

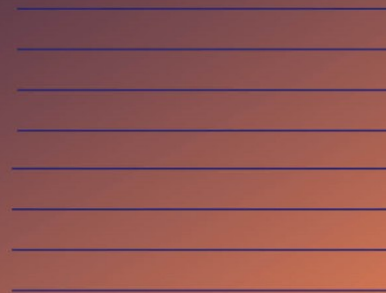


Australian Government  
The Treasury

# Review of the Australian Financial Complaints Authority

Report to the Minister for Superannuation, Financial Services and the Digital Economy, Minister for Women's Economic Security

August 2021





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**The Treasury**

# **REVIEW OF THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY**

**Report to the Minister for Superannuation,  
Financial Services and the Digital Economy,  
Minister for Women's Economic Security**

**August 2021**

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## TERMS OF REFERENCE

Section 4 of the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (the Act) requires the Minister to establish an independent review of the operation of the amendments made by the Act. The Act also requires the Minister to table the review report in the Parliament within 15 sitting days after receiving the report.

The Treasury is to undertake this review and is to report to the Minister for Superannuation, Financial Services and the Digital Economy by no later than 30 June 2021.

The review provides an opportunity for feedback on the operation of the Australian Financial Complaints Authority (AFCA) since its establishment and to consider whether further enhancements should be made to ensure the external dispute resolution (EDR) scheme is appropriately calibrated and operating effectively.

Legislation requires the review to consider whether AFCA has been effective in resolving complaints in a way that is fair, efficient, timely and independent. In doing so, the review will take account of feedback provided by consumers and small businesses and by financial firms.

Legislation also requires the review to examine the appropriateness of the monetary limits on claims that may be made to, and remedies that may be determined by, AFCA in relation to disputes about credit facilities provided to primary production businesses, including agriculture, fisheries and forestry businesses.

The increased internal dispute resolution (IDR) transparency changes made by the Act will not be considered by the review as these are currently being implemented, with time being provided to affected financial firms to make necessary system changes to collect standardised IDR data and the Australian Securities and Investments Commission to consult on and determine IDR reporting requirements.

## **GUIDANCE FOR SUBMISSIONS**

### **Delivering against statutory objectives**

1. Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?
  - 1.1 Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes?
  - 1.2 Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?
  - 1.3 Do AFCA's funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model?

### **Monetary jurisdiction in relation to primary production businesses**

2. Do the monetary limits on claims that may be made to, and remedies that may be determined by, AFCA in relation to disputes about credit facilities provided to primary production businesses, including agriculture, fisheries and forestry businesses remain adequate?

### **Internal review mechanism**

3. AFCA's Independent Assessor has the ability to review complaints about the standard of service provided by AFCA in resolving complaints. The Independent Assessor does not have the power to review the merits or substance of an AFCA decision.

Is the scope, remit and operation of AFCA's Independent Assessor function appropriate and effective?
4. Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? How should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?



## GLOSSARY

<b>Abbreviation</b>	<b>Definition</b>
AFCA	Australian Financial Complaints Authority
AFCA Act	<i>Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018</i>
APRA	Australian Prudential Regulation Authority
ASBFEO	Australian Small Business and Family Enterprise Ombudsman
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
CIO	Credit and Investments Ombudsman
Corporations Act	<i>Corporations Act 2001</i>
Credit Act	<i>National Consumer Credit Protection Act 2009</i>
EDR	External dispute resolution
FOS	Financial Ombudsman Service
IDR	Internal dispute resolution
OAIC	Office of the Australian Information Commissioner
Ramsay Review	Review of the financial system external dispute resolution and complaints framework
The Review	Review of the Australian Financial Complaints Authority (this review)
SCT	Superannuation Complaints Tribunal
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>

## EXECUTIVE SUMMARY

AFCA plays a critical role in providing consumers and small businesses with access to a binding, out-of-court dispute resolution service to hear and determine their complaints about financial firms. Financial firms also benefit from AFCA's dispute resolution service as an alternative to a court or tribunal process.

AFCA is tasked with providing an accessible and efficient ombudsman service that in turn promotes efficiency in the financial system. Consumers, small businesses and financial firms can participate in the financial system with confidence that a robust process is in place in the event of a dispute.

AFCA was the product of considered policy development through the 2017 *Review of the financial system external dispute resolution and complaints framework* and subsequently by the Government and the Parliament. AFCA's establishment, in November 2018, was a significant overhaul of the Australian financial services dispute resolution framework. This Review has provided an opportunity to seek feedback on AFCA's operation in its establishment phase, and to consider whether changes can be made to ensure the scheme is appropriately calibrated and operating effectively within the existing framework, rather than reopening AFCA's fundamental settings.

The Review has considered submissions received from current and former complainants, financial firms, consumer advocacy organisations, industry bodies and others, as well as detailed data on AFCA's operations. The Review has also benefited from an independent expert assessment of selected case studies.

In considering the submissions and information before it, the Review has taken an evidence-based approach and focused on whether there is evidence of systemic problems in AFCA's performance.

The overall finding of the Review is that AFCA is performing well in a difficult operating environment and a changing regulatory landscape. It has successfully brought together the three predecessor schemes – the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT) – to produce an effective dispute resolution service for consumers and small businesses. While this is an endorsement of its performance in its establishment phase, AFCA will need to continue to develop and improve its processes as it consolidates its place in the financial system.

The report begins with an examination of the context and background to the Review, an outline of AFCA's framework, and key data on AFCA's performance and operating environment.

The report then examines whether AFCA is resolving complaints in a fair, independent, efficient and timely manner, as well as jurisdictional matters, funding and fee structures, accountability and other matters.

The Review makes 14 recommendations in total. Most of the recommendations focus on enhancements to AFCA's transparency towards parties to a complaint, and improvements to decision making processes (in particular, the application of its fairness jurisdiction and timeliness to resolve disputes). The Review also makes recommendations regarding the desired objectives of AFCA's funding model and clarification of AFCA's role in its systemic issues function. The Review acknowledges that some of these recommendations may introduce additional costs for AFCA, which will ultimately be borne by its members, and these will need to be carefully considered by AFCA in designing and implementing the recommendations.

These recommendations are made in the first instance to AFCA to implement internally or through changes to its Rules or Operational Guidelines. However, the Review also notes that it remains open to

government to require AFCA to implement a number of these recommendations through legislative change or by amending AFCA's authorisation conditions. There is also one recommendation directed to government alone – to no longer require authorised credit representatives to hold AFCA membership.

*Is AFCA resolving complaints in a fair, independent, efficient and timely manner?*

AFCA's ombudsman model and its approach to making decisions based on what is fair in all the circumstances is, by design, very different to the approach taken by courts. Some respondents to this Review strongly endorsed this approach, while others took issue with it, particularly where it was used to make decisions that diverge from the relevant law, or where it was seen to hold financial firms to a higher standard than that required by the law or agreed contract terms.

It is unsurprising that there was dissatisfaction by some respondents with AFCA decisions where the outcome was not in their favour. Although some respondents to the Review raised concerns about AFCA's performance against the parameters of fairness, independence and efficiency, the Review did not identify evidence of any systemic failings or underperformance. Broadly, the Review finds that AFCA's decision making is fair, independent and efficient.

However, the Review finds that AFCA needs to exercise caution in the application of its fairness jurisdiction. The Review considers that in exercising its fairness jurisdiction when making decisions, AFCA should have primary regard to the four factors identified in its Rules – legal principles, industry codes, good industry practice and previous determinations.

Time, quality and cost are all important and need to be balanced by AFCA to provide an effective dispute resolution service. The Review identified some shortcomings in the timeliness of AFCA's resolution of complaints and recommends AFCA better manage users' expectations around timeframes, as well as focusing on improving the timeliness of complaints that remain unresolved beyond 12 months. In making this recommendation, the Review noted the challenges faced by AFCA in its first two years of operation, including the COVID-19 pandemic and initial complaint volumes exceeding expectations, and also the fact that there are often instances where the nature of the complaint and parties contribute to the time taken.

#### *Jurisdiction*

As they stand, AFCA's monetary limits and compensation caps are appropriate, particularly with respect to primary production disputes. Several respondents put forward proposals for increases to a number of the jurisdictional limits, but in the context of the intended roles for AFCA on the one hand and courts and tribunals on the other, there is insufficient evidence to recommend altering the limits.

However, the Review recommends AFCA exclude complaints from sophisticated or professional investors, unless there is evidence that they have been incorrectly or inappropriately classified.

#### *Funding and fee structures*

Ensuring a fair and sustainable fee structure is an important objective going forward. Many financial firms consider that AFCA's fee structure forces them to settle unmeritorious complaints.

AFCA's funding model should not disincentivise financial firms from defending complaints that they consider have no merit. The Review also recommends that the model better take into account the circumstances of AFCA members that are small businesses.

In broad terms, a fair and sustainable fee structure should incentivise early settlement of meritorious complaints without assisting unmeritorious complaints to succeed.

### *Accountability*

The Review does not consider further merits review of AFCA decisions is warranted. However, there are enhancements AFCA should pursue to some of its existing review mechanisms that preserve individual outcomes, including for those seeking to challenge a particular decision making approach with ongoing ramifications.

### *Other matters*

The report also covers AFCA's systemic issues function, the capability of AFCA staff and the issue of whether authorised credit representatives should be compulsory AFCA members.

Duplication of roles between AFCA and ASIC was a key issue raised by respondents in relation to AFCA's systemic issues function. The Review recommends that once a systemic issue has been referred to a regulator, AFCA should not be playing an active role in continuing an investigation of the systemic issue and should leave it to the regulator to take appropriate action as it sees necessary.

The Review is satisfied that AFCA currently has several strategies in place to develop and retain its staff but notes that regular reviews of staff capabilities are important going forward.

The Review recommends amending the *National Consumer Credit Protection Act 2009* to no longer require authorised credit representatives to be members of AFCA, as the requirement provides limited benefit in terms of enhanced consumer protection.

## **ACKNOWLEDGMENTS**

The Review recognises the unprecedented impact of the COVID-19 pandemic on consumers, financial firms and AFCA during the review period. The pandemic has presented many operational challenges for AFCA, with complaint volumes increasing and lockdowns impacting AFCA staff.

The Review has benefited from the diverse range of perspectives that respondents have brought to the process. Respondents who made a submission, as well as participants in roundtables held in March 2021, made many instructive contributions and showed a willingness to share their experiences, for which the Review is grateful. The Review also acknowledges the many individuals who have devoted considerable effort to share, via submissions, their stories of often distressing circumstances.

Finally, the authors wish to thank Ms Julie Dodds-Streeton QC and Mr Ahmed Terzic for their expert assessment of selected AFCA cases. This exercise tested respondents' assertions about what they identified as examples of poor practice or handling by AFCA, while providing important insights into AFCA's performance in key areas. In addition to submissions and evidence gathered through public consultation, and detailed data on AFCA's performance, this expert assessment was invaluable in informing the findings of the Review.

## LIST OF RECOMMENDATIONS

### IS AFCA RESOLVING COMPLAINTS IN A FAIR, INDEPENDENT, EFFICIENT AND TIMELY MANNER?

#### *Recommendation 1*

AFCA should provide clearer guidance on the circumstances under which a further issue identified during the complaint process would revert to financial firms for consideration through internal dispute resolution.

Where the issue is combined with an existing complaint, both parties should be provided with procedural fairness by having the opportunity to comment on changes to the scope of the complaint.

However, in instances where AFCA finds parties inappropriately seeking to add new issues, it should take action to dismiss or curtail such behaviour.

#### *Recommendation 2*

In making its decisions, AFCA should consider what is ‘fair in all the circumstances’ having primary regard to the four factors identified in its Rules – legal principles, industry codes, good industry practice and previous decisions.

#### *Recommendation 3*

AFCA should not advocate for, nor act in a manner that otherwise advantages, one party such that the impartiality of the complaints resolution process is compromised.

#### *Recommendation 4*

AFCA should address poor conduct by paid advocates affecting the efficiency of the scheme, such as by amending its Rules to allow it to exclude certain paid advocates from involvement in the complaints process. The Government could also consider an amendment to AFCA’s authorisation conditions to support such changes.

### *Recommendation 5*

AFCA should:

- continue to publish data on its timeliness and start publishing data on the full range of complaints it resolves, including those that extend beyond 12 months
- better manage expectations around timeframes in its communications with parties to a complaint
- focus on improving the timeliness of complaints that remain unresolved beyond 12 months.

## AFCA's jurisdiction

### *Recommendation 6*

AFCA should exclude complaints from sophisticated or professional investors, unless there is evidence that they have been incorrectly or inappropriately classified.

## Funding and fee structures

### *Recommendation 7*

AFCA's funding model should not disincentivise financial firms from defending complaints that they consider do not have merit and should better take into account the circumstances of small financial firms.

### *Recommendation 8*

AFCA should improve the transparency of its fees for financial firms and how the fees are being used to support AFCA's activities.

## Accountability

### *Recommendation 9*

AFCA determinations should continue to not be subject to merits review, but the substance of a determination should be reviewable with respect to its application to future cases. To this end, AFCA should enhance the visibility, accessibility and independence of its existing forward-looking review mechanism.

AFCA should amend its Operational Guidelines to remove the requirement for an applicant to demonstrate an error of law to access the formal forward-looking review mechanism. Applicants should be able to access it if they are able to demonstrate that the AFCA determination adopts an approach that could have a significant impact across a class of consumers, businesses or transactions.

*Recommendation 10*

Complaints about AFCA's service should remain the responsibility of the Independent Assessor. AFCA should improve the Independent Assessor's visibility as part of its communications with parties to a complaint.

*Recommendation 11*

AFCA should ensure consultation is undertaken on each Approach Document prior to final publication.

## Other matters

*Recommendation 12*

Where a systemic issue has been referred to ASIC or another regulator, AFCA should cease its investigation of the systemic issue. ASIC and other regulators should advise AFCA of the outcomes of the referrals they receive. However, AFCA should continue to resolve any relevant individual complaints.

*Recommendation 13*

AFCA should be more transparent in its public reporting of systemic issues, including on a de-identified basis as appropriate. This would encompass factors such as the industry to which the systemic issues relate, the nature of the complaints, the number of affected consumers, total value of remediation and reporting to the regulators.

*Recommendation 14*

The *National Consumer Credit Protection Act 2009* should be amended to no longer require authorised credit representatives to be members of AFCA.





# CHAPTER 1: CONTEXT AND BACKGROUND

## INTRODUCTION

- 1.1 This chapter provides context and background on the AFCA Review. It outlines the role that EDR plays in providing consumers and small businesses with access to a binding, out-of-court dispute resolution service to hear and determine complaints about financial firms. The chapter discusses the establishment of AFCA, the legislative requirements that underpin the Review, and the approach undertaken in completing the Review.

## EXTERNAL DISPUTE RESOLUTION IN THE FINANCIAL SYSTEM

- 1.2 The financial system has evolved rapidly since the 1980s and is one of the largest sectors in the Australian economy, with the financial and insurance services industry comprising around 9 per cent of Gross Value Added in 2019-20.<sup>1</sup> In the March quarter of 2021, the industry employed almost 500,000 people.<sup>2</sup>
- 1.3 The financial system's functions include providing credit and liquidity to households and businesses, assisting individuals to manage their savings, enabling effective risk management, delivering payment services and facilitating price discovery.<sup>3</sup>
- 1.4 In April 2016, the Government commissioned the *Review of the financial system external dispute resolution and complaints framework*. This comprehensive review was led by an independent expert panel chaired by Professor Ian Ramsay.
- 1.5 The Ramsay Review recognised that access to effective dispute resolution is critical to ensuring consumers are treated fairly and promoting confidence in the financial system.<sup>4</sup>
- 1.6 In Australia, industry ombudsman schemes have been a key forum for resolving disputes between consumers and financial firms, as they provide a faster, more cost-efficient service than courts and tribunals, which are difficult to access without legal representation.
- 1.7 The enactment of the *Financial Services Reform Act 2001* and the Credit Act required financial firms to be a member of an ASIC-approved industry ombudsman scheme to obtain and maintain a financial service or credit licence. This requirement is now limited to membership of AFCA, the EDR scheme for all financial complaints.

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1 Australian Bureau of Statistics (2019-20 financial year) *Australian System of National Accounts*, ABS website, accessed 27 July 2021.

2 Australian Bureau of Statistics (March 2021) *Labour Account Australia*, ABS website, accessed 27 July 2021.

3 The Treasury (2018) *Financial Services Royal Commission Background Paper 24: Submission on key policy issues*, the Treasury, Australian Government, 2018, p 3.

4 See Ramsay I, Abramson J and Kirkland A (2016) *Interim Report: Review of the financial system external dispute resolution and complaints framework*, pp 19–20.

- 1.8 Prior to the commencement of AFCA, ASIC approved eight EDR schemes to operate in the financial sector. Ultimately these were merged or renamed until there were two industry ombudsman schemes operating under the *Corporations Act 2001* (Corporations Act) and the Credit Act – FOS and CIO.<sup>5</sup>
- 1.9 Complaints about superannuation funds, annuities and deferred annuities, and retirement savings accounts were previously considered by the SCT.<sup>6</sup>

## ESTABLISHMENT OF AFCA

- 1.10 The Ramsay Review found that the EDR framework at that time was the product of history rather than design and gave rise to unnecessary duplication and consumer confusion. It also found that small businesses did not have effective access to redress and the dispute resolution arrangements for superannuation complaints were broken.<sup>7</sup> Extensive delays at the SCT meant that complainants and funds were missing out on many of the benefits seen in the ombudsman schemes, and existing pressures on the SCT were set to become more acute over time.<sup>8</sup>
- 1.11 The Panel made 11 recommendations, including the central recommendation to establish a new one-stop shop for all financial complaints, including superannuation complaints.<sup>9</sup>
- 1.12 On 9 May 2017, the Government announced that it accepted all 11 recommendations of the Ramsay Review and committed to create a new dispute resolution framework with the establishment of AFCA.<sup>10</sup>
- 1.13 On 23 April 2018, the then Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP authorised AFCA as the EDR scheme under the Corporations Act, following the passage of the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (AFCA Act).<sup>11</sup>
- 1.14 AFCA commenced operations on 1 November 2018 and replaced FOS, CIO and the SCT – known collectively as the predecessor schemes. This milestone was a significant overhaul of the Australian financial services dispute resolution framework.

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5 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, p 35; ASIC, *Dispute resolution*, ASIC website, n.d., accessed 27 July 2021. ASIC previously approved the Banking and Financial Services Ombudsman Limited, the Credit Ombudsman Service Limited, the Credit Union Dispute Resolution Centre Pty Limited, the Financial Co-operative Dispute Resolution Scheme, the Financial Industry Complaints Service Limited, the Insurance Brokers Disputes Limited, and the Insurance Ombudsman Service Limited, which all merged into FOS. ASIC also approved the Mortgage Industry Ombudsman Service Limited, which later became CIO.

6 ASIC, *Dispute resolution*, ASIC website, n.d., accessed 4 August 2021.

7 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 8–9.

8 See Ramsay I, Abramson J and Kirkland A (2016) *Interim Report: Review of the financial system external dispute resolution and complaints framework*, p 17.

9 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 14–17.

