

29 June 2018

Ms. Alison Morrow  
Australian Financial Complaints Authority  
GPO Box 3  
Melbourne VIC 3001

**By email only to**

[AMorrow@FOS.org.au](mailto:AMorrow@FOS.org.au)

[submissions@afc.org.au](mailto:submissions@afc.org.au)

Dear Ms. Morrow

**Proposed Australian Financial Complaints Authority (AFCA) Rules**

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, defined terms and numbering used in the proposed AFCA Rules.

In summary, the key issues raised by our members in relation to particular rules are as follows:

- treatment of systemic issues by the proposed rules
- inclusion of privacy complaints into AFCA's scope
- need for use of prior scheme findings; and
- Definitions and lack of clarity in several areas.

## **FSC Submission in relation to Proposed AFCA Rules: 29 June 2018**

Our detailed comments in relation to specific AFCA Rules (in numerical order for ease of reference) are as follows:

### **Section A14.3**

Concern was expressed as to the apparent possibility that an AFCA Decision-Maker could disregard findings from previous findings and schemes decisions, as the Decision-Maker is not bound by them. This approach could lead to uncertainty in future. It would be preferable for ongoing certainty and have a better understanding as how Decision-Makers would consider and possibly apply such precedents in its deliberations. We would be happy to discuss further the potential benefits of AFCA being able to take into account the findings and decisions of predecessor schemes.

### **Section A17.3 a) & b)**

We seek clarity as to how the remedial action in relation to systemic issues will operate by AFCA with regard to any actions required by ASIC. Is there a risk of overlap and duplication and what actions will AFCA and ASIC take to provide clarity?

### **Section A 17.4 c)**

Clarity also is required as to the meaning of key terms such as 'loss' and 'disadvantage' in this case, to better assess how to remedy these adverse outcomes to consumers. In this regard, should these terms be defined? All financial products have the potential for advantage and disadvantage depending on a range of circumstances typically outside the Financial Firm's control. It is also unclear what remedy should be applied when it is unlikely any loss or disadvantage could have reasonably been foreseen by the provider.

### **Section A 17.4 d)**

It is not clear to us how a Financial Firm will assess and act to provide foreseeable loss or disadvantage to consumers. Products that are market or event linked can mitigate or cause a measure of foreseeable loss. The concern here is that the scope of this rule is very broad and has the potential to cause widespread breach from an inability to make such an assessment for all products.

### **Section A 18.1**

This Rule appears to be inconsistent with Rule A17.5, as it does not include reference to the OAIC. The scope of this Rule requires clarification. In addition, we suggest that there be transparency, wherever possible, as to the kind of information referred to the other agencies.

**Section A 18.1 & 18.2**

The terms 'serious contraventions' (in A18.1) or 'serious breaches' (in A18.2) are not defined in the AFCA Rules. Accordingly, the difference in scope and application of these Rules is unclear. This ambiguity includes the kind of information to be reported to ASIC under each Rule. At a practical level our Members will need to understand what it is envisaged will be contained in these reports. In this regard, we note that reports made under to A18.2 and A18.1 should be transparent and clear and support the effective understanding and management of regulatory risks.

**Section A19.1**

We question whether demographic information is relevant to complaints. Financial Firms do not necessarily have this information about all customers. The level of information firms hold will depend on the nature of the product, the amount of information a customer has provided and whether a product was distributed directly or indirectly. If AFCA proposes to collect this demographic information this could add additional time for consumers to have their complaint lodged easily. Further, it may be that such collection breaches the Australian Privacy Principles, as the information is not always necessary for the purposes of filing and assessing a complaint.

**Section D2.1 (i)**

This Rule provides that, in relation to 'privacy-related' complaints, an AFCA Decision-Maker can make orders 'generally consistent' with declarations available to the Australian Information Commissioner under the *Privacy Act 1988*. We note that this power is not delegated to AFCA by the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act*, nor the *Australian Information Commissioner Act 2010* and it seems to us must remain the proper responsibility of the Australian Information Commissioner.

**Section D3.3 a) & b)**

In our view, these sections should be removed. Complaints related to privacy should remain the proper responsibility of the Australian Information Commissioner. Non-financial loss related to feelings or humiliation, enjoyment or peace of mind, is not defined and should not be within the scope of the rules, as a Financial Firm is unable to assure itself that it can design and deliver products and process, nor assess conduct and performance against all of these non-objective criteria.

**FSC Submission in relation to Proposed AFCA Rules: 29 June 2018**

**Mapping Papers**

We have received comment that the mapping papers are useful but suggested that it would be helpful to add an additional column with commentary detailing how the proposed AFCA rules differ, vary or align the existing approach under the Corporations Act.

---

**Yours sincerely**



**Paul Callaghan  
General Counsel**