6 April 2018

Clare McCarthy
Behavioural Research & Policy Unit
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3000

By email only to

policy.submissions@asic.gov.au

Dear Ms. McCarthy

Consultation Paper 298 Oversight of the Australian Financial Complaints Authority: Update to RG 139 (CP) and draft RG 139 (Draft RG 139)

The Financial Services Council (**FSC**) has over 100 members and represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies.The industry is responsible for investing more than $2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the third largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Thank you for the opportunity to provide a submission on this topic. For convenience, we will adopt in our submission, the broad headings and the lettering and numbering used in the CP and draft RG 139.

We do make a general observation at this stage however; which we suspect you also have considered. It is of course possible that the proposed framework may be impacted by or requires updating following the release and/or implementation of findings and recommendations by the current banking etc Royal Commission. The same are likely to have flow-on impacts, which should be taken into account and factored into any plans to adopt AFCA principles and reporting in the short term.

Financial Services Council Ltd Level 24, 44 Market Street T: +61 2 9299 3022 E: info@fsc.org.au
ABN: 82 080 744 163 Sydney NSW 2000 F: +61 2 9299 3198 W: fsc.org.au

FSC Response to Consultation Paper 298 Oversight of the Australian Financial Complaints Authority: Update to RG 139 (CP) and draft RG 139 (Draft RG 139): 6 April 2018

Our comments are as follows-

CP
Referring matters to appropriate authorities

Proposal concerning Reporting (B1Q1, B2Q1)

1. FSC members have expressed support, in principle, for an enhanced reporting regime under which AFCA will be required to report to ASIC within 30 days of becoming aware that a *serious contravention* of a law has or may have occurred, or about the existence of a *systemic issue*. We note that this is consistent with the legislative intent of the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act* 2018 (**the Act**). As noted in Draft RG 139, there is uncertainty about the threshold for reporting to ASIC. Our view that is industry would benefit from further consultation from ASIC about establishing appropriate thresholds. We note that such consultation is contemplated in paragraph 1.95 of the Revised Explanatory Memorandum (**EM**) to the Act in Bill form.

2. We do note, to foreshadow some of the comments we make below, that the 30-day timeframe is likely to be far too short. The time available should factor in and allow a financial firm to respond to AFCA in relation to what AFCA has flagged as 'serious' before it is reported to ASIC.

3. Thus in our view, a financial firm, should be given the time to thoroughly investigate and respond to AFCA before the matter is reported to ASIC.

4. As a substantive matter, it seems to us that the definition and concept of 'serious' contravention is circular and subjective

(Proposal B2). As we indicate below, this is an area which would benefit from further consultation.

5. Further, we would appreciate clarification regarding the proposed procedure and timeframe for AFCA to report serious contraventions or systemic issues. The CP proposes that:

> *(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.*

6. There are some unresolved issues in this formulation we outline our views in this regard below.

7. *First*, when is AFCA taken to have identified a systemic issue, following which the 30-day reporting requirement will run (B1(b)(ii))? For example, is it after step (b) in paragraph RG139.57 (and RG139.184) has been completed, and the financial firm has had an opportunity to respond and/or the response has been considered by AFCA? Is it the intention that AFCA waits for this response in order to determine whether or not a matter is systemic before it is reported, and before the 30 day time limit for reporting commences? What if AFCA determines a matter is not systemic – can it be clarified whether it will not be reported to ASIC in those circumstances (see RG139.57)?

8. *Second,* will alleged systemic issues identified by AFCA, which relate to general industry practices and/or involve multiple firms (see 139.58), also go through the process

identified in paragraph RG139.57 (and RG139.184)? As currently drafted, paragraphs RG139.57/139.184 only relate to systemic issues identified in the context of AFCA's consideration of complaints and there is no provision for how general industry practice and/or multiple firm systemic issues will be managed before being reported.

9. *Third*, and this is more directly related to B2Q1, Draft RG 139 does not contemplate a financial firm having the opportunity to engage with AFCA regarding a 'serious contravention', before it is reported to ASIC.

10. Finally, in this context and by way of general comment, members have emphasised that care will need to be taken when there are unproven allegations. Members support early reporting of potential serious breaches, but would like comfort that this operates through a framework that it is fair and reasonable. Members have expressed a desire for clarity around the implications of early reporting and are keen to ensure that there is no pre-judgment of "guilt" in this process.

Role of the independent assessor

Proposal concerning Independent Assessor (B3Q1, B4Q1, B5Q1)

11. FSC members have indicated support for the proposed guidance on the primary role of the assessor. Members also support the proposed guidance in its clarification of what is not the role of the independent assessor – that is, the assessor is not a merits reviewer. However, an observation has been made that although the independent assessor should not be able to re-open or overturn AFCA decisions on a merits basis, it would

be appropriate if the independent assessor had power to make appropriate recommendations where required.

12. The FSC membership generally supports the proposed requirements for the independent assessor. It is integral that the independent assessor is fiercely independent and appropriately qualified to undertake this important role. From a customer and industry perspective, it is important that the independent assessor is appropriately resourced. Adequate resourcing will ensure that the independent assessor can assess, respond to, and, if necessary, provide remedies for issues in a timely manner. In addition, the Independent Assessor is integral to the proper functioning of AFCA's complaint handling operations and performance.