10 Morrison S (9 May 2017) *Building an accountable and competitive banking system* [media release], Treasurer.

11 AFCA Scheme Authorisation 2018.

- 1.15 At that time, open complaints with FOS and CIO were transferred to AFCA to be resolved under those predecessor schemes' rules. The SCT continued to resolve open complaints after this time and ceased operations at the end of 2020.<sup>12</sup>

## SCOPE OF THE REVIEW

- 1.16 The AFCA Act requires the Minister to cause a review of the AFCA scheme, as soon as practicable 18 months after the AFCA scheme begins receiving complaints. The AFCA Act also requires the Minister to table the review report in the Parliament within 15 sitting days after receiving the report.<sup>13</sup>
- 1.17 On 19 February 2021, the Minister for Superannuation, Financial Services and the Digital Economy, Senator the Hon Jane Hume released the terms of reference for the AFCA Review and invited interested stakeholders to provide feedback on AFCA's functions and performance.<sup>14</sup> The Review was not carried out earlier due to the COVID-19 pandemic.
- 1.18 Under the terms of reference, the Review is required to consider whether AFCA has been effective in resolving complaints in a way that is fair, efficient, timely and independent.
- 1.19 The terms of reference also require the Review to examine the appropriateness of monetary limits on the value of claims that may be made, and the value of remedies that may be determined under the AFCA scheme in relation to disputes about credit facilities provided to primary production businesses, such as agriculture, forestry or fisheries.
- 1.20 The scope of the Review as set out in the guidance for submissions included with the terms of reference is broader than what is required in the AFCA Act. In addition to focusing on the experience of complainants, the Review has also considered the feedback of AFCA members and industry stakeholders. This is in recognition of the impact and costs that AFCA decisions can also have on financial firms.

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12 AFCA (2020) *Annual Review 2019-20*, AFCA, p 125; ASIC (June 2018) *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority*, ASIC, p 5; AFCA (9 December 2020) *ASIC approves changes to AFCA Rules to assist transition of SCT complaints by 31 December 2020 deadline* [media release], AFCA.

13 AFCA Act, section 4.

14 Hume J (19 February 2021) *Review of the Australian Financial Complaints Authority* [media release], Minister for Superannuation, Financial Services and the Digital Economy.

- 1.21 The guidance for submissions also sought feedback from stakeholders on the following issues:
- whether AFCA’s funding and fee structures impact competition
  - the scope, remit and operation of AFCA’s Independent Assessor function
  - whether there is a need for an internal mechanism to review the substance of AFCA decisions
  - whether AFCA’s processes for identifying and responding to systemic issues are effective.<sup>15</sup>

## THE APPROACH UNDERTAKEN BY THE REVIEW

- 1.22 The Review has considered a range of feedback including from complainants, small businesses, financial firms, industry associations, consumer advocacy organisations and government agencies. A mixture of bilateral and roundtable meetings were held with over 70 stakeholders and 167 submissions were received.
- 1.23 The need for evidence to support opinions on AFCA’s performance was emphasised in the guidance for submissions and during stakeholder consultations. Stakeholders were also invited to provide specific case examples and case studies to support their submissions. Over 200 case examples were received by the Review.
- 1.24 The Review selected a sample set of these cases and engaged an independent expert, the Hon Julie Dodds-Streeton QC to assess the validity of the concerns raised by stakeholders within the themes of procedural fairness, consistency of outcome, apportioning liability and timeliness. These themes were selected as they represented some of the key concerns raised in submissions.
- 1.25 The Review has also considered material and data provided by AFCA, including AFCA-initiated surveys and reviews.
- 1.26 Further information on the case assessments and AFCA-initiated reviews and surveys is in Appendices A to C.

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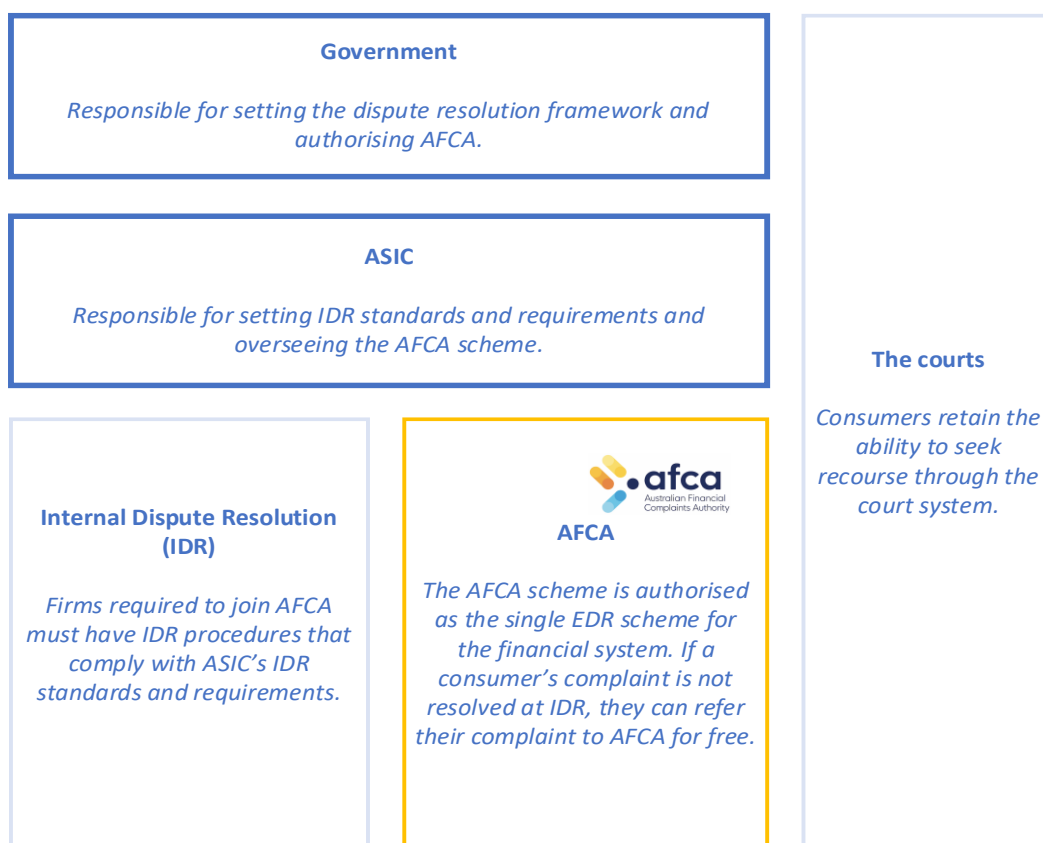
15 The Treasury (19 February 2021) *Review of the Australian Financial Complaints Authority: Terms of Reference and guidance for submissions*, the Treasury, Australian Government.

# CHAPTER 2: AFCA'S FRAMEWORK

## INTRODUCTION

- 2.1 This chapter outlines the role of the government, ASIC and AFCA in the EDR process. It also examines AFCA's governance framework and process for resolving complaints.
- 2.2 EDR is a key component of a broader dispute resolution framework for the financial system that consists of the government, ASIC, financial firm IDR, and the courts. AFCA is responsible for administering the authorised EDR scheme, which is also referred to as the AFCA scheme.

**Figure 2.1: Overview of the dispute resolution framework<sup>16</sup>**



## THE ROLE OF THE GOVERNMENT

- 2.3 The government is responsible for setting the EDR framework and for authorising AFCA as the EDR scheme under the Corporations Act.

<sup>16</sup> Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, p 33.

- 2.4 In authorising the AFCA scheme, the Minister was required to:
- be satisfied that the scheme meets certain organisational, operator, operational and compliance requirements, known as the mandatory requirements (see Appendix D)<sup>17</sup>
  - take into account the general considerations, which include the accessibility, independence, fairness, accountability, efficiency and effectiveness of the scheme.<sup>18</sup>
- 2.5 AFCA was authorised by the Hon Kelly O’Dwyer MP, then Minister for Revenue and Financial Services on 23 April 2018. AFCA is required to comply with the mandatory requirements and any additional conditions specified by the Minister because of this authorisation.
- 2.6 The Minister has the power to revoke or vary conditions of AFCA’s authorisation.<sup>19</sup> The Minister has varied AFCA’s authorisation on two occasions since its establishment:
- On 19 February 2019, the Government varied AFCA’s authorisation conditions to extend AFCA’s remit to consider legacy complaints dating back to 1 January 2008.<sup>20</sup>
  - On 21 April 2020, the Government varied AFCA’s authorisation conditions to give effect to the Government’s COVID-19 economic response in relation to small and medium enterprise lending.<sup>21</sup>

## THE ROLE OF ASIC

- 2.7 Under the Corporations Act, ASIC has an oversight role in relation to the AFCA scheme. This provides a level of assurance that AFCA will continue to comply with its mandatory requirements and the general considerations in the Corporations Act. It also ensures that material changes to the AFCA scheme, which can affect multiple stakeholder interests, are subject to ASIC approval.
- 2.8 ASIC has three main powers to perform this role:
- ASIC has the power to issue regulatory requirements, which relate to compliance with the mandatory requirements and any of the general considerations of the AFCA scheme.<sup>22</sup>
  - ASIC has the power to issue general directions if AFCA has not done all things reasonably practicable to ensure compliance with its relevant requirements and conditions.<sup>23</sup> ASIC can also issue directions to AFCA to increase monetary limits

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17 Corporations Act, subsections 1050(1) and 1051(1).

18 Corporations Act, section 1051A.

19 Corporations Act, subsections 1050(4) and (5).

20 *AFCA Scheme (Additional Condition) Amendment Authorisation 2019.*

21 *AFCA Scheme Authorisation (Additional Condition) Amendment 2020.*

22 Corporations Act, sections 1051 and 1052A.

23 Corporations Act, section 1052C.

and compensation caps, and to take measures to ensure operations are sufficiently financed.<sup>24</sup>

- ASIC must approve material changes to the AFCA scheme.<sup>25</sup>

2.9 ASIC’s guidance in Regulatory Guide 267 *Oversight of the Australian Financial Complaints Authority* sets out how ASIC oversees the AFCA scheme. It states that ASIC will approach its oversight responsibilities in a way that:

- ensures compliance with the mandatory requirements
- is consistent with the Ministerial authorisation and conditions
- respects the operational independence of AFCA
- supports AFCA to deliver independent, timely, and fair decisions for consumers and financial firms.<sup>26</sup>

2.10 Since commencement of the scheme, ASIC has issued two instruments under its regulatory requirement powers, requiring AFCA to amend its Rules without consultation. One instrument gives effect to the Government’s COVID-19 economic response in relation to small and medium enterprise lending.<sup>27</sup> The other closes a gap in AFCA’s jurisdiction, which was identified in the judgment in *DH Flinders Pty Ltd v Australian Financial Complaints Authority Limited* [2020] NSWSC 1690.<sup>28</sup>

2.11 ASIC has also approved material changes to the AFCA scheme to enable the scheme to name firms in published decisions and to extend refer-back timeframes during the COVID-19 pandemic.<sup>29</sup>

2.12 ASIC does not have the power to review or intervene in AFCA’s decision making processes or the outcomes of individual complaints.<sup>30</sup>

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24 Corporations Act, sections 1052B, 1052BA and 1052D.

25 Corporations Act, section 1052D.

26 ASIC (June 2018) *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority*, ASIC, p 14.

27 *ASIC Corporations (AFCA Scheme Regulatory Requirement) Instrument 2020/0433*.

28 *ASIC Corporations (AFCA Regulatory Requirement) Instrument 2021/0002*.

29 ASIC (2021) *Independent Review of the Australian Financial Complaints Authority: Submission by the Australian Securities and Investments Commission*, ASIC, p 4; AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 20. The ‘refer-back’ period is the time given to the financial firm to seek to resolve the complaint directly with the complainant before AFCA begins considering the complaint.

30 ASIC (2021) *Independent Review of the Australian Financial Complaints Authority: Submission by the Australian Securities and Investments Commission*, ASIC, p 4; Explanatory memorandum, Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017, [1.60].

## THE ROLE OF AFCA

- 2.13 The Australian Financial Complaints Limited is a company limited by guarantee that has been authorised by government to be the operator of the EDR scheme under the Corporations Act. As the operator, the Australian Financial Complaints Limited is known as AFCA.
- 2.14 AFCA's Board, discussed further below, is responsible for:
- ensuring AFCA complies with its mandatory requirements in legislation, any conditions on its authorisation and any regulatory requirements imposed by ASIC
  - appointing AFCA decision makers
  - appointing the Independent Assessor
  - commissioning independent reviews of the scheme
  - reporting publicly and to ASIC.<sup>31</sup>
- 2.15 The AFCA Board therefore plays an important front-line role in ensuring that the AFCA scheme delivers on its legislative objectives.
- 2.16 AFCA assists consumers and small businesses to reach agreements with financial firms about how to resolve their complaints. AFCA's service is offered as an alternative to tribunals and courts to resolve complaints that are not resolved directly by the firm in the first instance. Complainants are not obliged to use AFCA's service and retain the option to institute court proceedings or use any other available dispute resolution forum instead.
- 2.17 AFCA considers complaints about:
- credit, finance and loans
  - insurance
  - banking deposits and payments
  - investments and financial advice
  - superannuation.
- 2.18 AFCA is required by legislation to operate in a way that is accessible, independent, fair, accountable, efficient and effective.
- 2.19 AFCA is only able to receive complaints about financial firms that are members of AFCA. At the end of October 2020, AFCA had a total of 40,334 members, of which 10,697 were licensee financial firms and 29,637 were authorised credit representatives.<sup>32</sup>
- 2.20 All financial services licensees, credit licensees, authorised credit representatives and superannuation trustees are required to be members of AFCA under the Corporations Act,

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31 ASIC (June 2018) *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority*, ASIC, p 15.

32 AFCA (4 March 2021), material supplied to the Review.



- Credit Act and *Superannuation Industry (Supervision) Act 1993* (SIS Act).<sup>33</sup> Other firms may also choose to join AFCA voluntarily, including firms operating under an exemption.<sup>34</sup> In either case, the AFCA Rules form part of a contract between AFCA, financial firms and complainants.<sup>35</sup>
- 2.21 Typically, AFCA will only be able to consider a complaint if it is made within six years after the complainant first became aware, or should reasonably have become aware, that they suffered the loss to which the complaint relates. Further, if the complainant has already complained to their financial firm through its IDR process, they need to lodge the complaint with AFCA within two years of getting an IDR response from their financial firm.<sup>36</sup>
- 2.22 AFCA uses informal and formal methods to resolve complaints. Informal methods include negotiation and conciliation. If informal methods do not work, or there is a reason to progress the matter without considering these options, AFCA will use formal methods to resolve complaints. This can involve a preliminary assessment and/or a determination.<sup>37</sup>
- 2.23 The determinations that AFCA makes are binding on members of the scheme (if accepted by the complainant), but not binding on complainants. Complainants retain their rights of private action where they do not accept an AFCA determination. However, any determinations made by AFCA relating to superannuation complaints are binding on both parties.<sup>38</sup>
- 2.24 For non-superannuation complaints, AFCA determinations may not be appealed, other than a limited ability for judicial review by the courts.<sup>39</sup>
- 2.25 An AFCA superannuation determination can be appealed by either party to the Federal Court on an error of law. The Federal Court can affirm, substitute or remit such a determination to the scheme.<sup>40</sup>
- 2.26 AFCA can award compensation for losses suffered because of a financial firm's error or inappropriate conduct. AFCA does not, however, award compensation to punish financial

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33 In detail, the requirement to hold AFCA membership applies to all Australian financial services licensees, unlicensed product issuers, unlicensed secondary sellers, credit providers, credit representatives, retirement savings account providers and trustees of regulated superannuation funds (other than self-managed superannuation funds) and approved deposit funds. A trustee of an exempt public sector superannuation scheme is not required to be a member of the AFCA scheme, but can elect to do so. Corporations Act, paragraphs 912A(2)(c) and 1017G(2)(c); Credit Act, paragraphs 47(1)(i), 64(5)(c) and 65(6)(c); SIS Act, paragraph 101(1)(a); Retirement Savings Accounts Act 1997, paragraph 47(1)(a); Explanatory memorandum, Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017, [1.176]–[1.177].

34 ASIC (June 2018) *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority*, ASIC, p 9.

35 AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rule A.1.2; AFCA (1 March 2018) *Australian Financial Complaints Limited Constitution*, AFCA, paragraph 12.1(d).

36 AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rule B.4.3.

37 AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rules A.8.1–A.8.2; AFCA (n.d.) *The process we follow*, AFCA website, accessed 6 August 2021.

38 Corporations Act, paragraph 1051(4)(e); AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rules A.15.1–A.15.4; AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 75; Explanatory Memorandum, Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017, [1.179]

39 Corporations Act, paragraph 1051(4)(e); AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rule A.15.3; AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 75; *Investors Exchange Limited v Australia Financial Complaints Authority Limited* [2020] QSC 74, [12]–[39].

40 Corporations Act, section 1057.

- firms or impose fines.<sup>41</sup> The maximum amounts that may be awarded by AFCA for complaints other than superannuation complaints are outlined in Appendix E.
- 2.27 There is no monetary limit for superannuation complaints. AFCA does not award compensation per se for superannuation complaints, but rather determines a remedy to place the complainant as nearly as practicable in a position that any unfairness or unreasonableness no longer exists. There is no limit on the value of the remedy AFCA may determine.<sup>42</sup>
- 2.28 If a financial firm fails to comply with an AFCA determination, AFCA may choose to revoke the firm's membership with AFCA. This would mean the firm is in breach of its financial services or credit licence obligations.<sup>43</sup>
- 2.29 Depending on the circumstances, a failure by a financial firm to comply with the AFCA Rules (which as mentioned above form a binding contract) can result in expulsion as an AFCA member and reporting to ASIC.<sup>44</sup>
- 2.30 AFCA is not a government department or agency, and it is not a regulator of the financial services industry.
- 2.31 However, AFCA is required to report certain matters to regulators – ASIC, the Australian Prudential Regulation Authority (APRA) and the Australian Taxation Office (ATO) – including where a serious contravention of the law may have occurred, and to identify, refer and report systemic issues.<sup>45</sup>
- 2.32 Regulatory Guide 267 sets out ASIC's guidance on these reporting requirements, including that reports are to be made within 15 days. The guidance states:
- The primary purpose of the reporting requirement in [section 1052E of the Corporations Act] is to require AFCA to give information to a regulator so that it may consider whether regulatory action—beyond the resolution of any underlying complaints—is necessary.<sup>46</sup>

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41 AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 5.

42 AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, pp 153–154; Corporations Act, paragraph 1051(4)(f) and subsections 1056(4) and (5).

