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Dear Ms Rush

Internal Dispute Resolution Update to RG 165

The Australian Financial Markets Association (AFMA) welcomes the opportunity to comment on *Consultation Paper CP 311 Internal Dispute Resolution: Update to RG 165*. Internal Dispute Resolution (IDR) can play a valuable role in efficiently and effectively addressing complaints from customers to the benefit of customers, firms, and the wider economy. ASIC's regulatory guidance is valuable in producing a common standard and understanding of what is expected from firms in this area, as well as contributing to the smooth integration of IDR practices with the broader regulatory complaints system. As the Ramsay Review noted "effective IDR supports effective EDR [External Dispute Resolution]"[1].

AFMA supports ASIC's proposal to update the IDR framework to reflect recent developments including, where appropriate, to better align with the approach of Australian Financial Complaints Authority (AFCA).

We note a number of concerns in relation to the proposals, most notably around the potential change in definition of 'small business' which may be difficult for members to identify and track whether clients fall into this category. This could bring a number of wholesale clients within scope and result in firms needing to set up an IDR scheme and potentially join an EDR scheme, the costs for which will not be offset by any benefit to these clients.

[1] https://treasury.gov.au/sites/default/files/2019-03/R2016-002_EDR-Review-Final-report.pdf p. 19

If you would like more information on AFMA's submission please do not hesitate to contact me on 02 9776 7993 or on [redacted]

Yours sincerely

Damian Jeffree

Response to Proposals in the Consultation Paper

B3

IDR is designed to address the imbalance that can be present when 'retail clients' have complaints with firms that may be far better resourced. For this reason, the requirements AFS licensees must have an IDR process that covers complaints made by 'retail clients'.

Wholesale clients are not required to be covered by IDRs as given the different relativities in sophistication and size of these clients a mechanism designed for retail may not be an appropriately tuned approach. After all the whole purpose for the creation of IDR backed up by EDR was as an access to justice mechanism for individuals who would not otherwise have the financial means or commercial importance to pursue their legal rights. Further, requiring firms to establish processes for dealing with retail clients within the wholesale business space when in the past there has always been a very clear distinction creates unnecessary costs and frictions for the wholesale markets, potentially creating disincentives to the provision of these services with attendant costs to the economy.

AFMA's key concern relates to the proposed changes to the definition of small business.

> We propose to modify the definition of 'small business' in the Corporations Act to align it with the small business definition in the AFCA Rules:
>
> > A Primary Producer or other business that had less than 100 employees at the time of the act or omission by the Financial Firm that gave rise to the complaint.
> >
> > Your feedback
> >
> > B3Q1 Do you support the proposed modification to the small business definition in the Corporations Act, which applies for IDR purposes only? If not, you should provide evidence to show that this modification would have a materially negative impact.

The current relevant section of the guidance states:

> RG 165.72 As a minimum, any IDR procedure for financial service providers must be able to deal with complaints made by 'retail clients', as defined in s761G of the Corporations Act and its related regulations, and this includes small businesses. A 'small business' is defined in s761G as a business employing fewer than:
>
> a) 100 people (if the business manufactures goods or includes the manufacture of goods); or
> b) 20 people (otherwise).

For businesses that do not manufacture goods the proposed change would see an increase in the number of employees from less than 20 people to less than 100 people.

In financial services neither definition is ideal as the number of employees is often not a good guide to the size or sophistication of a firm. Particularly where funds management is involved or where corporate structures may involve entities with comparatively few local employees.

Basing the definition of small business on headcount means that:

- Investment firms with large sums under management but small numbers of staff; and
- multinational firms with small but significant local offices;

would be treated as if they were retail clients for IDR purposes. This is not in keeping with the intention of the scheme which is to provide protection for retail clients and avoid unnecessary costs in the wholesale space.

In the absence of an improved metric the current definition is strongly preferred.

For financial services firms the proposed change could bring a number of wholesale clients currently not caught by the definition of small business into the regime and thus require the establishment of an IDR system for firms servicing these clients.

Even where only a small number of wholesale clients would be brought into the regime this would require affected firms to set up IDR infrastructure in order to conform to the regulation.

The requirement to have an IDR system creates costs and risks for firms. Firms operating in the wholesale markets that do not offer services to retail clients have a clear preference based on these costs not to have to establish these processes. We would therefore request that either the current definition be maintained or there be additional criteria added to adjust for these anomalies.

We also note that the Corporations Act requires membership of an EDR for firms where "financial services are provided to persons as retail clients" (912A(1)(g)). In the event of a misalignment between this requirement to be a member of an EDR scheme, the Corporations Act definition of retail client and the requirements of the regulatory guide to have an IDR based on a different definition of retail, this could result in firms requiring an IDR scheme (due to RG 165) but not being a member of an EDR scheme. This may not be an ideal arrangement.

Other issues

AFMA also has a range of concerns and queries about other elements of the proposed changes that will be amplified if the proposed changes are made to the definition of small business.

B1

We note the Commission's proposal to update the definition of 'complaint'.

> The AS/NZS 10002:2014 definition expands the concept of 'complaint' to include expressions of dissatisfaction made 'to or about' an organisation. We consider that this should capture complaints made by identifiable consumers on a firm's own social media platform(s).
>
> > B1Q1 Do you consider that complaints made through social media channels should be dealt with under IDR processes? If no, please provide reasons. Financial firms should explain:
> > (a) how you currently deal with complaints made through social media channels; and

(b) whether the treatment of social media complaints differs depending on whether the complainant uses your firm's own social media platform or an external platform.

