregard the recipient account name as part of its customer's instruction, AFCA requires the sending ADI to provide a user with an on-screen warning, before the transaction is finally confirmed, that the account name will not be used.

Clause 25 of the code deals with on-screen warnings. It sets out a subscriber's obligation to warn users about the importance of entering the correct identifier and the risks of MIPs. But clause 25 does not require the on-screen warning to make clear that the recipient account name will not be used to make the transfer.

We have observed that users generally believe the recipient account name will also be used to make the transfer. The absence of a warning that the account name will not be used contributes to this belief. In AFCA's view, clause 25(1) should require sending ADIs that process Pay Anyone transfers using only the BSB and/or account numbers to warn users that the recipient account name will not be used.

1.3 'Reasonable endeavours' to retrieve funds

Clause 32.1 applies where the amount of a MIP exceeds the funds available in the unintended recipient's account. It requires the receiving ADI to use reasonable endeavours to retrieve the funds from the unintended recipient.

AFCA considers that, to use 'reasonable endeavours' as required by clause 32.1, the receiving ADI must take action that includes:

- changing the unintended recipient's account to 'deposit only'
- freezing the balance of that account and returning its balance (along with any future deposit up to the amount of the MIP) to the sending ADI.

It would be helpful to provide an example of reasonable endeavours, including the action listed above, at the end of clause 32.1

1.4 Complaints

Clause 34 states that a user who reports a MIP can complain to the sending ADI about the action taken in response to the report. Clause 34.4 requires both the sending ADI and the receiving ADI to cooperate with the sending ADI's EDR scheme. However, clause 34 does not include any clear statement or direction to indicate which ADI is liable when things go wrong in the MIP process.

Where the MIP process fails because of the receiving ADI's conduct, AFCA makes the sending ADI liable to compensate the user, relying on clause 34.4. We believe the code should outline this expressly in clause 34. We note in this context that ADIs can make separate arrangements, through undertakings or indemnities for example, to ensure financial resolutions are fair between ADIs.

An alternative suggestion is to require the receiving ADI to allow the user to make a complaint about its handling of the MIP through IDR procedures, with access to EDR.

1.5 Process

CP 310 emphasises the importance of simplifying the MIP process. AFCA supports simplification but considers that, to improve outcomes for consumers, the code should specify process requirements in more detail.

Our view is that the code should:

- outline the information that an ADI should obtain from a user who reports a MIP, such as
 - > details of the mistake made
 - > correct details about the intended recipient
 - > the reason for making the transfer
- state the timeframe within which the sending ADI must determine whether a MIP has occurred

Until this is determined, clause 27.2 and later provisions requiring steps in the MIP process to be taken within stated timeframes do not operate. Also, a request by a user to a sending ADI to recover a MIP is, by its nature, urgent. AFCA suggests the timeframe for the sending ADI be short, for example one or two business days.

- for each MIP reported, require the sending ADI to prepare a report on action and outcomes

We suggest the report should provide all the information the user would need to understand what was done, when it was done and outcomes. It could be required to include key details such as the date and time when the MIP process commenced and the receiving ADI's response. Industry could develop a standard form for this report. The code could require the sending ADI to provide the report to the user and, where a complaint proceeds to EDR, to AFCA.

2. Small business access to code provisions

2.1 Extending code to small business

AFCA recommends that all of the consumer protections provided in the code should be extended to small business. The main reasons for this recommendation are outlined below.

- Small businesses have the same need for consumer protection as individuals in regard to electronic payments.

Small businesses submit unauthorised transaction and MIP complaints to AFCA that are identical to complaints from individuals, save that the relevant account is designated as a business account. The small business complaints relate, for example, to a business credit card or a business transaction account.

- The approach of extending the code to small business would be consistent with approaches taken in other relevant areas.

- > Other industry codes

Other industry codes operating in the financial sector, including the Customer Owned Banking Code of Practice and the Code of Banking Practice, protect small business consumers. The new Banking Code of Practice will provide enhanced protection for small business customers of banks.

- > Complaint resolution arrangements

A central feature of Australia's framework for financial services complaints is that small business consumers have access to complaint handling mechanisms. ASIC's Regulatory Guide 267 includes small business consumers as one of the subgroups within the group of consumers entitled to protection through IDR and EDR.

It is unsatisfactory in AFCA's view to give small businesses access to IDR and EDR but not also give them the full benefit of the code in complaints against code subscribers.

- > Recent reforms and current reform proposals

Recent reforms have extended consumer protection to small business. An example is the extension of unfair contract terms protection.