43 AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 78.

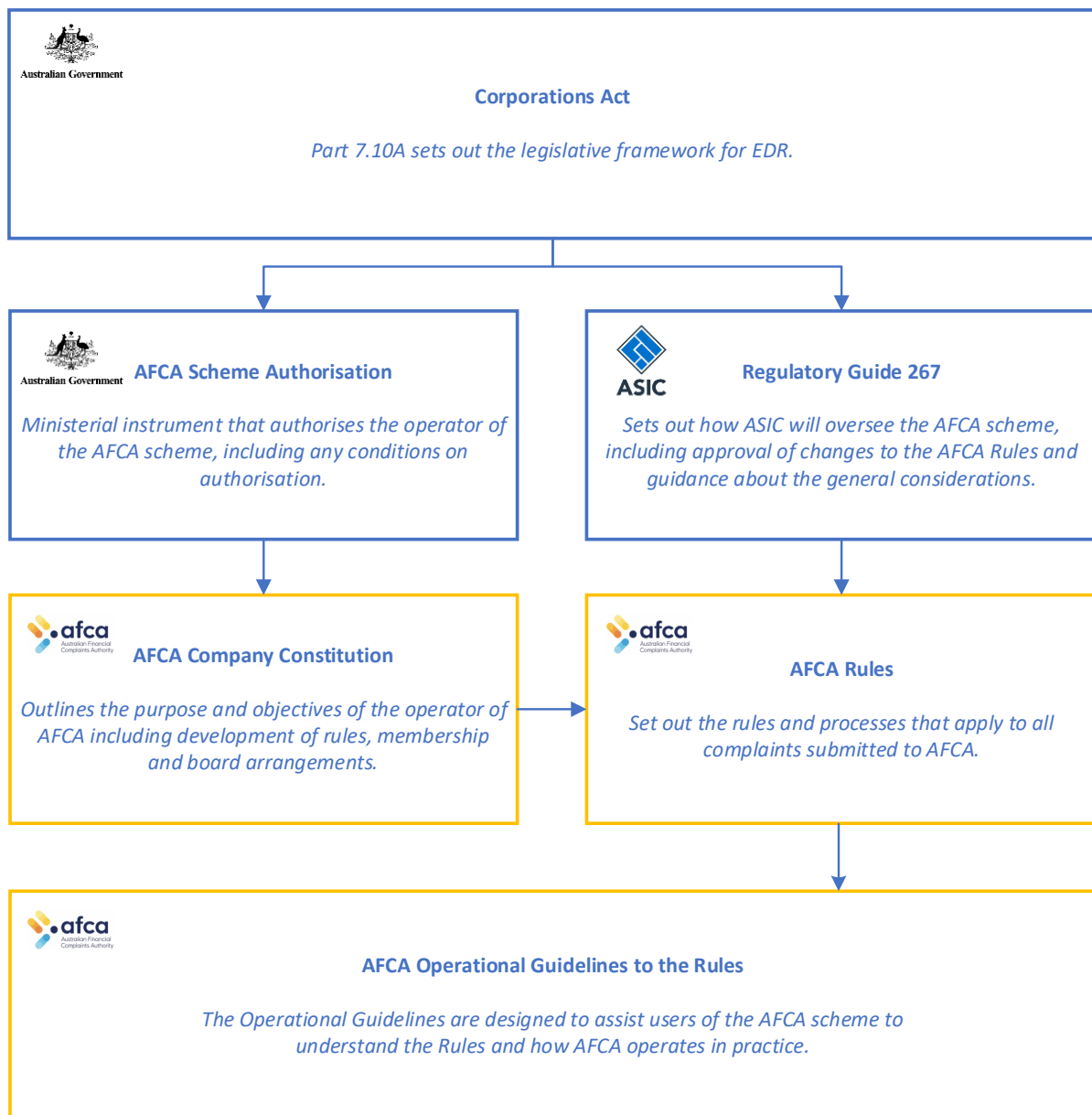
44 AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 87; AFCA (1 March 2018) *Australian Financial Complaints Limited Constitution*, AFCA, clause 3.4.

45 Corporations Act, section 1052E.

46 ASIC (June 2018) *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority*, ASIC, p 18.

## How is AFCA governed?

**Figure 2.2: Overview of the AFCA framework**



- 2.33 As illustrated in Figure 2.2, AFCA’s operations are governed by a company constitution, the AFCA Rules and the Operational Guidelines. These documents are available on AFCA’s website.
- 2.34 The company constitution outlines the purpose and objectives of AFCA, including how the Rules and processes are developed, agreed and implemented. It also outlines membership arrangements, board arrangements and director appointments, powers and duties.<sup>47</sup>
- 2.35 AFCA is a not-for-profit company limited by guarantee. It is governed by a board of directors, which includes equal numbers of industry and consumer directors. The Chair of the Board is required to be an independent person.<sup>48</sup>

47 AFCA (n.d.) *AFCA constitution*, AFCA website, accessed 27 July 2021.

48 AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 5.

- 2.36 The then Minister for Revenue and Financial Services appointed the inaugural Chair of the Board and four directors. However, the company constitution provides that all subsequent appointments are a decision for the AFCA Board.<sup>49</sup>
- 2.37 AFCA's Chief Ombudsman is responsible for the management of the organisation.<sup>50</sup>
- 2.38 The Rules set out the requirements and processes that apply to all complaints submitted to AFCA. They include what complaints AFCA can consider, procedures it can use to resolve those complaints, remedies it can provide and related matters such as reporting obligations. The Rules are approved by ASIC, in accordance with the requirements of the Corporations Act.<sup>51</sup>
- 2.39 The Operational Guidelines to the Rules are designed to assist users of AFCA to understand the Rules and how AFCA operates in practice by explaining in more detail how AFCA interprets and applies its Rules when considering complaints.

## AFCA's complaint resolution process

- 2.40 The stages in AFCA's complaint resolution process are illustrated in Figure 2.3 below.

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49 AFCA (1 March 2018) *Australian Financial Complaints Limited Constitution*, AFCA, clauses 4.1–4.2; AFCA (n.d.) *The AFCA Board*, AFCA website, accessed 13 July 2021.

50 AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 5.

51 AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, p 3; AFCA (n.d.) *Rules and guidelines*, AFCA website, accessed 6 August 2021.

**Figure 2.3: AFCA complaint resolution points<sup>52</sup>**

**Registration and Referral:** the complaint is resolved directly by a financial firm with the complainant and AFCA is notified of the resolution before it progresses to case management.

**Rules Review:** the complaint is assessed as outside AFCA's jurisdiction (in accordance with AFCA's Rules) before it progresses to case management.

**Case Management 1:** the complaint is resolved early in case management before or directly after initial contact and correspondence, without additional AFCA consideration.

**Case Management 2:** the complaint is resolved, normally through negotiation or facilitated discussions between the parties, before progressing to a preliminary assessment or decision.

**Case Management Conciliation:** the complaint is resolved after a conciliation conference is conducted and before progressing to a preliminary assessment or decision.

**Preliminary View:** the complaint is resolved after both parties accept AFCA's preliminary assessment on the merits of the complaint. A preliminary assessment may be provided through a written recommendation or a verbal or other written preliminary view, without the need for the complaint to proceed to a decision. Complaints that have been progressed to preliminary view may also be finalised at this status through a negotiated or conciliated resolution, prior to a preliminary assessment being issued.

**Decision:** the complaint is resolved as a result of a determination made by an adjudicator, ombudsman, or panel. Complaints that have been progressed for a determination to be issued may also be finalised at this status through a negotiated or conciliated resolution, or assessed as outside the Rules, prior to a determination being issued. Complaints may also be expediated directly to a determination without a preliminary assessment being provided.

- 2.41 As detailed in the process map in Appendix F, once a decision is made to consider a complaint, AFCA will place it in either a fast track, standard, complex or financial difficulty pathway.
- 2.42 The fast-track process is used for single-issue, low-value complaints that generally do not require detailed investigations. This process is considered suitable for fast information-gathering and negotiations or decisions. It is not applied to financial difficulty or legacy complaints.<sup>53</sup>
- 2.43 The standard process is applied to complaints that require AFCA to investigate, gather and consider more information to deal with the complaint issues. They generally involve straightforward issues and may be more likely to be resolved by agreement through negotiation, conciliation or as a result of an early assessment of a complaint's merit.<sup>54</sup>
- 2.44 The complex process is for complaints that generally require detailed investigations and considerations. These complaints may involve a range of issues and are less likely to be resolved by agreement through informal methods and are more likely to require a decision by AFCA.<sup>55</sup>

52 AFCA (1 March 2021), material supplied to the Review.

53 AFCA (n.d.) *Guideline to Workflow Criteria*, AFCA, p 1.

54 AFCA (n.d.) *Guideline to Workflow Criteria*, AFCA, p 2.

55 AFCA (n.d.) *Guideline to Workflow Criteria*, AFCA, p 3.



# CHAPTER 3: KEY AFCA DATA

## INTRODUCTION

- 3.1 This chapter sets out the data on AFCA’s performance and operating environment, to provide context for the analysis in the remaining chapters of this report. It covers membership, resourcing, complaint volumes, dispute resolution, service complaints and identification of systemic issues.
- 3.2 The chapter presents the data without analysis, but subsequent chapters address the significance of the data to the topics they discuss.
- 3.3 This chapter draws from information provided to the Review by AFCA, as well as publicly available information.

## MEMBERSHIP

### AFCA’s membership base

- 3.4 All Australian credit licensees and Australian financial services licensees, including superannuation trustees, are required to be members of AFCA under the Corporations Act, Credit Act and SIS Act. This chapter refers to them as ‘licensee members’ to distinguish them from authorised credit representatives, who are also required to individually hold AFCA membership.
- 3.5 At the end of October 2020, AFCA had a total of 40,334 members. Of these, one quarter (10,697) were licensee members, while the remainder (29,637) were authorised credit representatives.<sup>56</sup> Chapter 8 discusses authorised credit representatives in more detail.

### Data on licensee members

- 3.6 AFCA collects data on licensee members by sales/service channel, as self-reported by the firms. Figure 3.1 presents the top 10 sales/service channels by number of complaints in the first two years of AFCA’s operation.

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56 AFCA (4 March 2021), material supplied to the Review.

**Figure 3.1: Top 10 sales/service channels by total number of complaints, 1/11/18 – 31/10/20<sup>57</sup>**

Sales/service channel		Complaints	Sales/service channel		Complaints
1.	Bank	53,442	6.	Underwriting agency	4,417
2.	General insurer	30,311	7.	Life insurer	3,851
3.	Credit provider	19,981	8.	Non-cash payment system provider	3,489
4.	Superannuation fund trustee / adviser	11,170	9.	Financial adviser / planner	2,476
5.	Debt collector or buyer	5,168	10.	Managed investment scheme operator / fund manager	2,062

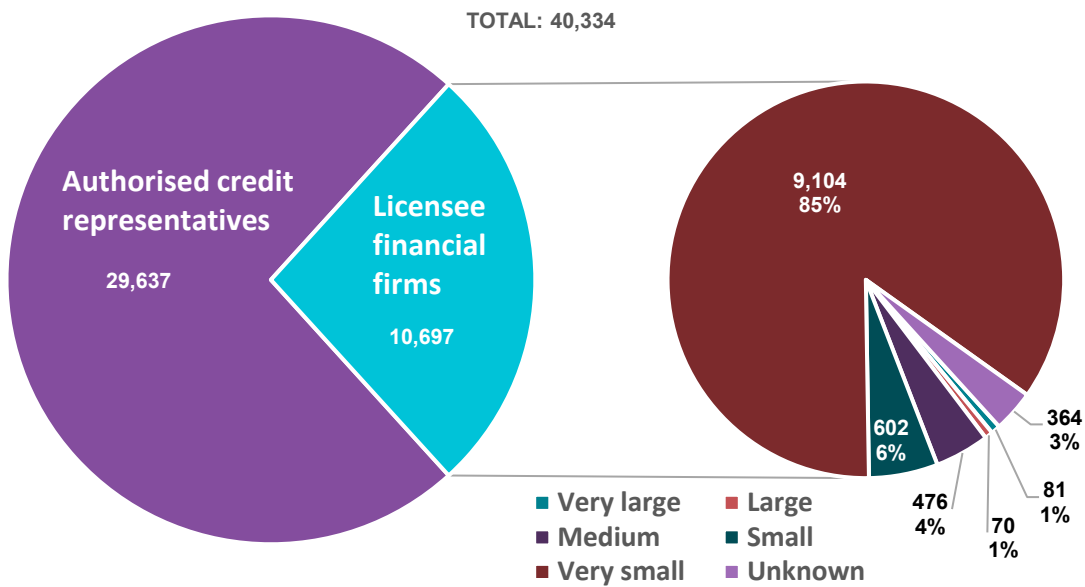
- 3.7 AFCA categorises licensee members by size as part of calculating membership levies and for comparative reporting purposes.
- 3.8 All AFCA members, except superannuation trustees, complete an annual business size assessment as part of their membership, which uses metrics such as employee numbers, size of loan portfolios and funds under management.<sup>58</sup>
- 3.9 Figure 3.2 shows that even among the licensee cohort, which excludes authorised credit representatives, the vast majority of members are very small (85 per cent). In comparison, of its licensee members in 2015-16, FOS classified 78 per cent as very small and a further 10 per cent as small. In the same year, around 97 per cent of CIO's members were sole traders, partnerships or small businesses.<sup>59</sup>

<sup>57</sup> AFCA (4 March 2021), material supplied to the Review.

<sup>58</sup> AFCA (12 March 2021), material supplied to the Review.

<sup>59</sup> Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 48, 65. Percentages in this chapter are expressed to the nearest whole percentage point, except for figures smaller than 1 per cent.



**Figure 3.2: AFCA's membership as at 31/10/20<sup>60</sup>**

Note: Membership by licensee financial firms is broken down into size categories.

## Fees charged to AFCA members

3.10 AFCA is member-funded on a cost recovery basis. Its services are free of charge to small businesses and consumers who make a complaint. AFCA members, other than superannuation trustees, pay the following categories of fees:

- Members pay a **membership levy** to be a member of AFCA, which covers a full financial year of AFCA membership. The amount an individual member pays each year is determined by a range of factors, including the relative size of the member's business compared with other AFCA members. In 2020-21, the minimum financial firm membership levy was \$370 and the credit representative membership levy was \$65.
- The **user charge** is calculated and proportionately allocated to members annually. It is based on the budgeted annual user charge amount, which is then apportioned to relevant members based on their proportion of complaints closed in the preceding 12-month period and the stage at which they are closed as a proportion of total complaints closed in the period. Members who have only one, or no, complaints closed in the relevant 12-month period do not incur a user charge.
- The **complaint fee** for a particular complaint is based on the stage in the process at which the complaint is resolved and the complexity of the complaint if it progresses beyond the initial investigation stage.<sup>61</sup>

3.11 In the first two years of AFCA's operation, fewer than 20 per cent of licensee members had complaints lodged against them.<sup>62</sup>

60 AFCA (4 and 12 March 2021), material supplied to the Review.

61 AFCA (n.d.) *Funding Model: Fact Sheet: From 1 July 2018*, AFCA; AFCA (June 2020) *Changes to fees and charges 2020-21*, AFCA; AFCA (15 July 2021), material supplied to the Review.

62 AFCA (4 March 2021), material supplied to the Review.

3.12 Superannuation trustees pay a single **superannuation levy** each financial year that is based on the projected annual number of superannuation complaints and associated complaint costs, and a proportional contribution to AFCA’s indirect costs not covered by complaint fees. The levy is divided between trustees based on their size and was increased by 10 per cent in 2020-21 compared to the previous year as a result of a projected increase in superannuation complaints and a Consumer Price Index adjustment.<sup>63</sup>

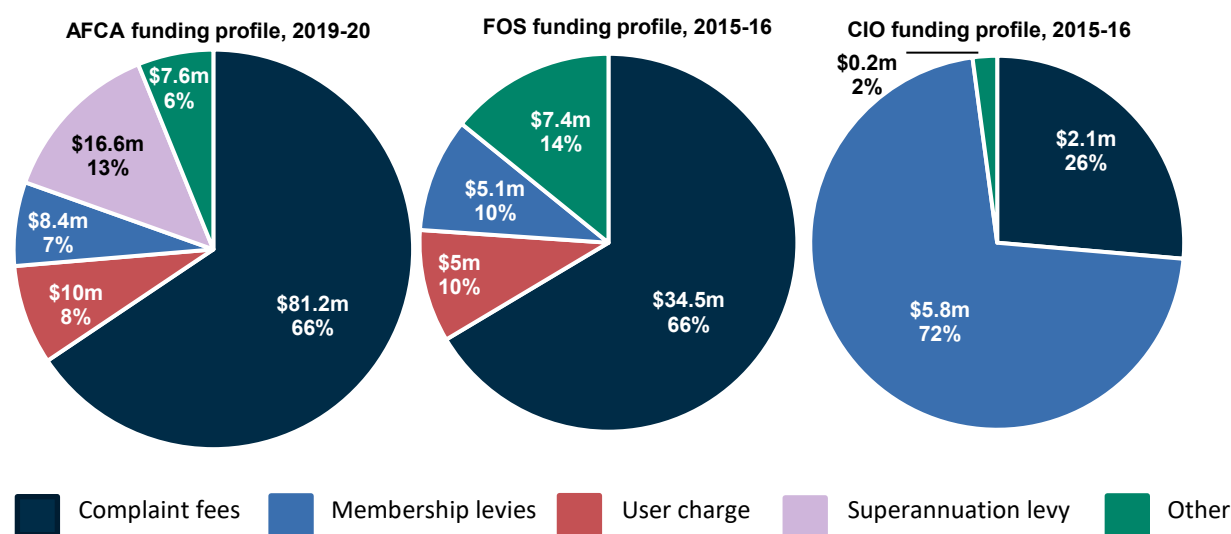
## RESOURCING

### Funding sources

3.13 Figure 3.3 compares AFCA’s funding profile with that of FOS and CIO. The funding sources for FOS had a similar composition to AFCA’s, with both relying principally on complaint fees. CIO had the reverse composition – a far greater reliance on membership levies over complaint fees.<sup>64</sup>

3.14 The SCT was funded through an annual appropriation from government, which was then cost recovered via the annual financial sector levies paid by APRA-regulated superannuation funds to APRA.<sup>65</sup>

**Figure 3.3: Funding profiles for AFCA, FOS and CIO<sup>66</sup>**



63 AFCA (June 2020) *Changes to fees and charges 2020-21*, AFCA.

64 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 61, 62, 74; AFCA (2020) *General Purpose Financial Report for the financial year ended 30 June 2020*, AFCA, p 33.

65 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, p 87.

66 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 61, 62, 74; AFCA (6 May and 3 June 2021), material supplied to the Review; AFCA (2020) *General Purpose Financial Report for the financial year ended 30 June 2020*, AFCA, p 33. The ‘other’ category for AFCA includes CIO legacy complaint fees, systemic issue fees, code compliance recoupment, government grants and interest income.

3.15 Figure 3.4 shows the composition of AFCA's levy and complaint revenue in 2019-20, broken down by fee type and member size.

**Figure 3.4 AFCA's levy and complaint revenue in 2019-20**

Size	Complaint fees	%	Membership levy	%	User charge	%	Superannuation levy	%	Total	%
Very small	\$10.1m	12	\$4.0m	48	\$0.8m	8	<\$0.1m	0	\$14.9m	13
Small	\$3.1m	4	\$0.3m	4	\$0.3m	3	\$2.8m	17	\$6.5m	6
Medium	\$11.3m	14	\$1.3m	15	\$1.3m	13	\$2.9m	18	\$16.9m	15
Large	\$8.5m	10	\$0.8m	10	\$1.1m	11	\$4.2m	25	\$14.6m	13
Very large	\$48.2m	59	\$1.9m	23	\$6.5m	65	\$6.7m	41	\$63.4m	55
Total	\$81.2m	100	\$8.4m	100	\$10.0m	100	\$16.6m	100	\$116.2m	100

Note that this excludes \$7.6m from other sources of revenue including CIO legacy complaint fees, systemic issue fees, code compliance recoupment, government grants and interest income.<sup>67</sup>

3.16 Figure 3.4 includes fees paid by authorised credit representatives, who paid a standard annual membership levy of \$60 in 2019-20 and fall within the very small size category. As a group, they paid \$1.6m in membership levies and \$0.1m in complaint fees.<sup>68</sup>

3.17 Chapter 6 discusses AFCA's funding and fee structures in more detail.

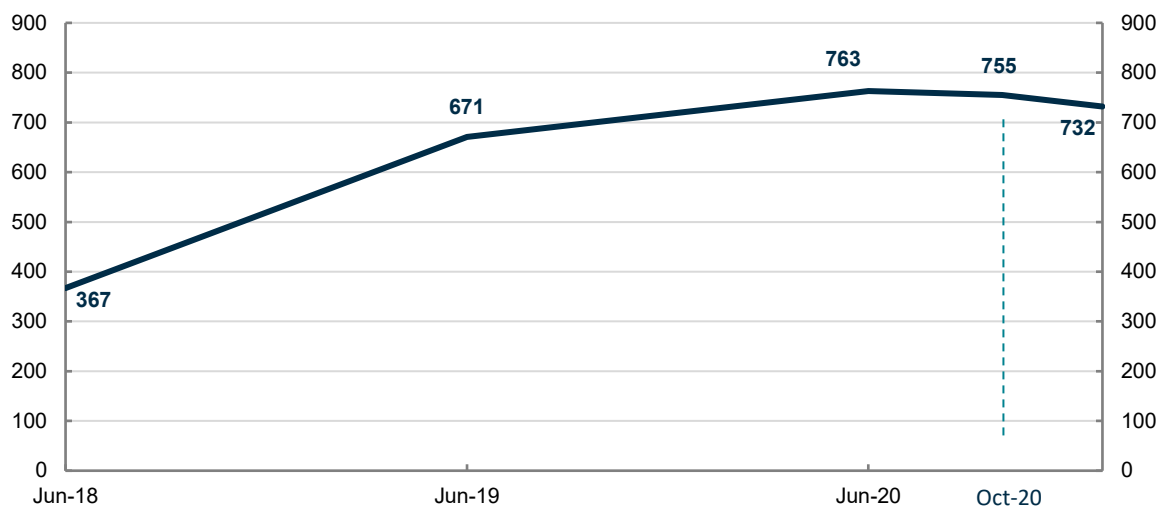
67 AFCA (6 May 2021), material supplied to the Review. Amounts rounded to nearest \$0.1m.