AFMA agrees it is appropriate to update the definition of complaint to reflect AS/NZS 10002:2014. However, we query however whether the inclusion of expressions of dissatisfaction made 'about' an organisation establishes social media as a legitimate channel for making complaints. We do not see this as necessarily following from the changes in 10002:2014, instead viewing it as an orthogonal issue.

The changes to include complaints 'about' a firm would appear to be in relation to the *content* of the complaint rather than the *medium* through which the complaint is delivered. This would not be to exclude complaints made through channels such as social media which may well be 'about' a firm, although they may equally be 'to' the firm.

The inclusion of a requirement to include complaints 'about' an organisation would appear to remove the earlier restriction that limited the scope of complaints considered by the standard to the products and services of the firm or the complaints handling system.

It would be widened to include complaints about the way an organisation was behaving itself outside of the products and services and complaints handling services it provides. This could include matters such as the way the firm approached litigation in which it was involved. A complaint that a firm was bringing vexatious litigation or was litigious might properly be considered not within scope under the old standard but would be caught by the new scope.

Firms may well choose certain social media channels to receive complaints in a manageable way, but this need not be read from the change to the definition of complaint in the new standard.

It will be to the benefit of complainants and firms if firms are able to continue to appropriately manage the channels of communication including social media to ensure predictable and orderly responses to genuine complaints.

There is a risk that ASIC's more prescriptive interpretation of the implications for social media engagement could make complaints less manageable for firms and result in uncertainty about which interactions with the public should be required to be dealt with under IDR systems.

The statement in the Consultation Paper that "At a minimum, we expect that complaints made on a financial firm's own social media platform(s) will be dealt with through the firm's IDR process when the consumer is both identifiable and contactable" appears to suggest that firms might be required to treat commentary that might not be intended as a complaint to be managed by its IDR system, merely because the consumer making the commentary is identifiable and contactable. This may be at odds with the intention and desire of the customer and could produce counterproductive outcomes where customers might feel their interaction has been recorded by the company and tracked against their wishes or intention.

While unnecessary restrictions on how complaints can be formed by customers might not be appropriate, there may be benefit in firms requiring some minimal formality around complaints to

ensure that treatment is aligned with expectations of customers and to allow for firms to have clear sight over where their responsibilities lie.

B7

We note that ASIC also proposes to publish IDR data at the firm level:

> We propose to publish IDR data at both aggregate and firm level, in accordance with ASIC's powers under s1 of Sch 2 to the AFCA Act.
>
> B7Q1 What principles should guide ASIC's approach to the publication of IDR data at both aggregate and firm level?

AFMA supports the publication of aggregate benchmark data but notes that caution should be applied where ASIC determines that data should be published that identifies individual firms.

These matters can be poorly represented by such broad metrics where numbers can be skewed by factors including:

- firm size (larger firms may produce larger numbers of complaints solely due to their greater number of transactions and clients);
- diligence in capturing complaints (firms that are highly diligent in ensuring all complaints are captured and reported might be over represented in statistics compared to firms that are less diligent); and
- the firm's assessment of the seriousness of complaint (metrics can obscure the difference between minor and major matters, and firms will have different ways of categorising matters).

Such reporting could create perverse incentives to minimise complaint capture or to minimise the assessment of complaint seriousness.

Complaints remain, in the first instance in a market-based economy, primarily a matter for the relationship between firms and their customers.

The Explanatory Memorandum for the AFCA Bill suggests:

> 2.22 Under the enhanced IDR framework, ASIC will have the ability to publish IDR activity data (including firm specific data). Publishing IDR data will drive IDR Firms to improve their IDR practices, by providing industry benchmarks on how long it takes to resolve disputes by highlighting poor performing firms. This will also improve the ability to compare outcomes, identify product and service complaint trends and understand the number of complaints received by comparable firms.
>
> …
>
> 2.24 ASIC may publish information that relates to a particular entity, or information from which a particular entity may be identified. However, ASIC must not publish 'personal information' within the meaning of the Privacy Act 1988.

Similar language of 'highlighting poor performing firms' was also used in the Minister's second reading speech. The Ramsay Review also speaks to ASIC having the 'discretion' to publish firm level data.

To achieve the objectives that Parliament has set for it, ASIC should publish benchmark data and consider identifying poorly performing firms. It may also be appropriate to provide firms their own data back in a format that allows comparison with the benchmark. However, it may not be appropriate to publish firm identifying data as a matter of course for firms where there is no poor performance.

AFMA's view would be that in a market economy, businesses should generally be free to conduct their business including dealing with their customers without government publication of sensitive internal data unless there is a legitimate public interest in doing so. There is a cost to the attractiveness of the business environment and ultimately to the economy of excessive regulatory intervention in this regard. Businesses may be less inclined to offer services to retail customers if there is a requirement that sensitive IDR data be published by a regulator.

We welcome further consultation on the publication by ASIC of firm identifying IDR data and note that it may be appropriate for such a consultation to be undertaken by Treasury to set the matters to which ASIC should apply its discretion.

B13

In relation to RG 165.130 "Reports to the board and executive committees must include metrics and analysis of consumer complaints including about systemic issues that arise out of those complaints." We note that the proper role of Boards is governance rather than management and that as long as the appropriate governance settings are in place it may not be necessary for Boards to engage in management-like consideration of metrics and analysis.