Current reform proposals also acknowledge a need to increase support for small business. This can be seen in the recommendations made earlier this year by the Royal Commission, including:

- Recommendation 1.10, to expand the definition of small business in the new Banking Code of Practice
- measures to assist primary producers such as establishing a comprehensive national scheme for farm debt mediation (Recommendation 1.11) and preventing banks from charging default interest on loans secured by agricultural land in areas affected by a natural disaster (Recommendation 1.13).

- The code contains provisions that could be particularly helpful for small businesses.

As indicated above, AFCA believes the code should apply fully to small businesses. Examples of consumer protection in the code that, based on our

complaint resolution experience, could be particularly helpful for small businesses are:

- > clause 11.3, which provides for liability where more than one pass code is required
- > clause 38.2, which imposes requirements for a subscriber to obtain information in unauthorised transaction complaints.

2.2 Definition of small business

AFCA considers that the code should define small business to mean:

A business, including a primary production business as defined in the *Income Tax Assessment Act 1997*, with fewer than 100 employees.

The EDR arrangements for financial services were comprehensively reviewed and redesigned recently. A key change, highlighted in Government announcements⁴ about the establishment of AFCA, was the introduction of a broader definition of small business. Our view is that this broader definition should be used in the code if it is expanded to cover small business.

The definition above is designed to align with the definitions of small business in Regulatory Guide 267 and the AFCA Rules. Alignment of definitions would reduce the risk of confusion and avoid practical difficulties that could arise if different definitions apply.

3. Unauthorised transactions

The Productivity Commission's report on its recent inquiry into competition in the financial system⁵ supported the role of account aggregators. It suggested a code amendment to provide for account aggregators to access a user's account using separate log-on details issued to them by subscribers at their customer's request. The suggested amendment includes changes to provide for liability in the event of unauthorised transactions and ensure complaints are handled appropriately.

At present, it is possible for an organisation without AFCA membership to subscribe to the code. Such an organisation would need to comply with Appendix A instead of Chapter F. We note that the complaints handling provisions of the code, including Appendix A, are being reviewed.

AFCA considers that, if amendments are made to the code along the lines suggested by the Productivity Commission, the amendments should be limited so as to apply

⁴ See, for example, [Media Release on 14 February 2018](#).

⁵ [Productivity Commission Inquiry Report No 89](#), 29 June 2018, *Competition in the Australian Financial System*, pages 503-504.

only to an account aggregator that is a member of AFCA. This limitation is suggested to ensure that, in a complaint about unauthorised activity, AFCA can investigate and determine which account log-on was used to perform the unauthorised transaction, and hold the account aggregator liable if its log-on was used.

4. Complaints handling

AFCA supports all users having access to IDR and EDR procedures that comply with ASIC's Regulatory Guide 165 (RG 165).

In our view, the two current complaint handling regimes in the code (Chapter F and Appendix A) should be reduced to one complaint regime – Chapter F. This will:

- simplify complaint handling
- provide users who currently have their complaints handled under Appendix A access to IDR and EDR procedures that comply with RG 165.

5. Non-subscribers

Some AFCA members that are card issuers and process electronic payments are not subscribers to the code.

AFCA supports the code being made compulsory for all banks, credit unions, building societies, card issuers and other providers of electronic payment facilities.

If the code is not made compulsory, then we would welcome a statement by ASIC to the effect that the code represents good industry practice. The statement could appear in 'About this code' before the code's table of contents.

Appendix – About AFCA

AFCA is a free, fair and independent dispute resolution scheme. AFCA's service is offered as an alternative to tribunals and courts to resolve complaints that individual and small business consumers have with their financial firms. We consider complaints about:

- credit, finance and loans
- insurance
- banking deposits and payments
- investments and financial advice
- superannuation.

AFCA's role is to assist consumers to reach agreements with financial firms about how to resolve their complaints. We are impartial and independent. We do not act for either party to advocate their position. If a complaint does not resolve between the parties, we will decide an appropriate outcome.

Decisions made by AFCA can be binding on the financial firm involved in a complaint. We can award compensation for losses suffered because of a financial firm's error or inappropriate conduct. There are other remedies we can also provide for superannuation complaints.

AFCA is not a government department or agency, and is not a regulator of the financial services industry. We are a not-for-profit company, limited by guarantee, governed by a board with equal numbers of industry and consumer representatives. AFCA's Chief Executive and Chief Ombudsman is responsible for the management of the organisation.

Under transitional arrangements that have been put in place with ASIC's approval, AFCA is currently resolving open complaints that were previously submitted to FOS and CIO and will continue to do so until they are resolved. These complaints will be handled in accordance with the FOS Terms of Reference or CIO Rules, as applicable and in force when the relevant complaint was lodged.