68 AFCA (6 May and 3 June 2021), material supplied to the Review. See paragraph 8.59 in relation to the contribution of authorised credit representatives.

## Staff numbers

3.18 As at 31 October 2020, AFCA had 782 employees, working a full-time equivalent load of 755 employees.<sup>69</sup>

**Figure 3.5: AFCA full-time equivalent staff – June 2018 to January 2021<sup>70</sup>**



3.19 The figure for June 2018 represented previous FOS staff that transferred to AFCA employment in May 2018, prior to AFCA commencing operations in November 2018. That figure excludes CIO staff (who transferred to AFCA in September 2018) and staff employed subsequently for AFCA’s superannuation jurisdiction. The June 2018 figure also does not include additional staff employed to deal with increased complaint volumes from November 2018.<sup>71</sup>

3.20 These staff numbers compare to 317 full-time equivalent staff for FOS and 59 full-time equivalent staff for CIO in 2015-16. The SCT had 32 employees in 2015-16.<sup>72</sup>

## Staff skills and qualifications

3.21 AFCA noted its staffing profile includes legal qualifications, accounting and economics qualifications, and financial planning certification. AFCA also noted its employees generally have industry experience in the area in which they work, either directly or in advising those in the industry.<sup>73</sup>

3.22 Over 96 per cent of AFCA ombudsmen hold a law degree and are admitted as a lawyer with a supreme court. AFCA describes the remaining 4 per cent as holding relevant qualifications, including commerce and economics degrees and dispute resolution and mediation accreditation.<sup>74</sup>

69 AFCA (4 March 2021), material supplied to the Review.

70 AFCA (4 and 5 March 2021), material supplied to the Review.

71 AFCA (5 March 2021), material supplied to the Review.

72 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 51, 67, 88.

73 AFCA (4 March 2021), material supplied to the Review.

74 AFCA (21 April 2021), material supplied to the Review.

**Figure 3.6: AFCA’s description of the qualifications of its staff working in case management, jurisdiction and technical specialist teams<sup>75</sup>**

<b>Qualifications of AFCA’s case managers and technical specialists</b>	
Banking and finance	Almost 80% hold a legal, financial planning, accounting, or relevant finance, banking or business degree/professional qualification
Financial difficulty and conciliation	85% hold a legal, financial planning, psychology, financial counselling or relevant finance, business degree or mediation accreditation
Insurance	85% hold a legal, accountancy, commerce or relevant finance, business degree or professional qualification
Investments and advice	95% hold a legal, financial planning, accountancy or relevant economics, finance, business degree or professional qualification
Superannuation	Over 75% hold a legal, financial planning or relevant financial or business degree/professional qualification

3.23 Chapter 8 discusses capabilities of AFCA’s staff in more detail.

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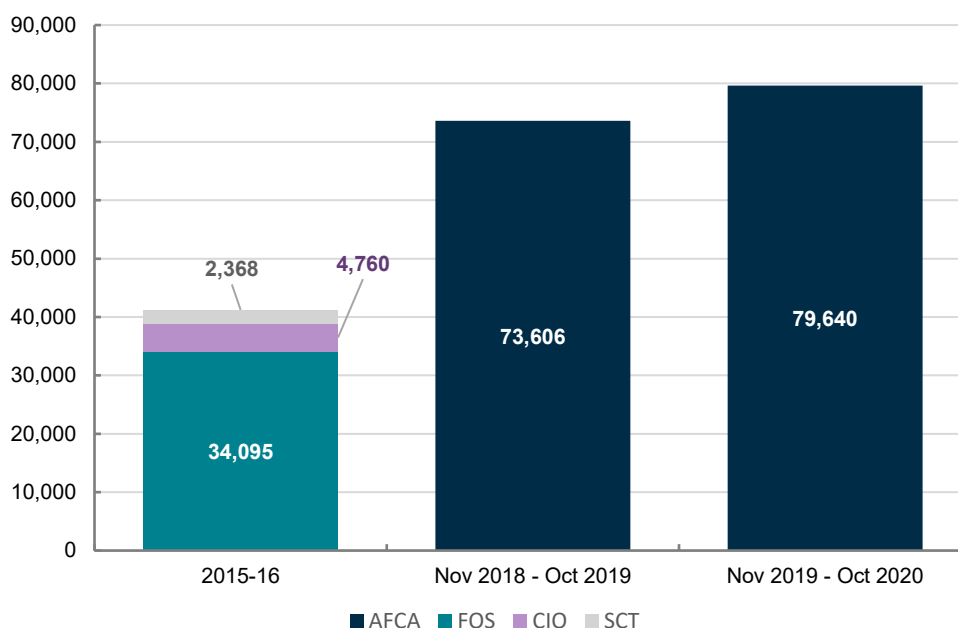
75 AFCA (21 April 2021), material supplied to the Review.

## COMPLAINT VOLUMES

### Total complaints received

3.24 AFCA received 153,246 complaints in its first two years of operation.<sup>76</sup> Figure 3.7 compares these two years and complaints received by the predecessor schemes in 2015-16.

**Figure 3.7: Total number of complaints received<sup>77</sup>**



3.25 AFCA identified its expanded legacy jurisdiction, natural disasters and the pandemic as contributing factors to the 8 per cent increase in the second year.<sup>78</sup>

### Complaints closed

3.26 The number of complaints that AFCA closed in those first two years were 66,834 and 79,390 complaints respectively, totalling 146,224 complaints. AFCA identified the 19 per cent increase in the second year as ‘reflecting AFCA’s increased capacity and investment in staffing to deal with higher complaint volumes received’.<sup>79</sup>

3.27 AFCA closes a complaint when it has been resolved, either by agreement (68 per cent of complaints in November 2018 to October 2020), by accepted preliminary assessment (4 per cent) or by determination (6 per cent). Additionally, AFCA may close a complaint if it is discontinued by the complainant (5 per cent), if the complainant fails to respond to

<sup>76</sup> AFCA (2021) *Two year report: 1 November 2018 to 31 October 2020*, AFCA, p 4.

<sup>77</sup> AFCA (4 March 2021), material supplied to the Review; Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 49, 65, 78.

<sup>78</sup> AFCA (4 March 2021), material supplied to the Review.

<sup>79</sup> AFCA (4 March 2021), material supplied to the Review. This data includes complaints received by FOS and CIO before 1 November 2018 that AFCA resolved.

multiple requests or contact attempts by AFCA (5 per cent), or if it is outside the scheme Rules (11 per cent).<sup>80</sup>

- 3.28 This compares with 8 per cent of disputes closed by FOS in 2015-16, and 0.2 per cent of CIO disputes being resolved with a determination in the same period. Of the complaints that were within the SCT's jurisdiction, 87 per cent were resolved during investigation or conciliation and 13 per cent by determination in 2015-16.<sup>81</sup>

## Compensation awarded

- 3.29 Compensation provided on closed complaints in the first two years of AFCA's operation totalled \$477.4 million and remediation on closed systemic issues totalled \$202.2 million.<sup>82</sup>

## Complaints excluded

- 3.30 In its first two years of operation, AFCA excluded 15,141 complaints because they were outside of AFCA's Rules, representing 10 per cent of the total number of complaints received (or 11 per cent of complaints closed) in that period. Most of those exclusions (87 per cent) occurred in the Rules review stage. The most common reason for exclusion was that a financial service was not provided (4,845 instances).<sup>83</sup>
- 3.31 In terms of exclusions involving monetary limits, there were 74 instances of a claim exceeding \$1 million and 26 instances of a small business credit facility exceeding \$5 million.<sup>84</sup>
- 3.32 There were 68 instances where the complaint being frivolous, vexatious, misconceived or lacking in substance was a specific reason for exclusion. More broadly, complaints without merit or that do not warrant further investigation can also be closed under AFCA's general discretion to exclude.<sup>85</sup>
- 3.33 These statistics compare to 17 per cent of disputes received by FOS, 11 per cent of disputes received by CIO and 35 per cent of complaints received by the SCT falling outside the schemes' jurisdiction in 2015-16.<sup>86</sup>

## Consumers, small businesses and primary producers

- 3.34 The majority of complaints to AFCA are lodged by consumers. Across the first two years of AFCA's operation, approximately 94 per cent of complaints were lodged by consumers (144,256) and 6 per cent by small businesses (8,910). Primary producers lodged

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80 AFCA (4 March 2021), material supplied to the Review. This data includes complaints initially received by FOS and later closed by AFCA. CIO complaints later closed by AFCA are excluded because the data was structured differently. AFCA explains that there is minimal impact to the overall information, as complaints received by CIO represent fewer than 2 per cent of closures.

81 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 54, 69, 82.

82 AFCA (4 March 2021), material supplied to the Review. This includes complaints initially received by FOS and later closed by AFCA.

83 AFCA (4 March and 3 June 2021), material supplied to the Review.

84 AFCA (4 March 2021), material supplied to the Review.

85 AFCA (4 March and 3 June 2021), material supplied to the Review.

86 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 56, 72, 84.

125 complaints in this period, which represents 1 per cent of small business complaints and fewer than 0.1 per cent of total complaints.<sup>87</sup>

3.35 Small business and primary producer complaints often have very large amounts at stake. While they represent a small proportion of overall complaints, they represent a greater proportion of compensation awarded.

3.36 In the first two years of AFCA’s operation, while small business complaints represented 6 per cent of the total lodged, the share of total compensation awarded for resolved small business complaints was 10 per cent and their average compensation award was double the average for all complainants.<sup>88</sup>

3.37 Similarly, while primary producer complaints represented 0.1 per cent of the total lodged, the share of total compensation awarded for resolved primary producer complaints was 0.5 per cent and their average compensation award was over 13 times the average for all complainants.<sup>89</sup>

**Figure 3.8: Total compensation and average compensation awarded, 1/11/18 – 31/10/20<sup>90</sup>**

	Total compensation	Average compensation
<b>All complainants</b>	\$477,602,000	\$4,118
<b>Small businesses</b>	\$47,859,000	\$8,300
<b>Primary producers</b>	\$2,248,000	\$56,200

3.38 Chapter 5 discusses monetary limits and compensation caps for primary production and small businesses in more detail.

87 AFCA (4 March 2021), material supplied to the Review.

88 AFCA (4 March 2021), material supplied to the Review.

89 AFCA (4 March 2021), material supplied to the Review.

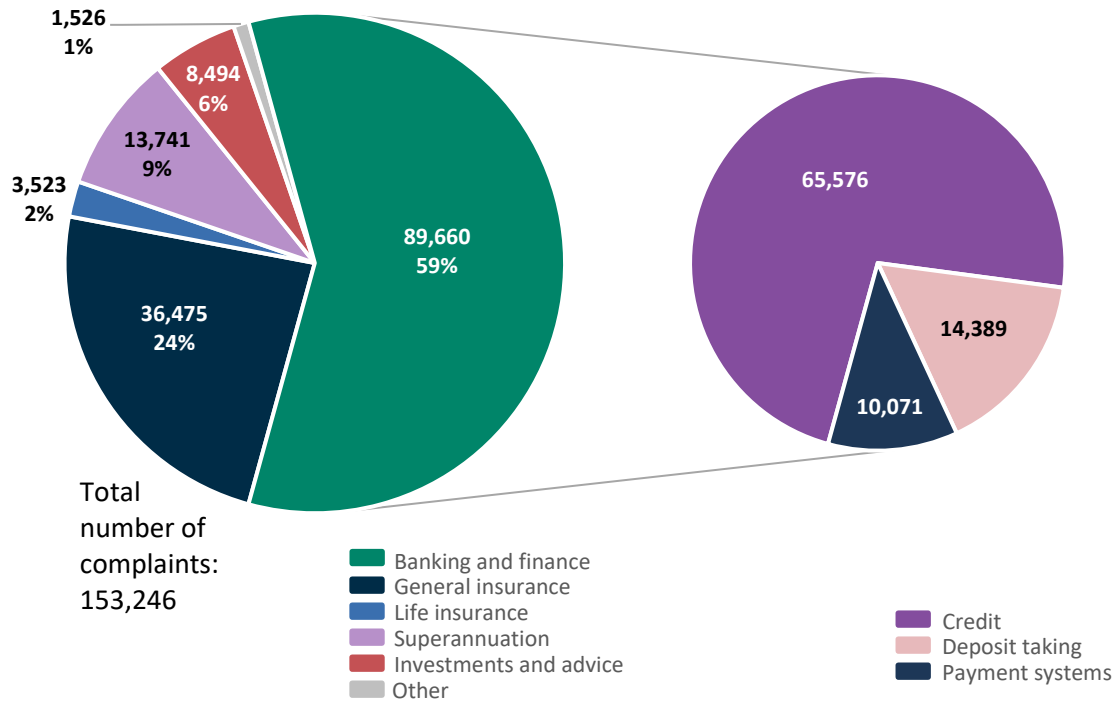
90 AFCA (4 March 2021), material supplied to the Review. ‘Total compensation’ is rounded to the nearest \$1000. ‘Average compensation’ is the average awarded for resolved complaints, whether resolved by agreement, assessment or determination. All complaints are factored into the averages, including those for which there was no compensation awarded or recorded.



## Complaint volumes by product line

3.39 Banking and finance complaints made up a majority of the total complaints received by AFCA in its first two years of operation (59 per cent), with general insurance the next largest category, representing approximately one quarter of complaints.

**Figure 3.9: Complaint volumes by product line, 1/11/18 – 31/10/20<sup>91</sup>**



Note: Banking and finance complaints are broken down into further categories.

3.40 As illustrated in figure 3.9, the banking and finance complaint category can be broken down into credit, deposit taking and payment systems. Breaking the approximately 65,000 complaints in the *credit* sub-category down further, the most common issues were credit reporting, responsible lending and a financial firm failing to respond to requests for assistance.<sup>92</sup>

3.41 FOS had the broadest subject matter mandate out of the predecessor schemes. Of the disputes that FOS received each year between 2010-11 and 2015-16, credit disputes generally represented between 45 and 50 per cent and general insurance disputes represented 26 to 30 per cent. The remainder related to deposit taking, payment systems, life insurance, investments and other matters.<sup>93</sup>

91 AFCA (2021) *Two year report: 1 November 2018 to 31 October 2020*, AFCA, pp 4, 8; AFCA (4 March 2021), material supplied to the Review. The sum total of categories in the pie chart on the left marginally exceeds total complaints received (153,419 compared to 153,246) because some complaints related to multiple product lines. The percentages in Figure 3.9 are of the total number of complaints actually received – 153,246. The same is true for the sum of credit, deposit taking and payment system complaints marginally exceeding the total for 'banking and finance'.

92 AFCA (4 March 2021), material supplied to the Review.

93 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, p 49.

## DISPUTE RESOLUTION

### Stages of the process

3.42 Figure 3.10 identifies the proportion of complaints closed at each stage of AFCA’s process. It also identifies the average time for complaints that are closed at each stage, depending on whether they are allocated to the standard and complex stream or fast track stream.

**Figure 3.10: Proportion of complaints closed by status and average timeframe for complaints closed by status, 1/11/18 – 31/10/20<sup>94</sup>**

Status	Proportion of complaints closed	Average time for standard and complex complaints closed	Average time for fast track complaints closed
Registration and referral	49%	31 days	
Rules review	11%	61 days	
Case management 1	19%	118 days	69 days
Case management 2	7%		
Preliminary view	7%	189 days	118 days
Decision	7%	283 days	152 days

Note this refers to the average lifespan of complaints that are closed with the particular status (not the average duration of the stage itself).

3.43 The proportion of complaints closed with ‘preliminary view’ or ‘decision’ *status* is distinct from the proportion of complaint closures by a preliminary assessment or determination as the *outcome*. As detailed above at paragraph 3.27, of complaint closures from November 2018 to October 2020, 4 per cent were by accepted preliminary assessment and 6 per cent were by determination.<sup>95</sup>

3.44 The difference is because AFCA will sometimes close complaints after they have progressed to ‘preliminary view’ status, or even ‘decision’ status, for another reason. For example, a complainant and financial firm might reach a resolution on their own, shortly before AFCA was due to issue a determination. This complaint would be recorded as having closed in the ‘decision’ *status*, even though an AFCA determination was not the *outcome* that resolved the complaint.

### Timeliness

#### Average complaint timeframes

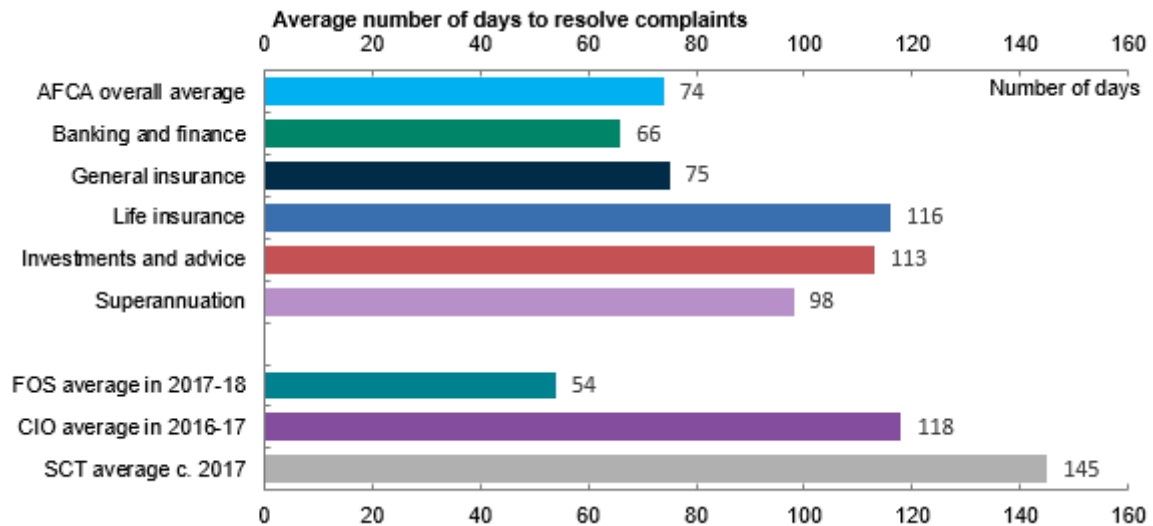
3.45 In the first two years of its operation, the overall average timeframe for a complaint lodged with AFCA was 74 days.

94 AFCA (4 March 2021), material supplied to the Review. The data includes complaints initially received by FOS and later closed by AFCA.

