

11 September 2023

Ms Natalie Cameron  
Lead Ombudsman – Banking & Finance  
Australian Financial Complaints Authority

Via email: [consultation@afca.org.au](mailto:consultation@afca.org.au)

Dear Ms Cameron

### **Consultation on AFCA's Approach to Responsible Lending**

COBA welcomes the opportunity to provide feedback on the '*The AFCA Approach to Responsible Lending*' consultation draft, issued in July 2023. We also thank AFCA for the opportunity to participate in the roundtable discussion on 24 August 2023.

COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies). Collectively, our sector has around \$160 billion in assets and 5 million customers. Customer owned banking institutions account for around two thirds of the total number of domestic Authorised Deposit-taking Institutions (ADIs) and deliver competition and market leading levels of customer satisfaction in the retail banking market. Our sector's share of ADI housing lending is around 6 per cent and our share of ADI personal lending is around 5 per cent<sup>1</sup>.

COBA represents our member customer-owned banks who have a wide range of business models and service many different demographics including those originating from employee groups (e.g. essential workers) or specific regional areas. The customer owned banking sector has a long history of sound lending practices and putting our customers first.

COBA appreciates that responsible lending is a complex area of law in a rapidly changing environment, and it welcomes AFCA seeking to provide further transparency in relation to how it considers responsible lending complaints. We support AFCA wishing to ensure its approach to responsible lending is 'consistent, clearly documented and fair in all the circumstances'<sup>2</sup>.

### **Interaction with regulatory landscape**

COBA generally supports simplifying unnecessarily complex regulatory landscape to make it easier for consumers and small business to access credit, reduce red tape and improve competition while ensuring that the strongest consumer protections are targeted at the most vulnerable consumers. To this end, COBA views *AFCA's Approach to Responsible Lending* as AFCA's interpretation of ASIC's *RG209 Credit Licensing: Responsible lending conduct* (RG209), relevant legislation and case law. COBA would be concerned if *AFCA's Approach to Responsible Lending* instead became akin to a secondary regulatory guide or imposed an additional layer of regulatory obligations on our members

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<sup>1</sup> APRA's Monthly Authorised Deposit-taking Institution Statistics, July 2023: [Monthly Authorised Deposit-taking Institution Statistics](#) .

<sup>2</sup> AFCA, *The AFCA Approach to Responsible Lending - consultation draft*, page 4.

outside of the current regulatory framework. We note that our members are also subject to APRA's lending standards requiring sound credit assessment and approval criteria.

COBA encourages AFCA to apply flexibility, scalability, and technological adaptability to its Approach to Responsible Lending, to further encourage alignment with the current regulatory framework. Over recent years, our members have experienced exponential and disproportionate increase in compliance costs resulting from increasingly complex and challenging regulatory environment. Alignment with RG209, current case law and legislation is therefore critical when considering AFCA's Approach to Responsible Lending.

### **Specific feedback**

COBA raises the following feedback for AFCA's consideration:

#### *Inquiries and verification*

We appreciate AFCA acknowledging that in some circumstances 'fewer inquiries or verifications may be appropriate'<sup>3</sup>. We encourage AFCA to further illustrate this in its Approach to Responsible Lending, specifically in consideration of scalability and ongoing evolving technological changes in the credit industry. AFCA may consider including additional examples and a range of circumstances that will assist to further understand AFCA's approach in practice in relation to flexibility around 'reasonableness'.

While AFCA acknowledges in the consultation draft that benchmarks may be used in the verification process (for example, to test whether an applicant's declared living expenses are broadly reasonable)<sup>4</sup> AFCA continue to state that a benchmark should not be used as an estimate of future expenses when information known to a lender indicates that the applicant's future expenses may be higher than the benchmark and '*[i]t would generally be reasonable for the financial firm to take further steps to verify the consumer's expenses to ensure they have a reasonable basis to estimate their likely future expenses*'<sup>5</sup>.

The consultation draft then sets out a number of situations where a benchmark may not be a reliable indication of likely living expenses including where:

- *the financial firm obtains information indicating the consumer has significant fixed ongoing costs that are not included in calculation of the relevant benchmark index amount; or*
- *the verification documents provided to the financial firm (such as the consumer's bank statements) indicate the consumer's existing total outgoings significantly exceed the total of the benchmark combined with their other assessed outgoings in the serviceability assessment*<sup>6</sup>.