We do note however that a suggestion has been made is that ASIC should appoint the Independent Assessor, rather than AFCA itself appointing that person. An alternative approach would be for AFCA to appoint the Independent Assessor, subject to the approval of ASIC. However, our preference would be for this appointment to be the province of ASIC.

13. We also suggest that the terms of reference for the internal assessor should be developed in consultation with industry to assess issues such as

(a) Customer privacy protections;
(b) Business engagement, and;
(c) Reporting.

EDR disclosure obligations

Updating legal disclosures and communications (B6Q1, B6Q2)

14. We note that in terms of Proposal B6 - Disclosure obligations – firms are to update complaint/decision letters, online information and forms and personalised disclosures, including periodic and exit statements by commencement of AFCA which is no later than 1 November 2018. We express our significant concern in relation to the expectations and timeframes for financial firms to update all of their legal disclosures and consumer communications, so proposed in the CP. At the date of this submission, firms do not have the contact details for AFCA that are required to be included in the relevant disclosure documents and customer communications including both printed and online versions of PDSs, periodic statements, forms and letters for all open and legacy products. Clearly, it is desirable to have this information available as soon as possible, so the appropriate updates can be made. In summary then we feel there is insufficient time for this process as collateral changes are significant. There ought to be, as explained below, a separate transition period applied to the updating of PDSs and Periodic Statements to ensure firms have appropriate time to plan and successfully update all disclosure materials .In this regard, we anticipate that IDR letters dealing with the resolution process of disputes will be required to reflect the new AFCA scheme on commencement.

15. It ***may*** be possible to update the documents listed at paragraph 38 of the CP (Proposal B6 (b) - online information and forms and (c)-periodic and exit statements) ***if*** details of AFCA were made available by say 30 June 2018. However, we do note that some members have indicated that even if all of the details of AFCA were made available by 30 June 2018, it would be extremely unlikely that they would be able to amend online information and forms and periodic statements and exit statements, by 1 November 2018. This is because for these members:

    (a) The majority of forms and letter templates as well as periodic and exit statements are "system-generated". These are unable to be updated without intensive system development and testing. Given the many existing

projects on foot for financial service and product advisors and resource constraints, full and proper testing would be challenging to complete by 1 November 2018;

(b) Projects necessary to update statements for the financial year ended 30 June 2018 are already underway. These take into account RG 97 and other changes. Any other changes to scope, including changes to EDR details, could impact the delivery of annual superannuation statements for the 2018 financial year

16. In relation to the remaining documents listed at paragraph 35 of the CP, we suggest that a transition period to 30 June 2019 would be fair and appropriate. In this regard, we confirm that the proposed transition period to the commencement of AFCA, i.e. no later than 1 November 2018, for the reasons outlined above, is insufficient to enable financial firms to satisfy their disclosure obligations.

17. One ***possible*** approach here which may be workable and achieve policy objectives of advising users of services and products of the EDR changes, is that disclosures not be required to be updated until

(a) The next material update of that document (FSG, PDS or statement), or

(b) Not later than 18 months from commencement of AFCA.

ASIC should have express power to grant relief power for relief in this context where special circumstances apply

18. We also note that in paragraph 298.20 of the CP, it is indicated that ASIC will consult on the ***IDR processes*** and performance data to be provided to ASIC ***after*** AFCA commences. We suggest that this consultation commences earlier and ASIC liaises with APRA. At a minimum, the reporting obligations should be aligned in terms of timeframes and definitions. In terms of the CP suggestion, we note that the proposed timeframe provides very little time for consultation. We further note that the paragraph assumes that financial firms will hold a similar amount of data and have the ability to respond in fairly much a similar time. We suggest that further consideration be given to this issue and consultation take place in relation to this matter.

19. In summary, although internal policies and procedures may be capable of being updated within the time frame, product documents and other consumer facing documents, such as disclosure documents, will require a transitional time frame. PDS review generally is only taken on an annual basis at best for open products and less frequently (if at all) for closed products and there are significant costs in updating disclosure documents and in some firms, a significant time frame.

20. Further, and on balance, it seems to us that the disclosure requirements usefully could be limited to **open products**. This approach would be consistent with other regulatory provisions and would recognise that there are other methods by which existing members in closed products could be notified of the EDR changes. Accordingly, we suggest that there be appropriate treatment which ensures the existing approach to updating customers in soft and hard-closed products is not disrupted to avoid additional costs.[1]
This approach would be consistent, and would operate without changing a financial firm's existing obligations in ASIC Class Order (CO 03/237) to provide updated information to customers.

21. Further, in relation to ***life insurers who are FSC members***, as you may be aware the FSC is contemplating introducing version 2 of the Life Insurance Code of Practice from 1 July 2019. The revised Code will require significant changes to systems, processes and customer documentation including Product Disclosure Statements. We consider that financial firms need to be provided with a sufficient transitional period to comply with the requirements outlined in the 'EDR disclosure obligations' section of the CP to align with the expected implementation date of the version 2 of the Code (1 July 2019). Thus for these members, it is quite onerous for them to update disclosure documents over a six month period i.e. for AFCA and then for LICOP version 2.