95 AFCA (4 March 2021), material supplied to the Review.

3.46 This compares to an average of 54 days for FOS to resolve a complaint in 2017-18 and an average of 118 days for CIO in 2016-17 (last date of public information).<sup>96</sup>

**Figure 3.11: Average complaint timeframes by product line, with overall averages for AFCA and predecessor schemes<sup>97</sup>**



Note that AFCA figures are for the period 1/11/18 – 31/10/20 but include complaints initially received by FOS and later closed by AFCA.

3.47 The average timeframe for AFCA to resolve a superannuation complaint in its first two years was 98 days, and for those proceeding to decision status, the average timeframe was 266 days.<sup>98</sup> This compares to an overall average timeframe of 145 days for complaints to the SCT, reported in 2017.<sup>99</sup> In 2015-16, for those complaints that went to a determination, the average time from lodgment to determination by the SCT was 796 days.<sup>100</sup>

3.48 Comparing each of the first two years of AFCA's operation, the overall average timeframe to resolve a complaint rose from 64 days to 81 days.<sup>101</sup>

### Distribution of complaint duration

3.49 Figure 3.12 presents the (cumulative) proportion of cases closed by certain milestones.

96 AFCA (4 March 2021), material supplied to the Review. AFCA notes that the FOS and CIO data does not include the longer IDR period of 90 days provided for superannuation trustees.

97 AFCA (2021) *Two year report: 1 November 2018 to 31 October 2020*, AFCA, pp 8, 10, 12, 14, 16; AFCA (4 March 2021), material supplied to the Review; Senate Economics Legislation Committee (9 October 2017) *Official Committee Hansard: Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017*, p 15.

98 AFCA (4 March and 3 June 2021), material supplied to the Review.

99 Senate Economics Legislation Committee (9 October 2017) *Official Committee Hansard: Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017*, p 15.

100 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, p 80.

101 AFCA (4 March 2021), material supplied to the Review.

**Figure 3.12: Closure rates by milestone<sup>102</sup>**

		Closed within 30 days	Closed within 60 days	Closed within 90 days	Closed within 180 days
AFCA	All complaints	28%	61%	76%	92%
	Excluding complaints closed at registration and referral	24%	54%	70%	89%
FOS in 2015-16		43%	77%	85%	94%
CIO in 2015-16		23%	47%	63%	83%

Note that AFCA figures are for 1/11/18 – 31/10/20 but include complaints initially received by FOS and later closed by AFCA. For the row excluding complaints closed at registration and referral, days are counted from the date an unresolved complaint progresses from registration and referral status to case management status.

- 3.50 Closing a complaint at the registration and referral stage largely involves a resolution through the firm's IDR process or the parties reaching an agreement themselves, albeit in the shadow of prospective EDR. As a standard practice, AFCA's investigation and case management work does not commence until after the registration and referral stage.<sup>103</sup>
- 3.51 The second row in figure 3.12 excludes complaints closed at the registration and referral stage, which may provide a more concrete reflection of how AFCA is applying its resources to deliver timely outcomes.<sup>104</sup>

### *Complaint timeframes exceeding 12 months*

- 3.52 Of 143,723 complaints closed by AFCA in its first two years of operation, 2,302 complaints (or 2 per cent) closed more than 12 months after lodgment.<sup>105</sup>
- 3.53 There were 24 complaints that closed more than two years after lodgment, all of which were complaints initially received by FOS.<sup>106</sup>

102 AFCA (2021) *Two year report: 1 November 2018 to 31 October 2020*, AFCA, p 4; AFCA (12 March and 22 April 2021), material supplied to the Review; Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 50, 67; Financial Ombudsman Service (2017) *Annual Review 2016-17*, Financial Ombudsman Service, p 64.

103 AFCA (22 April 2021), material supplied to the Review. AFCA advises that its activities during the registration and referral stage can include guiding the parties through the process and timeframes, sharing information provided to AFCA by one or both parties, referring consumers to services that may provide legal advice or representation, working with the parties to ensure the complaint is lodged against the correct entity, assessing requests for urgent prioritisation of a complaint, assessing timeframe extensions, etc.

104 AFCA (22 April 2021), material supplied to the Review.

105 AFCA (22 April 2021), material supplied to the Review. This includes complaints initially received by FOS and later closed by AFCA (but not those initially received by CIO and later closed by AFCA).

106 AFCA (22 April 2021), material supplied to the Review.

## Complaint outcomes

- 3.54 Of all complaints closed by AFCA in the first two years of its operation, 68 per cent were resolved by agreement between the complainant and financial firm, which can occur:
- through negotiation
  - through conciliation
  - as a result of an early assessment of a complaint’s merit provided by AFCA in case management
  - through the complainant directly resolving the matter with the financial firm at any stage.<sup>107</sup>
- 3.55 These resolutions take a variety of forms including full or partial monetary compensation, repayment arrangements, interest waivers, contract alterations, apologies, and sometimes no compensation or action.<sup>108</sup>
- 3.56 The 68 per cent figure for AFCA compares with 61 per cent of disputes lodged with FOS being resolved by agreement (resolved by the financial firm, by negotiation or conciliation) and 61 per cent of disputes lodged with CIO being resolved through conciliation specifically in 2015-16.<sup>109</sup>
- 3.57 Fourteen per cent of complaints reached preliminary view status – 7 per cent closing at that stage, with the remaining 7 per cent closing in the decision phase beyond that.<sup>110</sup>
- 3.58 AFCA records complaint resolutions in favour of the complainant where it issues a preliminary assessment or determination ‘in which some significant issue was decided in the complainant’s favour’. It records complaint resolutions in favour of the financial firm where it issues a preliminary assessment or determination ‘in which no significant issue was decided in the complainant’s favour’.<sup>111</sup>
- 3.59 AFCA defines ‘significant issue’ as ‘an issue that is important in the context of the whole complaint, and/or which results in some significant remedy being awarded to the complainant’.<sup>112</sup>
- 3.60 From November 2018 to October 2020, of those complaints closed where AFCA made a finding in one party’s favour, either as a preliminary assessment accepted by the parties or as a final determination, the finding was in the financial firm’s favour 69 per cent of the time and in the complainant’s favour 31 per cent of the time. The split is 71 per cent to 29 per cent for determinations specifically.<sup>113</sup>

107 AFCA (4 March and 3 June 2021), material supplied to the Review. This figure and other data under ‘complaint outcomes’ include complaints initially received by FOS and later closed by AFCA.

108 AFCA (4 March 2021), material supplied to the Review.

109 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 54, 69.

110 AFCA (4 March 2021), material supplied to the Review.

111 AFCA (n.d.) *AFCA Datacube: Glossary of key terms*, AFCA website, accessed 6 May 2021; AFCA (n.d.) *Complaint Outcome Glossary*, AFCA, pp 2–3.

112 AFCA (n.d.) *Complaint Outcome Glossary*, AFCA, pp 2–3.

113 AFCA (4 March 2021), material supplied to the Review.

- 3.61 Of all complaints closed at the preliminary view phase, 39 per cent were in the financial firm's favour and 19 per cent were in the complainant's favour.<sup>114</sup> The remaining 42 per cent included agreements reached between complainant and firm after AFCA had designated the complaint as moving into the preliminary view phase, discontinued complaints and AFCA excluding the complaint for being outside the Rules.
- 3.62 Of all complaints closed at the decision phase, 65 per cent were determinations in the financial firm's favour and 27 per cent were determinations in the complainant's favour.<sup>115</sup> Again, there is an 8 per cent remainder for reasons similar to those outlined above for complaints closed at the preliminary view phase.

### Overtake rate

- 3.63 Of those complaints finalised by determination following a rejected preliminary assessment in AFCA's first two years of operation, 9 per cent overturned a preliminary assessment. That is, the determination was in a different party's favour than was recommended in the preliminary assessment.<sup>116</sup>
- 3.64 Just under half of those instances (4 per cent) were due to new information provided by the parties, with the remainder (5 per cent) due to a different interpretation of a relevant law or a difference of opinion based on the facts.<sup>117</sup>

## SERVICE COMPLAINTS

- 3.65 Any person or business directly affected by how AFCA deals with a complaint against a financial firm can complain to AFCA, and then to AFCA's Independent Assessor if dissatisfied with the response. The Independent Assessor can only consider complaints about the standard of service provided by AFCA and cannot consider the merits of an AFCA decision.<sup>118</sup>

### Service complaints received by AFCA

- 3.66 AFCA received 1,795 complaints about its service in its first two years of operation. As a proportion of the total volume of complaints lodged against financial firms at AFCA, this represented 1.2 per cent. In that period, 1,529 of the service complaints were made by complainants (85 per cent), 160 were made by financial firms (9 per cent) and 106 were made by a third party (6 per cent).<sup>119</sup>
- 3.67 For those service complaints made by financial firms, 77 were from very small financial firms (48 per cent) and 23 were from very large financial firms (14 per cent).<sup>120</sup>

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114 AFCA (4 March 2021), material supplied to the Review.

115 AFCA (4 March 2021), material supplied to the Review.

116 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 20; AFCA (3 June 2021), material supplied to the Review.

117 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 20.

118 AFCA (n.d.) *Independent Assessor Terms of Reference*, AFCA, p 1.

119 AFCA (4 March 2021), material supplied to the Review.

120 AFCA (19 July 2021), material supplied to the Review.

- 3.68 The three most commonly raised issues in service complaints were biased processes, delays and determinations failing to take into account relevant information.<sup>121</sup>
- 3.69 In the two-year period, AFCA found 13 per cent of issues raised in service complaints to be substantiated and 87 per cent unsubstantiated.<sup>122</sup>
- 3.70 These figures compare to FOS receiving 360 complaints about its service in 2015-16, representing 1 per cent of total disputes resolved. The main reasons for the complaints were disagreement with a decision to discontinue a dispute and incorrect assessment of fact or law.<sup>123</sup>

## Service complaints received by the Independent Assessor

- 3.71 The Independent Assessor received 280 service complaints in the first two years of AFCA's operation, representing 0.2 per cent of total complaints lodged against financial firms. Of these, 262 were from complainants (94 per cent), 14 from financial firms (5 per cent) and four from third parties (1 per cent).<sup>124</sup>
- 3.72 Almost all service complaints raise multiple issues: the 280 complaints received raised 768 issues in total. Of the issues raised, 82 (11 per cent) were substantiated by the Independent Assessor. Of the 82 issues substantiated, 35 related to communication, 31 related to timeliness, 15 related to fairness and impartiality, and one was a process issue.<sup>125</sup>
- 3.73 Just over half of the assessments issued by the Independent Assessor had at least one element substantiated (56 complaints, compared to 55 complaints with no elements substantiated).<sup>126</sup>
- 3.74 Chapter 7 discusses the Independent Assessor function in more detail.

## IDENTIFICATION OF SYSTEMIC ISSUES

- 3.75 In AFCA's first two years of operation, 2,287 possible systemic issues were identified by AFCA complaint resolution teams and referred to AFCA's systemic issues team. A similar number of referrals were made in each year – 1,131 referrals from November 2018 to October 2019 and 1,156 referrals from November 2019 to October 2020. Over 80 per cent were identified during the case management and preliminary view stage of complaints. Banking and finance, and general insurance product areas had the most referrals.<sup>127</sup>

121 AFCA (4 March 2021), material supplied to the Review.

122 AFCA (4 March 2021), material supplied to the Review.

123 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, p 55.

124 AFCA (4 March 2021), material supplied to the Review. This data includes a small number of service complaints relating to complaints lodged against financial firms at CIO and FOS.

125 AFCA (4 March 2021), material supplied to the Review.

126 AFCA (4 March 2021), material supplied to the Review. Most of the remaining service complaints were closed because they were outside the terms of reference. The Independent Assessor does not issue assessments where complaints are outside the terms of reference, withdrawn or closed because a complainant did not respond to correspondence.

127 AFCA (4 March and 16 July 2021), material supplied to the Review. The statistics in this section include some systemic issues referred or identified by FOS and later finalised by AFCA.

- 3.76 The majority (78 per cent of systemic issue closures) were closed after the systemic issues team’s review and without further investigation required, or at the point the case was first referred to them.<sup>128</sup>
- 3.77 AFCA’s systemic issues team considered the remaining 433 (22 per cent of systemic issues closures) to be possibly systemic and referred them to the financial firm seeking further information to determine whether it was a definite systemic issue.<sup>129</sup>
- 3.78 Of the 433 possible systemic issues AFCA identified, 193 systemic issues were considered definite and therefore met the threshold to be reported to the regulator. A systemic issue is classified as resolved if the financial firm engages with AFCA and agrees on remedial action to fix the systemic issue. Of the 193 definite systemic issues, AFCA resolved 166 with the financial firms.<sup>130</sup>
- 3.79 FOS identified 1,635 possible systemic issues in 2015-16, of which 58 were assessed as definite systemic issues following additional information being sought from the member. FOS resolved 64 systemic issues in that year.<sup>131</sup>
- 3.80 Again in 2015-16, CIO had 38 systemic issues reported, of which 34 were resolved. The SCT did not have a formal requirement to perform a systemic issues role in relation to the superannuation complaints it received.<sup>132</sup>
- 3.81 Chapter 8 discusses AFCA’s systemic issues function in more detail.

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128 AFCA (4 March 2021), material supplied to the Review.

129 AFCA (4 March 2021), material supplied to the Review.

130 AFCA (4 March, 3 June, 15 July and 19 July 2021), material supplied to the Review.

131 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 62, 63.

132 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, pp 38, 75.



# CHAPTER 4: IS AFCA RESOLVING COMPLAINTS IN A FAIR, INDEPENDENT, EFFICIENT AND TIMELY MANNER?

## INTRODUCTION

- 4.1 This chapter considers whether AFCA has been resolving complaints in a way that is fair, independent, efficient and timely. In addition to feedback and case examples provided by consumers, small businesses and financial firms, findings from an independent assessment of sample cases conducted by the Hon Julie Dodds-Streeton QC (the independent expert) have informed the findings of this chapter. Data and additional information provided by AFCA are also reflected in this chapter.

## FAIRNESS

### Fairness of AFCA's processes

- 4.2 AFCA's Rules require that it provide procedural fairness to the parties to a complaint. This requires that before a complaint is determined, both the complainant and the financial firm must be provided with access to relevant information and have an opportunity to make submissions.<sup>133</sup>
- 4.3 The Review heard concerns from AFCA's users in relation to procedural fairness, where they consider AFCA is not meeting its stated objectives. This was one of the most referred to concerns from both complainants and financial firms.
- 4.4 Examples provided from complainants included AFCA not appropriately reviewing or taking account of evidence provided, AFCA not making available all necessary documentation relating to the case and AFCA not providing parties with an opportunity to respond.
- 4.5 Some examples provided from financial firms were in line with those raised by complainants, but many financial firms also indicated that: they were not informed of AFCA's decision before it was formally handed down; AFCA places a higher burden of proof on financial firms than that required of complainants (this was particularly a concern for smaller financial firms); and AFCA case managers sometimes added new issues to an existing complaint, which not only went beyond the original issue raised by the complainant but also did not provide the firm with an opportunity to resolve the new issues via IDR. In addition, a few respondents predominantly from the insurance and advice sectors expressed concern that AFCA is more generous in granting requests for extensions (for example, to provide further information) to complainants compared to financial firms.
- 4.6 AFCA itself has initiated independent reviews in 2019 and 2020 to assess whether its processes complied with the central elements of procedural fairness. As detailed in Appendix C, these reviews were conducted by Ms Debra Russell alone in 2020 and by Ms Russell in conjunction with Professor John McMillan in 2019. The reviews assessed 150 AFCA determinations in 2019 and a smaller sample of 31 determinations in 2020.

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133 AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rule A.10.

- 4.7 Both of these independent reviews initiated by AFCA found that AFCA's processes were fair and that parties were made aware of the pivotal issues so that they could make their arguments and provide relevant material. The parties were also given a fair opportunity to comment on each other's submissions. In the 2019 review, the independent reviewer recommended that the decision maker should inform the parties to a complaint when they are minded to take a decision that will not be expected by the parties in the interests of transparency and procedural fairness. In the 2020 review, the independent reviewer found that there had been an improvement compared to 2019 in terms of parties receiving sufficient foreshadowing of the likely result of an AFCA decision.
- 4.8 To assess the concerns raised by respondents to the Review, procedural fairness was specifically a factor assessed by the independent expert in four of the case assessments conducted, and was also broadly considered in conjunction with other issues in all 20 cases reviewed.
- 4.9 In all but one of the cases reviewed, the independent expert did not find failures to accord procedural fairness by AFCA. In one case where procedural fairness was specifically examined, the independent expert found that although AFCA's routine practice in the relevant circumstances accorded with procedural fairness, it was not followed in the particular case due to an oversight.

### **Analysis and findings**

- 4.10 While concerns have been raised regarding procedural fairness in AFCA's handling of cases, the evidence provided to the Review, including the findings of the independent expert, has not substantiated that there is a systemic issue in regard to procedural fairness.
- 4.11 The Review also sought data from AFCA regarding the cases where extensions were granted to complainants and financial firms. The data revealed that extensions granted as a proportion of extensions requested was 11.5 percentage points higher for complainants compared to financial firms in AFCA's first two years of operation, that is, 68.6 per cent for complainants versus 57.1 per cent for financial firms. More extensions were granted to both complainants and financial firms in AFCA's second year, likely due to COVID considerations. In comparing extensions granted as a proportion of extensions requested for different financial firms by size, the proportions are broadly balanced.<sup>134</sup>
- 4.12 Taking into consideration that complainants engaging with AFCA are generally less sophisticated than financial firms, it is unsurprising that AFCA may grant a slightly higher proportion of extensions to complainants than to financial firms. While the evidence suggests that on average AFCA is broadly balanced in agreeing to provide extensions to different types of financial firms and complainants, it would be worth AFCA monitoring trends over time and being mindful when granting extensions to ensure there are no inappropriate biases.
- 4.13 The issue of AFCA expanding the scope of matters at various stages of complaints was raised by some financial firms.
- 4.14 The Review notes, as a matter of principle, that the majority of complainants engaging with AFCA are unlikely to have a detailed understanding of financial services laws and therefore will require AFCA's case managers to determine the issues that fall within the scope of the complaint. This on occasion may result in matters being identified that were not specifically raised by the complainant. For example, a complainant may lodge a

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134 AFCA (14 and 22 April 2021), material supplied to the Review.

- complaint about financial advice they received which they believe caused them financial loss, without necessarily being aware of relevant obligations on the financial service provider under the Corporations Act, including the best interests duty and misleading and deceptive conduct provisions. While this is appropriate (particularly in the initial stages of a complaint) and an important aspect of the EDR system in efficiently resolving disputes, AFCA must ensure procedural fairness is maintained whenever this occurs.
- 4.15 Consistent with the broader AFCA framework and current practice, where a new and completely separate issue is identified (that is, an issue not related to, or not connected to the initial complaint), the financial firm should be provided with the opportunity to address the new issue through its IDR framework. AFCA should enhance the transparency of its process in relation to these matters including providing clearer guidelines on where a matter would revert to financial firms for consideration through its IDR framework. The guidelines should take into account that there are trade-offs between procedural fairness and timely resolution of complaints.
- 4.16 Taking into consideration that a key objective of AFCA is to ensure timely resolution of complaints, enabling new issues to be considered through a further IDR process is only desirable in circumstances where any new issue is a matter that is able to be separated from the issues initially raised by the complainant. It would not be a desirable outcome, from both an efficiency and user-experience perspective, for complainants to be shuffled repeatedly between the EDR and IDR frameworks. Therefore, in instances where a new, but still related, issue comes up after a complaint has been lodged, the Review considers that it would likely be appropriate to combine the issues. In these situations, the Review considers it is important that both parties are provided with procedural fairness by having the opportunity to comment on any proposed changes to the scope of a complaint.
- 4.17 The Review has, however, seen examples where some parties, including paid advocates, seek to consistently add new issues (even in later stages of AFCA's processes), which prolongs cases. This is not appropriate and issues relating to paid advocates more broadly are considered further in the efficiency section of this chapter. The Review notes that AFCA should be mindful of this practice and take necessary steps to dismiss or curtail such behaviour.