Whilst the language in the consultation draft document is not definitive, it appears that AFCA's Approach to Responsible Lending is generally not aligned with the less prescriptive approach to the responsible lending obligations as per *Australian Securities and Investments Commission v Westpac Banking Corporation* (2020) 277 FCR 343 (*ASIC v Westpac*). COBA considers it would be a material change to verify living expenses using bank statements or data in all cases (assuming that is AFCA's intention).

The possible lack of alignment with *ASIC v Westpac* and potential higher standard on lenders is also significant as there is no transitional period between the consultation process ending and the final approach being published in late 2023 or early 2024.

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<sup>3</sup> AFCA, *The AFCA Approach to Responsible Lending - consultation draft*, page 12.

<sup>4</sup> AFCA, *The AFCA Approach to Responsible Lending- consultation draft*, page 17.

<sup>5</sup> AFCA, *The AFCA Approach to Responsible Lending- consultation draft*, page 18.

<sup>6</sup> AFCA, *The AFCA Approach to Responsible Lending- consultation draft*, page 18.

### *Living expenses*

We are concerned that the example outlined on page 24 in relation to living expenses may imply that consumers are not accountable for the information they declare in relation to living expenses and that the banks are required to conduct an extensive verification process for each declared expense. COBA submits that there should be an element of trust and accountability on the customer to declare living expenses honestly. In practice, banks may not ask for all statements to verify a consumer's expense and may use a variety of other tools to support its assessment.

We are also concerned that AFCA considers that the declared living expenses, which are generally intended to reflect the extent of a borrower's living expenses that they are unwilling to forgo<sup>7</sup>, cannot be less than the borrower's current living expenses (for example, as indicated on the borrower's bank statement).

### *Retrospective nature of complaints*

We recommend that AFCA further clarifies that when assessing complaints, AFCA considers the regulatory landscape and industry practice at the time the lending decision was made, and not the time of assessing the complaint.

### *Breach of financial firm's own policy*

COBA proposes that AFCA considers removal of this section. AFCA notes 'we will consider whether the breach is relevant to the firm's compliance with its responsible lending obligations'<sup>8</sup>. Therefore, unless the breach of policy is relevant to the other factors used to assess a financial firm's breach of responsible lending obligations, the policy itself will not determine a breach of a financial firm's obligations. In other words, the same obligations will apply if this section was not included in the consultation draft, and this will reduce the likelihood of confusion and duplication.

### *Serviceability buffers*

COBA notes that the industry does not conduct a full reassessment of loans when a loan rolls over from a fixed rate to a variable rate. It is unclear if AFCA contemplates this when it discusses interest rate buffers and it would be helpful to clarify AFCA's approach further.

### *Reducing Compensation due to complainant conduct*

COBA is concerned that AFCA considers it appropriate to compensate individuals who perpetrate a criminal offence (fraud) during the loan application process and subsequently claim that the loan was unsuitable. The general principle in law is that you cannot receive financial benefit from a crime, and therefore requiring credit providers to compensate borrowers who knowingly provide fraudulent or otherwise false and misleading information in order to obtain credit, is contrary to this established legal principle. The example on page 41 requires a substantial payment of compensation that is only discounted by 25% for providing fraudulent payslips that were not readily apparent to the credit provider. It is unclear how this ruling is consistent with AFCA's stated objective of doing what is 'fair in the circumstances' for both parties.

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<sup>7</sup> Refer *Australian Securities and Investments Commission v Westpac Banking Corporation* (Liability Trial) [2019] FCA 1244 [at 76] 'the only way one or more declared living expenses can be shown to be necessarily relevant to the issue of whether the consumer can afford to make repayments is by identifying some living expenses which simply cannot be foregone or reduced beyond a certain point'.

<sup>8</sup> AFCA, *The AFCA Approach to Responsible Lending- consultation draft*, page 21.

COBA considers that any circumstances where the complainant knowingly defrauds the respondent and that fraudulent conduct contributed to the loss claimed by the complainant then AFCA should dismiss the complaint and rule in favour of the respondent. The failure to do so simply rewards criminal behaviour.

If you wish to discuss this submission, please contact Ilana Madjar ([imadjar@coba.asn.au](mailto:imadjar@coba.asn.au)).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Michael Lawrence', with a stylized flourish at the end.

**MICHAEL LAWRENCE**  
Chief Executive Officer