[1] In this regard we note *soft-closed products* means products where no new investors are admitted but current investors may make further payments into the product. By way of contrast, *hard-closed products* are those which permit neither new investors nor receipt of additional funds from existing investors.

DRAFT RG 139

22. We note that Draft RG139.57 states:

> *AFCA may identify a possible systemic issue in the course of resolving a complaint that, after investigation, AFCA decides is not systemic. Consistent with our guidance in RG 139.184, AFCA must have systems and processes in place to:*
> (*a) identify systemic issues that arise from its consideration of complaints;*
> *(b) refer these matters to the financial firm for response and action; and*
> *(c) report systemic issues in accordance with s1052E(4).*

As we have mentioned earlier, it is not clear from these comments at which stage of the process that systemic issues will be reported by AFCA to ASIC i.e. whether systemic issues will be reported only when a formal systemic issue investigation has been completed and found to be systemic. Our view is that only confirmed systemic issues should be reported to ASIC to avoid unnecessary regulatory investigation/action given that the proposals envisage the names and details of financial firms to be provided from AFCA to ASIC.

23. By way of general observation, we note that the draft RG 139 contains some references to disclosing names of employees. For example, paragraph [139.51] indicated that AFCA can disclose terms of settlements to regulatory bodies. It is not clear to us why names of employees would be relevant in this regard.

24. It is unclear from the proposals at which stage of the process that systemic issues will be reported by AFCA to ASIC i.e. whether systemic issues will be reported only when a formal systemic issue investigation has been completed and found to be systemic. By way of illustration, in 2016 a member received a possible systemic issue enquiry from FOS requiring investigation and action. The final response received from FOS stated that the Lead Ombudsman was of the view that the matter did not represent a definite systemic issue. Our view is that only confirmed systemic issues should be reported to ASIC

to avoid unnecessary regulatory investigation/action given that the proposals provide for the names and details of financial firms to be provided from AFCA to ASIC.

25. Draft RG 139.63 in relation to reporting requirements for AFCA says that it will report on the *demographics* of complaints. The current EDR bodies often do not have access to demographic data. Thus, it is not clear to us how it proposed that AFCA obtain that information. We also note that commonly, a financial firm may not have demographic information about complainants. We understand that it may be intended that AFCA require firms and complainants to provide such data. Clarification is required.

26. Draft RG 139.65 indicates that ASIC may develop additional reporting requirements which they will seek to harmonise and streamline with other data sets. We do note that where relevant this will need to be aligned to the APRA data reporting set.

27. Draft RG 139.66 states that AFCA must publish entity level complaints data annually. In this regard we suggest that there does need to be a threshold for statistically significant matters.

28. Draft RG 139.79-80 requires AFCA to actively promote the scheme including *targeted stakeholder engagement strategies and using demographic data to contact vulnerable or under-represented groups*. There is an issue as to funding of these strategies and clarification would be appreciated.

29. Draft RG 139.88-99 deals with legal proceedings by firms. The arrangements which are set out here do not appear to reflect the current FOS principle that FOS will not deal with complaints that are being litigated by the complainant unless the proceedings are stayed. In our view, this should be replicated in the TOR.

30. Draft RG 139.105-106 sets out the principles for the funding model and says that AFCA must consult with industry and other stakeholders on the funding arrangements. It is not clear to us how this can occur in the current timeframe (November 2018) for the commencement of AFCA operations.

31. Draft RG139.118 indicates that AFCA's TOR will reflect a general presumption that a firm does not have discretion to

withhold documents or information from a consumer except where it would endanger a third party or compromise the financial firm's security measures. In our view, this requires some clarification and refinement. Thus, firms should only have to provide documents relevant to the consumer's specific complaint and relevant transactions. Other documents which are either not relevant (eg, board papers) or privileged (eg, legal advice) should not be required to be disclosed.

32. Draft RG 139.168 indicates that one of the remedies available to AFCA should be the power to vary the terms of a contract. In our view, AFCA should have regard to the law including contractual arrangements, unless the contract is manifestly unfair. In addition, this proposal needs to be aligned with other statutory rights of a firm, eg, rights under s 29 of the *Insurance Contracts Act* for an insurer to vary a contract in the event of non-disclosure or misrepresentation. Further consideration is required of this issue.

33. Draft RG 139.173 contains a concept of 'refer back', i.e., AFCA initially should refer matters back to the firm if they have not been through IDR or they have been through IDR and the firm has given its final response. The former proposal is reasonable; however, the latter concept does present some degree of concern. It is not clear to us why a complaint should be referred back to the firm if the complaint has been addressed in the firm's IDR process. That, after all, is the function of AFCA, to consider such complaints.

34. Draft RG 139.181 contains a very broad and open-ended definition of *systemic issues*. The current RG 139 definition should be retained.

Yours sincerely

Paul Callaghan
General Counsel