### Recommendation 1

AFCA should provide clearer guidance on the circumstances under which a further issue identified during the complaint process would revert to financial firms for consideration through internal dispute resolution.

Where the issue is combined with an existing complaint, both parties should be provided with procedural fairness by having the opportunity to comment on changes to the scope of the complaint.

However, in instances where AFCA finds parties inappropriately seeking to add new issues, it should take action to dismiss or curtail such behaviour.

## Fairness of AFCA's decisions

- 4.18 AFCA's decision making approach, as set out in the AFCA Rules, is that in determining disputes (other than superannuation disputes), an AFCA decision maker must do what is fair in all the circumstances having regard to: legal principles; applicable industry codes or guidance; good industry practice; and previous relevant determinations of AFCA or predecessor schemes.<sup>135</sup>
- 4.19 The AFCA Rules also include some principles that underpin the scheme, one of which is that AFCA will support consistency of decision making, subject to its other obligations.<sup>136</sup> Specific activities and initiatives that AFCA has underway to support consistent, predictable and quality outcomes include: regular peer review and Lead Ombudsman review of decisions; revised decision templates; the introduction of investigation reasoning tables; enhanced quality assurance frameworks; establishment of a significant decisions library; and a comprehensive continuous development program for case managers and decision makers.<sup>137</sup>
- 4.20 Another principle included in AFCA's Rules is that AFCA will be as transparent as possible, while also acting in accordance with its confidentiality, privacy and secrecy obligations.<sup>138</sup> In the interests of transparency, AFCA publishes a series of 'Approach Documents' that provide guidance on how it approaches certain types of financial complaints it receives. AFCA has published over 30 Approach Documents on topics such as the 2013 Code of Banking Practice, COVID-19 travel insurance and financial difficulty.<sup>139</sup>
- 4.21 In addition, AFCA has established a fairness project to provide certainty about how it assesses what is fair in a way that is clearly understood by all stakeholders. As part of this project AFCA has, among other things, consulted on its Fairness Tool, published the AFCA Engagement Charter, and developed and implemented a training program on its jurisdiction, Rules and procedural and substantive fairness.<sup>140</sup>
- 4.22 Fairness of AFCA's decisions, that is the fairness of the outcomes achieved in disputes resolved through AFCA, was the most common issue raised in a large number of submissions from a wide range of financial firms. Complainants also raised this issue in their submissions, but to a lesser degree.
- 4.23 Submissions commenting on the fairness of AFCA's decisions focused on three broad concerns:
- AFCA's fairness jurisdiction (to make a decision that is 'fair in all the circumstances')
  - consistency of decision making
  - AFCA's approach to apportioning liability.
- 4.24 Some individual complainants were satisfied with the fairness of AFCA's decisions. Although many complainants that provided submissions noted a lack of fairness, they did

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135 AFCA (13 January 2021), *Complaint Resolution Scheme Rules*, AFCA, rule A.14.

136 AFCA (13 January 2021), *Complaint Resolution Scheme Rules*, AFCA, rule A.2.1(d).

137 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 3.

138 AFCA (13 January 2021), *Complaint Resolution Scheme Rules*, AFCA, rule A.2.1(f).

139 AFCA (n.d.) *AFCA Approaches*, AFCA website, accessed 27 July 2021.

140 AFCA (15 July 2021), material supplied to the Review.

not specify why they considered AFCA's decision to be unfair except to the extent there were inconsistencies.

### ***AFCA's fairness jurisdiction***

- 4.25 A wide range of financial firms that responded to the Review expressed concerns about AFCA's approach to fairness in its decision making. These concerns centred on AFCA using its fairness jurisdiction to hold financial firms to a higher standard than required by the law or agreed contract terms.
- 4.26 Financial firms commented that the uncertainty introduced by AFCA's approach and reliance on its fairness jurisdiction has negative implications when pricing risk into products and services (this was particularly a concern for the insurance sector), and in obtaining professional indemnity insurance.
- 4.27 The superannuation sector did not raise concerns regarding AFCA's application of its fairness jurisdiction for superannuation disputes to the same degree. This is largely due to the Corporations Act imposing stricter requirements on AFCA not to make a determination of a superannuation complaint that would be contrary to law or to the governing rules of the superannuation fund.<sup>141</sup>
- 4.28 However, the independent expert assessed one case where AFCA's determination held a superannuation trustee to a higher standard than the law strictly requires, deciding that the trustee should have notified the complainant about a transfer to the ATO even though the legislation did not mandate notice. The independent expert considered AFCA was entitled to do this in the exercise of its fairness jurisdiction as while this requirement went beyond the law it did not contradict the law or the governing rules of the fund.
- 4.29 Consumer advocacy organisations were supportive of AFCA's ability to have greater flexibility than courts and tribunals in resolving disputes and consider what is fair and reasonable beyond the black-letter law, which they consider can otherwise provide harsh and unjust outcomes for consumers.

### ***Consistency of decisions***

- 4.30 Complainants and financial firms also raised concerns around the consistency of AFCA's decisions, both between and within cases. This was a key issue raised in relation to fairness of decisions, with concerns that a lack of consistency in AFCA's approach in determining complaints makes it difficult to set expectations and plan for an outcome.
- 4.31 In one set of comparator cases assessed by the independent expert for consistency, it was found that the different outcomes in the two cases were mutually inconsistent and could not be satisfactorily explained by the factual differences. Both cases raised the same question of who should be liable for loss arising from the electronic transfer of funds to the account of an unintended recipient. The expert found that despite the similarity in the essential facts of the complaints in both case studies, the principles that AFCA applied and the factors to which it gave weight in coming to its decision were different. In one case AFCA determined that the complainant should be liable for loss arising out of the relevant

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141 The AFCA Rules set out that AFCA decision makers must make decisions having regard to the conduct of a fair and reasonable trustee (AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rule D.1.2). This reflects the parameters set out by subsections 1055(2) to (5) of the Corporations Act. Further, subsection 1055(7) of the Corporations Act provides that AFCA must not make a determination of a superannuation complaint that would be contrary to law or to the governing rules of the superannuation fund.

transfers, while in the second case AFCA formed the view that the bank should be liable for the loss arising from the transfer.<sup>142</sup> The expert pointed out that in the second case, AFCA did not apply the established legal principles governing the right of recovery for money paid under a mistake of fact. Of course, the decision maker is not bound by previous decisions or bound to apply legal principles in considering what is fair in all the circumstances, but this has led to an inconsistent outcome in this instance, with no explanation for the difference.

- 4.32 The independent expert reviewed two additional sets of comparator cases for consistency that were put forward by respondents to the Review. One set of cases related to a purported inconsistency of outcome in AFCA's determination of two complaints that involved the transfer of funds from a superannuation account to the ATO. The other set of cases related to purported inconsistency in two insurance complaints. In both instances, the independent expert considered that although the facts of the comparator cases may have appeared similar on the surface, there were enough differences in the facts and circumstances that the different outcomes did not involve any necessarily irreconcilable application of principles or approach on AFCA's part.
- 4.33 Both of the AFCA-initiated reviews found that in the determinations assessed by those reviews, the outcomes were overwhelmingly fair, consistent with the factual information and applied the law and good practice appropriately.

### ***Apportioning liability***

- 4.34 AFCA's approach to apportioning liability, particularly in instances of scams, was also an area of concern, primarily for financial firms in the banking sector. Financial firms argued that AFCA tended to deliver outcomes in favour of complainants more often than firms in these types of complaints and expressed concern that AFCA's approach failed to appropriately take into account that complainants should bear some responsibility for their decisions. Some firms also stated that there is an apparent inconsistency between AFCA's approach to scams (in its draft fact sheet) and ASIC's proposed changes to the ePayments Code (which has been under review since March 2019).<sup>143</sup>
- 4.35 The independent expert considered five cases relating to AFCA's approach to apportioning liability. In one case determination about an insurance dispute, the independent expert found that AFCA's approach to apportioning liability was appropriate in a situation where it had to balance competing considerations in a complex context and a perfect solution satisfactory to both parties was clearly unachievable. In this case, although the determination was contrary to the discretion conferred in the terms of a policy contract, the independent expert found that AFCA's approach to apportioning liability was a proper exercise of its jurisdiction to determine what is fair in all the circumstances. In another two case determinations that were assessed to test the appropriateness of AFCA's approach to apportioning liability, the independent expert detected no flaw in AFCA's processes or determination, and no persuasive basis for any apportionment of responsibility for loss.
- 4.36 Although not relevant in the cases reviewed, the independent expert noted that it is open to AFCA to reduce the amount payable to a complainant in appropriate circumstances where the complainant failed to take reasonable care to avoid a foreseeable risk of loss.

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142 The former case went to determination while the latter was settled following AFCA's preliminary assessment.

143 See ASIC (21 May 2021) *ASIC consults on updates to the ePayments Code* [media release], ASIC.

- 4.37 In the final two cases, awarding an uplift on an insurance payout despite the terms of the policy was assessed to be a proper exercise of AFCA's fairness jurisdiction.
- 4.38 The advice sector raised related concerns with respect to how AFCA calculated loss in certain cases, noting examples where AFCA had adopted methodologies that were generous to complainants but were not consistent with industry practice.
- 4.39 A small number of financial firms also raised concerns that decisions made by AFCA to award non-financial loss were inappropriate in some circumstances where the broader claim was unsuccessful. The compensation being awarded in such cases was perceived by firms as a last resort means to award compensation where the claim was otherwise unmeritorious.

### ***Other fairness issues***

- 4.40 Respondents raised concerns about AFCA sometimes going beyond its remit in terms of: applying standards or codes that either do not apply to the firm (for example, voluntary codes) or did not apply at the time the transaction happened (for example, due to a change in laws or regulations); making decisions on things outside its jurisdiction (for example, insurance premiums); and providing remedies that go beyond the compensation caps set out in AFCA's Rules (for example, awarding of temporary accommodation costs for an indefinite time period).

## **Analysis and findings**

### ***AFCA's fairness jurisdiction***

- 4.41 AFCA's 'fair in all the circumstances' jurisdiction for making decisions is broadly consistent with the jurisdiction of FOS and CIO. It is a jurisdiction that has existed in EDR for more than twenty years and is similar to other ombudsman schemes such as the Financial Ombudsman Service in the United Kingdom.
- 4.42 In recommending a single EDR body, the Ramsay Review found that the decision making test for financial disputes based on achieving 'fairness in all the circumstances' is appropriate and should continue.<sup>144</sup> The Government accepted all recommendations of the Ramsay Review and the legislation underpinning the establishment of AFCA requires that fairness of the scheme is a general consideration for the Minister in authorising the scheme.
- 4.43 Importantly, the fairness jurisdiction is what differentiates AFCA from courts and tribunals. It enables AFCA to make decisions outside of a strict legalistic approach and facilitates a more expedient decision making process.
- 4.44 In applying its fairness jurisdiction, AFCA is able to make a decision that is not strictly constrained to the application of legal principles as long as the decision is what it considers to be fair in the circumstances. Some respondents, particularly financial firms, expressed concerns with this fundamental design of AFCA's fairness jurisdiction and AFCA's application of it, predominantly in instances where AFCA holds the financial firm to a different standard to what the law or the contract requires.

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144 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, p 126.

- 4.45 There were a number of examples in the case assessments undertaken by the independent expert where AFCA was found to have looked beyond the terms of a contract in coming to a decision. The independent expert found that this was within the scope of AFCA's ability to apply its fairness jurisdiction in the cases reviewed.
- 4.46 As noted above, the AFCA Rules specify that the AFCA decision maker must consider what is fair in all the circumstances having regard to legal principles, applicable industry codes or guidance, good industry practice and previous relevant determinations of AFCA or predecessor schemes. While the cases examined as part of the Review did not show evidence of an inappropriate application of AFCA's fairness jurisdiction, they highlighted a broad interpretation of the fairness jurisdiction beyond that grounded in the four considerations outlined in the AFCA Rules.
- 4.47 For example, in one of the cases examined, AFCA awarded a 15 per cent increase in the payout to the complainant under a home insurance policy where the insurer had reached its maximum liability under the policy. This was awarded as an uplift on the sum insured. The imposition of the uplift was not based on any provision in the policy documents, legal principles or industry codes, but rather was based on an assessment of fairness that AFCA found the insurer owed to the complainant in the exercise of its discretion on the method of settlement under the policy.
- 4.48 Applying a broad, ungrounded, interpretation of fairness in its decision making risks AFCA holding financial firms to a standard that goes beyond the law, contract or established industry codes of conduct. Applications of broad notions of fairness also makes it difficult for financial firms to have to a clear understanding of the basis of AFCA's future decision making and therefore being able to establish the necessary systems and processes to ensure compliance. Many of the issues identified by financial firms as being of concern related to cases that appear to be very similar but when assessed by AFCA yielded different outcomes on the basis of considerations of fairness. It is therefore not surprising that financial firms are concerned with such decisions.
- 4.49 The Review considers that while it is appropriate that AFCA has a jurisdiction that enables it to make decisions with respect to considerations beyond the strict application of legal principles, AFCA should, in exercising its fairness jurisdiction, have primary regard to the four factors identified in its Rules – legal principles, industry codes, good industry practice and previous decisions – when making decisions.

### ***Consistency of decisions***

- 4.50 For the parties to a complaint to have confidence in AFCA's decisions, it is critical that AFCA has an appropriate framework to ensure consistency of decisions.
- 4.51 AFCA plays a unique role within the financial system's regulatory framework. This is because financial firms are required to be members of AFCA to obtain and maintain a financial services or credit licence and AFCA's decisions are binding on financial firms.
- 4.52 While AFCA does not establish policy settings in the financial system, financial firms take AFCA's approach into consideration in setting their practices and design of products given the binding nature of AFCA's decisions. Therefore, uncertainty about AFCA's approach to making decisions can have a negative effect on financial firms' ability to conduct their business, particularly given there is very limited scope for review of AFCA's decisions. As such, inconsistency can act to undermine fairness and AFCA's fairness jurisdiction.



- 4.53 A necessary element of consistent decision making is an awareness of the applicable legal principles, industry codes or guidance, industry practice and previous relevant determinations in the area under consideration. The Review has considered the existing mechanisms and work underway by AFCA, including the fairness project as well the initiatives noted in paragraph 4.19. The Review considers that the completion of these initiatives will assist in improving consistency of outcomes in AFCA's decisions.
- 4.54 Nevertheless, the Review considers that consistency of decisions will continue to be an area where users seek greater certainty and there is scope for AFCA to proactively identify inconsistencies on significant issues in decisions that have been made. For instance, where such an inconsistency is identified, AFCA could have a process to have it reviewed by an AFCA panel (or similar) to resolve the appropriate approach going forward for AFCA decision makers. In effect, this could be an instance of AFCA referring an approach for formal forward-looking review (discussed in chapter 7) on its own initiative. In reviewing a comparator set of cases where inconsistency was found, the specific example suggested by the independent expert was to consider the consequences of a customer giving a bank incorrect or incomplete electronic transmission instructions.

### ***Apportioning liability***

- 4.55 As noted above, the Review received multiple case examples from financial firms of decisions favourable to complainants where firms considered that it may have been appropriate for the complainants to also bear some of the liability.
- 4.56 In respect of feedback on AFCA's approach to apportioning liability in cases relating to scams, the Review considers that AFCA is applying the ePayments code as it currently stands. The ePayments Code provides consumer protections in relation to electronic payments, including ATM, EFTPOS, credit and debit card transactions, online payments, and internet and mobile banking.<sup>145</sup> While ASIC is currently considering updates to the Code, the proposed revisions are not yet in place and it is appropriate that AFCA applies the Code that is currently in force.
- 4.57 The Review considers that the proposed updates to the Code will help clarify consumer protections. The approach AFCA is to take in instances of payment issues arising in disputes relating to scams in future, following any code changes, should be correspondingly amended. More broadly, the breadth and extent of scams against consumers has rapidly expanded in recent times. It is a fluid and changing area for all participants involved and it will be important for AFCA to continue to adapt its approach as required.
- 4.58 The Review received some submissions detailing what respondents considered to be inappropriate loss calculations. If there are instances where AFCA is inappropriately calculating loss, the framework provides a mechanism where users have the ability to have such decisions reviewed by an AFCA panel (or similar) to resolve the appropriate approach via a forward-looking internal review (discussed in chapter 7).

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145 See ASIC (21 May 2021) *ASIC consults on updates to the ePayments Code* [media release], ASIC.

## Recommendation 2

In making its decisions, AFCA should consider what is ‘fair in all the circumstances’ having primary regard to the four factors identified in its Rules – legal principles, industry codes, good industry practice and previous decisions.

## INDEPENDENCE

- 4.59 AFCA’s Rules require complaints to be considered in an independent and impartial manner.<sup>146</sup>
- 4.60 In the feedback received as part of the Review, comments on independence focused on impartiality. The views of financial firms and complainants tended to be on opposite ends of a spectrum when it came to the impartiality of AFCA.
- 4.61 Many complainants considered that AFCA decisions tend to favour financial firms. The views expressed included that since AFCA is funded by its members, it inherently acts in their best interests, and also that it relies more on evidence supplied by firms. Some complainants also expressed concerns about many AFCA staff having an industry background. However, consumer advocacy organisations considered that AFCA is meeting its statutory objective to be independent.
- 4.62 When it comes to AFCA assisting complainants through the dispute resolution process, all respondents generally agreed that AFCA can and should assist complainants through the process of submitting and resolving their dispute, particularly given the differences between complainants and financial firms. Many complainants will be one-time users of AFCA’s service and are likely to have limited knowledge of processes and regulatory requirements in the financial system. ASIC’s regulatory guidance specifically states that AFCA should be adequately resourced to assist complainants to draft and lodge their complaints. The guidance also says that this does not amount to staff advocating for complainants, and should not compromise the impartiality of the complaints resolution process.<sup>147</sup>
- 4.63 Financial firms expressed concerns that AFCA can, on occasions, go beyond its role in assisting complainants through the dispute resolution process to actively help or even coach complainants through the process. Financial firms were concerned that such actions by AFCA are not appropriate because AFCA is also the arbiter or decision maker in the dispute. In contrast, consumer advocacy organisations are highly supportive of AFCA playing a role in assisting complainants to identify the correct financial firm about which they are complaining. They consider this to be a critical role for AFCA.
- 4.64 Some financial firms also expressed concerns about the public messaging by AFCA, suggesting that AFCA positions itself as a consumer-aligned organisation. For example, the amount of compensation awarded for complainants was pointed to as not being the best descriptor of AFCA’s performance or success.

146 AFCA (13 January 2021), *Complaint Resolution Scheme Rules*, AFCA, rule A.2.1(c)(i).

147 ASIC (June 2018) *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority*, ASIC, p 30.

- 4.65 The independence of AFCA's processes was recently the subject of commentary in the NSW Supreme Court's decision in *DH Flinders Pty Ltd v AFCA* (see Figure 4.1).<sup>148</sup>

**Figure 4.1: Summary of *DH Flinders Pty Ltd v AFCA***

- In November 2020, Justice Stevenson of the NSW Supreme Court handed down his decision in *DH Flinders Pty Ltd v AFCA*
- Although the substance of the matter related to AFCA's power to deal with a particular complaint, Justice Stevenson's obiter referred to AFCA's obligations of impartiality and fairness. While he did not decide whether AFCA acted in breach of those obligations, he stated that if it were necessary for him to decide on this aspect, he would have been 'inclined to conclude that AFCA did act in breach' of those obligations.
- In this case, AFCA assisted the complainants in identifying a different financial firm to which their original complaint related, and subsequently advised that it could open and join a complaint with that financial firm.
- Justice Stevenson observed that this behaviour was not procedurally fair to the financial firm involved, nor was it impartial. He went on to say that in this case AFCA 'was acting in an advisory relationship with the complainants'.
- However, given this matter was not decisive of the case, Justice Stevenson did not go into further detail on these observations.

- 4.66 In response to the concerns raised in the *DH Flinders* case, AFCA has advised it has established an internal working group to review its processes and guidance in relation to assisting a complainant to submit a complaint. The internal working group is considering possible enhancements to AFCA's Rules, Operational Guidelines and internal work procedures.<sup>149</sup>
- 4.67 AFCA's Operational Guidelines state that its existing governance and management structure ensure organisational independence. For example, from a governance perspective, AFCA is governed by its Board, which consists of an independent Chair and an equal number of consumer directors and industry directors. Following an initial transition phase where some Board members were appointed by the Minister, the AFCA Board now has autonomy to appoint all its directors going forward. Decision makers in AFCA, that is those ombudsmen, adjudicators and panel members who ultimately make decisions on complaints that reach the determination stage, are independently appointed by the AFCA Board.<sup>150</sup>
- 4.68 AFCA also uses expert panels to make determinations about particularly complex complaints. Panel members are appointed by the AFCA Board based on their objectivity, qualifications, experience and relevant personal qualities. AFCA currently has a pool of 47 panel members, with consumer and industry specialist experience.<sup>151</sup> AFCA's decision panels are made up of an independent ombudsman, a consumer panel member and an industry panel member.<sup>152</sup> The Review did not receive any submissions to contest the

148 *DH Flinders Pty Ltd v Australian Financial Complaints Authority Limited* [2020] NSWSC 1690.

149 AFCA (13 May 2021), material supplied to the Review.

150 AFCA (21 April 2021), *Operational Guidelines to the Rules*, AFCA, p 10.

151 AFCA (n.d.) *Panels*, AFCA website, accessed 27 July 2021.

152 AFCA (n.d.) *Independence*, AFCA website, accessed 27 July 2021.

appropriateness of the panel model used by AFCA, and industry respondents commented that they were generally satisfied with the quality of decision making by panel members (and ombudsmen).

- 4.69 From a management perspective, AFCA's recruitment strategy seeks to recruit staff from a range of backgrounds and invest in their ongoing professional development. In addition, under AFCA's Rules, when allocating an ombudsman or adjudicator to determine a complaint, AFCA's chief ombudsman (or their delegate) is required to consider the decision maker's expertise and experience, and whether they will be able to determine the complaint fairly and impartially.<sup>153</sup>
- 4.70 Chapter 3 includes more information on staff skills and qualifications.

### Analysis and findings

- 4.71 AFCA's independence objective is closely linked with its fairness objective. That is, to provide a dispute resolution service that is fair to all parties involved, AFCA needs to be independent and impartial.
- 4.72 AFCA is also required by legislation to be appropriately accessible to complainants that are dissatisfied with AFCA's members.<sup>154</sup> AFCA's accessibility mandate is essential to ensuring that consumers and small businesses have easy access to the AFCA scheme. At the same time, the Review places equal weight on the importance of independence and impartiality, as it influences the level of trust users have in the quality of AFCA's decisions. The Review does not consider these to be competing objectives and AFCA can simultaneously be independent and impartial in its decision making, while providing an accessible service for complainants. A key consideration when designing the framework for AFCA was that its Board be calibrated equally between consumer directors and industry directors with an independent Chair, to ensure that AFCA's leadership has balance.
- 4.73 The impartiality concerns raised in the *DH Flinders* case put a spotlight on how AFCA manages its accessibility and independence objectives. While questions regarding AFCA's independence are raised in the case, the Review did not find evidence to support a view that there are systemic issues with the independence of AFCA's operations.
- 4.74 In assessing cases, the independent expert assessed every case example for conformity to the requirements of independence and impartiality. The expert did not come across any material that would suggest that AFCA failed to demonstrate independence and impartiality in its handling of any of the complaints in the sample.
- 4.75 In addition, according to the data, of those complaints closed where AFCA made a final determination in one party's favour, over 70 per cent are found in favour of the financial firm involved in the complaint.<sup>155</sup> However, the Review has approached this figure with caution, as only 6 per cent of disputes are ultimately resolved by determination.
- 4.76 The Review also does not support the suggestion by some industry stakeholders that AFCA staff responsible for assisting complainants to articulate a complaint should not also be responsible for making a decision on that case. Separation of this kind would substantially increase time and costs, and would therefore be inefficient, to the extent that multiple AFCA staff have to be across the details of every relevant complaint. It is also worth noting

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153 AFCA (13 January 2021), *Complaint Resolution Scheme Rules*, AFCA, rule A.13.3.

154 Corporations Act, paragraph 1051(4)(a).

155 See also, section on 'complaint outcomes' in chapter 3.

that all complaints that progress to final determination are decided by independent decision makers (appointed by the Board) that have not been involved in helping to articulate the case in any way.

- 4.77 In relation to the concerns expressed by some complainants that AFCA is not and can not be impartial since it is entirely funded by its members, which are financial firms, the Review has not seen any evidence to support these concerns. Although AFCA is member-funded, these financial firms are required to be members of AFCA to maintain their licence.

### Recommendation 3

AFCA should not advocate for, nor act in a manner that otherwise advantages, one party such that the impartiality of the complaints resolution process is compromised.

## EFFICIENCY

- 4.78 According to AFCA's Operational Guidelines, AFCA's efficiency requirement recognises the importance of complaints being resolved in a timely way. AFCA says that it has designed a flexible complaints resolution process to cater for the range of complaints it considers.<sup>156</sup>
- 4.79 Respondents to the Review seem to be generally satisfied that AFCA is resolving disputes in an efficient manner but did have suggestions for improvement in a few areas, explored below.

## Paid advocates

- 4.80 There was consistent feedback across the board from a wide range of financial firms, consumer advocacy organisations and AFCA that paid advocates are increasingly lodging complaints with AFCA and engaging in inappropriate conduct that is negatively affecting AFCA's ability to provide an efficient service.
- 4.81 In this context, paid advocates include all private and fee-for-service representatives, including debt management firms and credit repair firms. They do not include legal representatives.
- 4.82 Most complaints lodged in the first two years of AFCA's operation were lodged by complainants on their own (121,050 complaints), with 16 per cent (23,206 complaints) having a representative. Of those with representation, paid advocates comprised 20 per cent, accounting for 5,316 complaints in the two-year period.<sup>157</sup>
- 4.83 Of the complaints with a paid advocate, 37 per cent closed at registration and referral, compared to 49 per cent for complaints overall. AFCA's analysis is that this may indicate paid advocates are less inclined to accept firms' settlement offers during IDR or post-IDR referral. Consistent with that statistic, a slightly greater proportion of complaints with a paid advocate were resolved by a determination (9 per cent), compared to AFCA complaints overall (6 per cent). Similarly, fewer complaints with a paid advocate were

<sup>156</sup> AFCA (21 April 2021), *Operational Guidelines to the Rules*, AFCA, p 10.

<sup>157</sup> AFCA (4 and 15 March 2021), material supplied to the Review.

- resolved by agreement (60 per cent) compared to AFCA complaints overall (68 per cent). However, whether a decision is found in favour of a complainant or financial firm does not vary significantly when a paid advocate is involved.<sup>158</sup>
- 4.84 According to the data, there was a more than 50 per cent increase in the number of paid advocates from the first to the second year of AFCA's operation.<sup>159</sup>
- 4.85 AFCA has said that during its first two years in operation, it has dealt with clear instances of inappropriate conduct by particular paid advocates in relation to how they were engaging and cooperating during IDR and EDR.<sup>160</sup>
- 4.86 Financial firms and AFCA also identified that AFCA's fees for resolving some very low-value complaints, such as credit reporting complaints, are higher than the value of the original claim or service provided. AFCA noted this leads to some distorted resolution practices which can be exploited by fee-for-service representatives who pursue their pecuniary interests ahead of their clients' best interests.<sup>161</sup>
- 4.87 Recognising the importance of AFCA continuing to be able to receive complaints about things like credit reporting issues, some respondents had suggestions for dealing with low-value complaints more efficiently. These included AFCA having a separate process and team for these complaints and AFCA introducing a short-form determination process (with reduced costs) where the complaint relates solely to removal of credit default listings.
- 4.88 AFCA is currently considering options to more effectively deal with recurring inappropriate conduct by some paid advocates. AFCA says it will consult with stakeholders on any proposed enhancements to its processes and Rules, while ensuring that it maintains a fair approach for all parties when dealing with such complaints.<sup>162</sup> In relation to low-value complaints, AFCA says it recognises that these types of complaints may benefit from a more streamlined, lower cost and earlier resolution approach and is reviewing options to improve its processes for these types of cases, including complaints lodged by consumers about their credit reports.<sup>163</sup>

## Analysis and findings

- 4.89 AFCA is designed to be free and accessible for individuals to make complaints without representation, but the scheme does not prevent complainants being represented.
- 4.90 While the evidence does not necessarily suggest large differences between case outcomes with and without the involvement of paid advocates, the Review considers that current differences and trends are a cause for concern, and that paid advocates may not always act in the best interests of the complainant. This is consistent with the unanimous position of respondents to the Review including consumer advocacy organisations, financial firms and AFCA itself that the prevalence of paid advocates is a growing concern. It is worth noting that paid advocates did not provide any submissions to the Review.
- 4.91 The Review notes that AFCA is well placed to recognise inappropriate conduct by paid advocates in the first instance and supports AFCA's consideration of initiatives to deal with such behaviour such as excluding certain paid advocates from being able to be involved in

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158 AFCA (4 and 15 March 2021), material supplied to the Review.

159 AFCA (4 March 2021), material supplied to the Review.

160 AFCA (15 March 2021), material supplied to the Review.

161 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 53.

162 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 7.

163 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, pp 40, 49.

- the complaints process. AFCA should also promptly report such behaviour to ASIC for regulatory action as appropriate.
- 4.92 AFCA should ensure it retains the flexibility to reconsider its position in the event the conduct of a paid advocate improves in the future.
- 4.93 Regulations requiring debt management firms to hold relevant licences to operate and to be members of AFCA took effect from 1 July 2021. These regulations give ASIC the power to revoke a licence or impose conditions, similar to other licensees, where required and for as long as is appropriate. While these reforms may improve the quality of complaints lodged with AFCA by a subset of paid advocates, it will not fully address the issues even for those advocates.
- 4.94 The Review also notes that AFCA is considering initiatives to deal with low-value complaints more efficiently. The Review supports the implementation of these initiatives in due course.

### Recommendation 4

AFCA should address poor conduct by paid advocates affecting the efficiency of the scheme, such as by amending its Rules to allow it to exclude certain paid advocates from involvement in the complaints process. The Government could also consider an amendment to AFCA's authorisation conditions to support such changes.

## Triaging

- 4.95 Many financial firms commented that AFCA could better triage complaints, both upfront and during the dispute resolution process. This would not only improve efficiency but also mean that firms would not be liable for fees unnecessarily. Feedback was that clearly unmeritorious complaints, complaints that have not first gone through IDR and complaints that have already been considered by predecessor schemes should be excluded upfront by AFCA. Even once a complaint has been lodged, there was some feedback that AFCA is inappropriately classifying cases into fast track, standard or complex streams. In addition, after a preliminary assessment has been completed, a few respondents suggested that AFCA should not permit a complaint to progress to final determination unless adequate reasoning is provided by the complainant or the financial firm as relevant.
- 4.96 The AFCA Rules set out the jurisdiction and powers of the AFCA scheme. AFCA must exclude certain complaints and it can use its discretion to refuse to consider other complaints if it decides that is appropriate in the circumstances. Typically, the main reasons why AFCA would not consider or further consider a complaint are: if the complaint does not satisfy the eligibility requirements set out in the AFCA Rules; if AFCA decides that it is not appropriate to consider a complaint in circumstances such as the complaint being without merit; and if the remedy sought exceeds limits set out in the AFCA Rules.<sup>164</sup>

164 AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rules A.4.1, A.8.3, C.1.1–C.2.2.

- 4.97 In its submission to the Review, AFCA noted that it already triages complaints into fast track, standard and complex streams but acknowledged that there is more that can be done to improve efficiency and address delays.<sup>165</sup>
- 4.98 Some financial firms also expressed a strong preference for AFCA to adopt a ‘reasonable offer’ rule, similar to that previously used by CIO. CIO’s rules allowed for a complaint to be closed if the scheme considered a firm had made a reasonable offer, having regard to the likely range of outcomes, and it was rejected by the complainant.<sup>166</sup> The suggestion is that such a rule would offer improved efficiency (and reduce costs for financial firms) through limiting the number of cases that proceed to final determination.
- 4.99 In addition, there was extensive feedback particularly from financial firms that AFCA sometimes does not make a decision early enough, particularly on jurisdictional issues, which from their perspective unnecessarily adds to the time and cost involved to close the case. Feedback from the superannuation sector in particular was that the SCT was much more proactive in closing matters outside its jurisdiction very early in the piece, while the burden to raise jurisdictional issues falls more to the financial firms when it comes to AFCA. It was also said that this can have an adverse impact on the complainant by raising their expectations, only to be disappointed later in the process.
- 4.100 AFCA said in its submission that it is considering options, as part of its program of initiatives in 2021, to further streamline its triage processes and more quickly and efficiently deal with low-value complaints, at a lower fee cost for AFCA members.<sup>167</sup> AFCA is also undertaking a pilot to consider the appropriateness of being able to apply its discretionary exclusion powers to cases in the fast track stream and these results will be used to consider how the powers may be applied more broadly for all complaints.<sup>168</sup>

## Analysis and findings

- 4.101 AFCA needs to make sure it has enough information about the facts of a complaint and the issues involved before making a decision about whether to exclude a complaint. AFCA’s policies require that all decisions to exclude complaints are made by experienced AFCA staff at the earliest opportunity, to avoid unnecessary costs and delays.<sup>169</sup>
- 4.102 The Review considers this to be appropriate as AFCA’s decision to exclude a complaint may permanently deprive complainants of the opportunity to have their concerns fully considered if they are unable or unwilling to engage with court processes. It is therefore important that AFCA carefully exercise its discretion in instances where there are compelling reasons for making such a decision.
- 4.103 Nevertheless, based on feedback from financial firms and following discussions with AFCA itself, the Review considers that there is scope for AFCA to make better use of its existing exclusion powers to triage complaints upfront. For example, matters that exceed the set monetary thresholds and matters that have previously been considered (including by predecessor schemes) are reasonably straightforward and should be excluded upfront by appropriately qualified staff.

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165 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, pp 24, 40.

166 CIO (August 2016) *Credit and Investments Ombudsman Rules*, 10th edn, CIO, rule 20.

167 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 40.

168 AFCA (13 May 2021), material supplied to the Review.

169 AFCA (21 April 2021), *Operational Guidelines to the Rules*, AFCA, p 44.



- 4.104 In relation to parties to a complaint needing to provide reasoning to progress a complaint from the preliminary assessment stage to final determination, it is worth noting that AFCA's Rules already require that reasoning be provided within the time specified by AFCA.<sup>170</sup> However, financial firms argued that AFCA tends to be lenient with this requirement and does not require reasoning in all instances. AFCA's Operational Guidelines provide that in some instances, such as where finality of a decision is deemed to be more important, cases can progress to final determination without a response from either party.<sup>171</sup> While this may be appropriate in a limited set of circumstances, the Review considers there is merit in requiring more reasoning for cases to progress in the interests of efficiency.
- 4.105 In response to suggestions that AFCA should adopt a reasonable offer rule like CIO, the Review notes that CIO's reasonable offer rule was a discretionary rule that was only applied in limited circumstances. In CIO's last three years of operation, this rule was rarely used: in 20 or fewer instances each year.<sup>172</sup>
- 4.106 AFCA currently has provisions in its Rules – mandatory and discretionary exclusions – that allow it to decline to investigate or deal with a complaint in certain instances. As noted in chapter 3, AFCA excluded over 15,000 complaints in its first two years of operation. Of those, the discretionary exclusions in AFCA's Rules were invoked in over 4,000 instances.<sup>173</sup> As such, the Review does not consider that AFCA needs to introduce a reasonable offer rule, but rather, could better exercise its existing discretion to exclude cases in appropriate circumstances. In this regard, AFCA has confirmed that it can exercise its discretion under its existing Rules to exclude a complaint if a financial firm has made a reasonable offer to the complainant.<sup>174</sup>
- 4.107 The Review notes that AFCA is considering various initiatives to improve its triage processes and supports the implementation of these initiatives in due course.

## Information requests

- 4.108 A number of submissions, mainly from financial firms, also expressed dissatisfaction with AFCA's approach to seeking information from parties. Some submissions stated that too much, sometimes unnecessary, information is requested upfront, while others said that AFCA has a scattergun approach to requesting documents.
- 4.109 Some financial firms in particular commented about the process AFCA goes through to seek information in the initial stages of a complaint – that is, that it goes out to the complainant and financial firm at the same time. The suggestion was that it would be more efficient to be more in line with court processes where the complainant submits their case first and the other party can then review that material in forming its response. Consumer advocacy organisations, however, strongly opposed this suggestion and argue that AFCA's existing processes have intentionally been set up as they are for a reason and that the model is working well. Specifically, they considered this method of requesting information is more appropriate given AFCA's inquisitorial approach to resolving disputes.

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170 AFCA (13 January 2021), *Complaint Resolution Scheme Rules*, AFCA, rule A.12.3

171 AFCA (21 April 2021), *Operational Guidelines to the Rules*, AFCA, pp 63–64.

172 AFCA (13 May 2021), material supplied to the Review.

173 AFCA (4 March 2021), material supplied to the Review.

174 AFCA (13 May 2021), material supplied to the Review.

## Analysis and findings

- 4.110 In relation to AFCA's processes for seeking information from the parties to a complaint, the Review finds that it could be more inefficient for there to be lots of back and forth between AFCA and parties to a complaint if it was to seek additional information in multiple batches as suggested by some respondents.
- 4.111 The Review is satisfied with AFCA's current processes, and considers AFCA is best placed to assess what works best at an operational level. AFCA should however be mindful about only seeking the information it requires, given the impact gathering information has on parties to a complaint, both in terms of time and cost.

## TIMELINESS

- 4.112 A timely service in response to all complaints that it receives is a key objective for AFCA as an alternative dispute resolution service.
- 4.113 There was a considerable amount of feedback from respondents about timeliness, or the lack of it, in many instances. While there was a general appreciation that some cases can be complex and these will understandably take time to resolve, many respondents could point to individual case examples that extended to twelve months or beyond.
- 4.114 Respondents' main concerns with delays were in situations where the delay has a financial impact either on the complainant (for example, when they are in financial hardship) or on the financial firm (for example, when interest is accruing). Some were also dissatisfied with the level of engagement they received from AFCA in terms of being kept up to date on the status or progress of their dispute.
- 4.115 As outlined in chapter 3, AFCA reports on a range of indicators around its timeliness. However, AFCA does not currently publish any key performance indicators around timeliness.
- 4.116 According to AFCA's data, the vast majority of cases are resolved in a reasonably timely manner – 61 per cent in 60 days and 92 per cent in 180 days. The overall average time it takes to resolve a dispute was 74 days in its first two years of operation. These statistics compare favourably to AFCA's equivalent in the United Kingdom (the Financial Ombudsman Service), where in 2019-20, 56 per cent of cases were resolved within three months and 74 per cent were resolved within six months.<sup>175</sup>
- 4.117 However, AFCA has some outlier cases, with 2 per cent of total AFCA complaints taking beyond 12 months. Although this represents a small proportion of the total complaints lodged with AFCA, it totalled 2,302 complaints in AFCA's first two years of operation. It is worth noting that over 900 of these complaints related to the collapse of one company and have since been settled.<sup>176</sup>

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175 UK Financial Ombudsman Service (2020) *Annual report and accounts for the year ended 31 March 2020*, UK Financial Ombudsman Service, p 26.

176 AFCA (22 April 2021), material supplied to the Review.

- 4.118 AFCA states that key factors driving delays are:
- the COVID-19 pandemic shifted operational settings for AFCA and financial firms in a number of areas
  - initial complaint inflows exceeded expected volumes
  - AFCA’s legacy jurisdiction changed the complexity and mix of complaints handled.<sup>177</sup>
- 4.119 In all five cases assessed for a lack of timeliness, the independent expert found that the claims were wholly, or partially, borne out. That is, AFCA’s handling of these matters was lengthy and exceeded standard timeframes beyond a level that can be explained by the relative complexity involved in the cases.
- 4.120 In three instances, the independent expert found that AFCA had acted appropriately expeditiously until the preliminary assessment stage, but that there was an unreasonable amount of unexplained time that elapsed between the rejection of the preliminary assessment and the progression to a final determination.
- 4.121 In one particular case, the independent expert commented that there were a series of repeated, unduly long delays in AFCA’s handling of a relatively simple complaint relating to a modest amount of money, which the AFCA costs greatly exceeded. Although the file evidences delays in obtaining documents from both parties, this does not appear sufficient to account for the length of time taken to process and determine the complaint. Whether the undue delay can be attributed to a particular avoidable cause, to unavoidable delays in obtaining essential documentation or information, or to a combination of these and other factors, was not able to be discerned by the independent expert from the case files in isolation.
- 4.122 A possible explanation that the independent expert identified is that AFCA’s limited available resources and increasing case load are contributing to lengthy delays. In particular, the expert considered the examples of lengthy delays between preliminary assessment and determination may indicate a shortage of decision makers for current caseloads.
- 4.123 To address this issue, AFCA noted that it had substantially increased its decision making team from 32 officers in late 2019 to 52 officers in July 2021.
- 4.124 One case assessed saw a number of successive delays, repeated failures to respond to queries, failures to seek necessary clarifications and failures to manage the matter proactively by multiple AFCA officers. The independent expert noted that while the parties also contributed to confusion and delay, AFCA ultimately bears responsibility for the effective management and control of its processes. The finding was that AFCA collectively failed to exercise its powers to ensure, despite the challenges, an efficient process and a reasonably timely result.

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177 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 25.

- 4.125 AFCA said in its submission to the Review that it has several initiatives in place to try and improve timeliness going forward. These include:
- supporting and uplifting employee capabilities
  - enhancing its workforce planning capabilities
  - accelerating sector engagement practices
  - continuing to enhance quality and consistency in complaint-handling
  - renewing its focus on proven resolution techniques, such as conciliations.<sup>178</sup>
- 4.126 AFCA advised that it conducts monthly reviews of aged cases, with a focus on developing and implementing plans to prioritise the resolution of these cases. In addition, AFCA advised that it will be providing additional metrics to the AFCA Board on age profiles and information on management action to address older complaints from next financial year.<sup>179</sup>

## Analysis and findings

- 4.127 The Review considers that AFCA is transparent with data around its timeliness, but that this could be enhanced through the publication of data on the full range of complaints that it resolves. This would include greater specificity on how many cases are taking beyond 12 months to resolve and by how long.
- 4.128 Time, quality and cost are all important and need to be carefully balanced by AFCA to provide an effective dispute resolution service. However, undue delays in any case have a real and significant impact on the parties involved. When factoring in the timeframes involved for IDR processes as well (typically up to 30 days), the time it can take for an individual dispute to be resolved is even longer and complainants can understandably view this as unacceptable.
- 4.129 Making a complaint can be hard and takes a toll on the parties involved so providing a timely service is a fundamental feature of the EDR framework.
- 4.130 To the extent there are some cases extending to very long timeframes, the Review considers this is a concern. It is important to understand what is causing the delays and what improvements can be made. Acknowledging some delays may be outside AFCA's control (for example, where a vulnerable party requires a number of extensions or a complaint is paused due to external factors), AFCA should focus on improving timeliness for cases extending beyond 12 months wherever possible.
- 4.131 As AFCA's existing initiatives are implemented, the Review considers that it will be important for AFCA to continue to assess timeframes and causes for delays. This is particularly the case given the deterioration in AFCA's timeliness in its second year of operation.
- 4.132 Another important consideration is to set expectations appropriately for both parties to a complaint about likely timeframes. The suggestion in AFCA's complaint resolution process map that standard and complex matters will be resolved within 3-4 months is not reflective

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178 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 27.

179 AFCA (15 July 2021), material supplied to the Review.

of the statistics of how long it actually takes to resolve a portion of these cases.<sup>180</sup> In fact, 24 per cent of all complaints take more than 90 days to close.<sup>181</sup> As such, expectations around timeframes need to be better managed and AFCA should consider enhancing its communications with parties to a complaint to assist with this.

- 4.133 From the assessment of cases relevant to timeliness, the independent expert suggested a protocol for standard improved communications as to the stage matters have reached, and whether and when progress could be expected.

## Recommendation 5

AFCA should:

- continue to publish data on its timeliness and start publishing data on the full range of complaints it resolves, including those that extend beyond 12 months
- better manage expectations around timeframes in its communications with parties to a complaint
- focus on improving the timeliness of complaints that remain unresolved beyond 12 months.

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180 See Appendix F.

181 See figure 3.12.



## CHAPTER 5: JURISDICTION

### INTRODUCTION

- 5.1 The AFCA Act requires the Review to examine the appropriateness of the monetary limit on claims that may be made to, and remedies that may be determined by, AFCA in relation to disputes about credit facilities provided to primary production businesses.
- 5.2 This chapter considers the appropriateness of AFCA's monetary limits and compensation caps for complaints made by primary production businesses and small businesses.
- 5.3 It also considers other jurisdictional issues raised by respondents during the Review, such as the compensation cap for non-financial loss, the small business insurance product exclusions, the monetary limit for strata title disputes, and AFCA's consideration of complaints relating to wholesale clients.

### Primary production and small businesses

- 5.4 A primary production business must be a small business undertaking plant or animal cultivation, or fishing, pearling, tree farming or felling activities.<sup>182</sup>
- 5.5 The monetary limit for primary production businesses in relation to credit facility complaints is \$5.425 million and the compensation cap is \$2.170 million. In comparison, the monetary limit for other small businesses in relation to credit facility complaints is \$5.425 million and the compensation cap is \$1.085 million. All of these limits were increased on 1 January 2021 due to indexation.
- 5.6 The Review did not receive many submissions on the monetary limits and compensation caps. A small number of respondents called for an increase, while others (mainly industry stakeholders) considered the jurisdictional limits appropriate.
- 5.7 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO), with the National Farmers Federation, recommended lifting the monetary limits for primary production and small business complaints to \$10 million and the compensation limits to \$5 million.
- 5.8 As noted in chapter 3, in its first two years of operation, AFCA received 8,910 complaints from small businesses (or 6 per cent of total complaints). Primary producers lodged 125 complaints in this period, which represents 1 per cent of small business complaints and fewer than 0.1 per cent of total complaints.
- 5.9 Four primary production business complaints and 16 other small business complaints were excluded for exceeding the monetary limit.<sup>183</sup> However, these numbers may not accurately reflect the volume of demand for AFCA dispute resolution above the current limits, as primary production and small businesses may have decided against contacting AFCA in the first place for matters that clearly exceeded the limit.

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182 *Income Tax Assessment Act 1997*, subsection 995-1(1) (definition of 'primary production business').

183 AFCA (4 March 2021), material supplied to the Review.

- 5.10 No primary production business complaints were excluded for exceeding the compensation cap. In contrast, there were 22 instances where the compensation amount exceeded the \$1 million cap for small businesses. For primary production business complaints where compensation was awarded, all received less than \$1 million and 95 per cent received less than \$500,000.<sup>184</sup>

## Analysis and findings

- 5.11 The Review considers the monetary limit and compensation cap for primary production businesses to be appropriate. This is also the case when considering the monetary limit and compensation cap for small business complaints more broadly.
- 5.12 While there is evidence that a small number of complaints from primary production businesses and small businesses were excluded for exceeding the monetary limit, this does not indicate that there is a widespread problem with the current limit. The Review notes that with most caps or limits there will always be cases that fall just outside the limits set.
- 5.13 AFCA's monetary limits and compensation caps were set after extensive consultation by government before AFCA's establishment and are significantly higher than the monetary limits and compensation caps from predecessor schemes. Under FOS and CIO, the monetary limit for a credit facility was \$2 million and typically there was a compensation cap of \$309,000.<sup>185</sup>
- 5.14 Like most ombudsman schemes, AFCA was established to resolve smaller, lower-value disputes and provide claimants with a relatively simple process, negating the need for legal representation.
- 5.15 Complaints that involve very large monetary amounts, for example a \$10 million credit facility as recommended to the Review, would generally involve a high degree of complexity. Given the potential complexity of such matters, AFCA's broader fairness jurisdiction and the fact that AFCA decisions are binding on financial firms, the Review considers that such matters are most appropriately dealt with by existing legal mechanisms.
- 5.16 The Review also notes that there are already different definitions of small business that add to complexity and confusion. This issue was identified by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry when it recommended the Australian Banking Association (ABA) amend the definition of small business in the Banking Code of Practice to increase the limit on credit facilities from \$3 million to \$5 million.<sup>186</sup> The ABA has committed to implement this increase as part of the triennial review of the Banking Code of Practice, which would align the limit on credit facilities with the AFCA limit.<sup>187</sup> Changes to the AFCA limit would put the ABA increases out of step and exacerbate inconsistencies.
- 5.17 AFCA should continue to monitor the number of complaints from primary production businesses and small businesses, specifically the number of exclusions and the amount those cases were above the monetary limit or compensation cap. A credible dataset will

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184 AFCA (4 March 2021), material supplied to the Review.

185 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, p 37.

186 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) (2019) *Final Report Volume 1*, Royal Commission, recommendation 1.10.

187 Australian Banking Association (n.d.) *Small business definition to be expanded*, ABA website, accessed 7 August 2021.



assist AFCA to determine whether increases to the jurisdiction limits are warranted in the future.

## OTHER JURISDICTIONAL ISSUES

- 5.18 The Review received feedback from respondents on a range of other jurisdictional issues. Some of the key issues are considered below.

### Non-financial loss

- 5.19 For non-superannuation complaints, AFCA can award compensation up to \$5,400 for non-financial loss, including in relation to privacy breaches.<sup>188</sup> AFCA can award more than \$5,400 if the complaint encompasses several claims.<sup>189</sup>
- 5.20 AFCA and consumer advocacy organisations propose increasing the non-financial loss cap, stating the current cap does not always provide sufficient compensation for significant stress, inconvenience and pain and suffering caused to a complainant by a financial firm.<sup>190</sup>
- 5.21 AFCA’s submission noted two cases that AFCA believed demonstrated the inadequacy of the current limit, as the examples showed the complainants suffered extreme stress and were inconvenienced beyond the \$5,400 cap. AFCA and the consumer advocacy organisations also noted that similar bodies, such as the Office of the Australian Information Commissioner (OAIC), the Victorian Civil and Administrative Tribunal and the Queensland Civil and Administrative Tribunal have the power to award higher compensation amounts for non-financial loss.<sup>191</sup>
- 5.22 In contrast, some industry respondents expressed concerns about AFCA’s use of non-financial loss compensation (as mentioned in chapter 4), stating that it is being used more frequently and awarded in cases where the complainant was unsuccessful or the decision was finely balanced.
- 5.23 In its Operational Guidelines, AFCA states that it takes a measured approach to awarding compensation for non-financial loss, citing a preference for non-financial remedies, such as an apology, over financial compensation. It states that:
- we do not award non-financial loss compensation merely because the Complainant has suffered some inconvenience and anxiety. We expect Complainants to be moderately robust and to bear the normal degree of inconvenience experienced when a problem occurs and to take reasonable steps to manage the situation.<sup>192</sup>
- 5.24 AFCA’s stated approach to awarding compensation for non-financial loss is reflected in complaint outcomes. In its first two years of operation, AFCA awarded compensation for

188 AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rule D.3.3.

189 AFCA (4 March 2021), material supplied to the Review.

190 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 51.

191 The OAIC considers complaints about the handling of personal information by an Australian Government agency or any organisation covered by the *Privacy Act 1988*. The OAIC does not have a specified limit on non-financial loss, but has not awarded compensation for non-financial loss above \$20,000 to date. The Victorian Civil and Administrative Tribunal can award compensation up to \$100,000 for loss or damage from a privacy breach (*Privacy and Data Protection Act 2014* (Vic), paragraph 77(1)(a)); AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, pp 52-53.

192 AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 160.

non-financial loss in 1,432 determinations, or approximately 17 per cent of all AFCA determinations. Approximately 76 per cent of these decisions awarded less than \$2,000, 20 per cent awarded between \$2,001 and \$5,000 and 4 per cent awarded above \$5,000 for non-financial loss.<sup>193</sup>

## Analysis and findings

- 5.25 The Review does not support an increase in the compensation cap for non-financial loss, as there is insufficient evidence to suggest the existing cap is inadequate and AFCA decisions are not reviewable.
- 5.26 The power to award compensation for non-financial loss existed under the FOS and CIO regimes. In principle, it is an important remedial power that allows AFCA to quickly compensate complainants who may have suffered an unusual amount of physical inconvenience or stress. However, it is also important that there are limits to this power, considering the discretionary nature of AFCA decisions and the general flexibility of an ombudsman model. Compensation for damages suffered above the existing limit are more appropriately dealt with by the courts.
- 5.27 The Review did not receive many case examples that demonstrated the inadequacy of the current limit. Furthermore, most AFCA decisions to award compensation for non-financial loss are well below the current limit.
- 5.28 Finally, it would be inappropriate for AFCA to have the same or similar compensation limits for non-financial loss as the OAIC, Victorian Civil and Administrative Tribunal or the Queensland Civil and Administrative Tribunal, as the compensation decisions made under these forums are subject to review mechanisms, unlike AFCA compensation decisions.
- 5.29 AFCA should continue to collect data on decisions to award compensation for non-financial loss to help inform future consideration of this matter.

## Small business insurance product exclusions

- 5.30 The AFCA Rules currently prevent AFCA from considering small business insurance complaints in relation to contract works (referred to as 'contractors all risks'), fidelity guarantee, legal liability (including public liability and products liability), professional indemnity and industrial special risks.<sup>194</sup>
- 5.31 The Review heard feedback from ASBFEO that these exclusions should be removed to assist small businesses and insurance companies avoid the costs of litigation. The same recommendation was made by ASBFEO in its Inquiry into Small Business Insurance in 2020.<sup>195</sup>
- 5.32 AFCA supports the proposal as a matter of fairness and access to justice.<sup>196</sup>

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193 AFCA (4 March 2021), material supplied to the Review.

194 AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rule E.1.

195 ASBFEO (2020) *Insurance Inquiry Report*, ASBFEO, recommendation 2.

196 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 55.

## Analysis and findings

- 5.33 AFCA’s jurisdiction for insurance complaints, including small business insurance, largely reflects the general insurance financial product definition in paragraph 761G(5)(b) of the Corporations Act.<sup>197</sup>
- 5.34 The Review notes that the insurance products that are exempted have very different characteristics to the general insurance products that are defined as being provided to retail clients, both in terms of risks covered and how they are sold. For example, industrial special risk policies are generally complex tailored policies that are purchased to provide cover to medium and large businesses with assets above \$5 million and are often purchased by businesses with the assistance of an insurance broker.
- 5.35 The Review did not receive clear evidence to support the need for the removal of the small business insurance product exclusions. While expanding AFCA’s jurisdiction to include certain business insurance products would increase protections, the Review considers that these benefits are insufficient in light of ongoing concerns about access to and the pricing of these products.

## Monetary limits for residential strata title insurance

- 5.36 Strata title insurance is typically required by state and territory legislation to cover the estimated replacement cost from damage to building structures as well as to common property of the strata scheme, such as driveways, car parks, stairs, lifts and gardens. It also covers liability for personal injury.
- 5.37 Strata title insurance does not provide coverage for the contents of residences.
- 5.38 Under the AFCA Rules, a chair of an owner’s corporation or body corporate manager can make a complaint to AFCA if the claim does not exceed \$1.085 million.
- 5.39 Consumer advocacy organisations have submitted that the monetary limit for complaints from strata schemes should be increased, or alternatively claims made by complainants within the body corporate should be allowed to be disaggregated. This view was based on concerns that the current limits can be easily exceeded as they relate to several or all members of the body corporate.
- 5.40 In its first two years of operation, AFCA received 415 complaints about residential strata title insurance. From those complaints that were closed in this period, 66 were outside of AFCA’s Rules, but none were excluded for exceeding monetary limits.<sup>198</sup>

## Analysis and findings

- 5.41 The Review has not obtained sufficient evidence to suggest there is a systemic problem with the current monetary limit. As noted in earlier sections, AFCA’s existing monetary limits were set following extensive consultation and are significantly higher than predecessor schemes.

<sup>197</sup> Corporations Act, paragraph 761G(5)(b); AFCA (1 April 2021), material supplied to the Review.

<sup>198</sup> AFCA (15 July 2021), material supplied to the Review.

5.42 The Review notes that strata claims can be complex and expensive. While it is appropriate for AFCA to consider low-value strata complaints, the Review considers that complaints above the existing monetary limits are more appropriately dealt with by the courts.

## AFCA's consideration of complaints relating to wholesale clients

5.43 Under the Corporations Act, a person may fall within the definition of wholesale client if they:

- are purchasing a financial product or service above \$500,000
- have net assets of at least \$2.5 million or gross income of approximately \$250,000 per year
- are a professional investor
- are a sophisticated investor.<sup>199</sup>

5.44 Among other elements, a person is a sophisticated investor if the licensee is satisfied the person has sufficient experience to understand the merits, value and risks of the investment and the person signs an acknowledgment that the licensee does not owe them retail obligations.<sup>200</sup>

5.45 Some industry respondents were concerned with the extent to which AFCA accepts complaints from wholesale clients, submitting that some were purposely using the AFCA process to attribute the full cost of resolving the dispute to the financial firm, which may itself be a small business with limited means. Their view was that these disputes come from sophisticated consumers whose disputes should be heard by courts, and not AFCA, since they have the means to access the courts.

5.46 These respondents also argued that Parliament has decided through provisions in the Corporations Act that wholesale clients do not require the consumer protections that are afforded to retail clients.

5.47 This was a key concern raised by one industry association that recommended amending the AFCA Rules to clarify that AFCA does not have jurisdiction to hear complaints from wholesale clients. That industry association considered there should be a mandatory exclusion for wholesale client complaints.

5.48 AFCA noted that where a financial firm is licensed to deal with both retail and wholesale clients, its membership of AFCA also gives its wholesale clients potential access to the AFCA scheme, consistent with its predecessor schemes. AFCA further submitted that any mandatory exclusion would reduce consumer protection, noting that a number of complaints lodged with AFCA involve consumers being incorrectly categorised as 'wholesale' by the financial firm.<sup>201</sup>

5.49 AFCA has the power to exclude a complaint about a financial service if the complainant is a wholesale client.<sup>202</sup> However, AFCA's Operational Guidelines state that it will not exercise

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199 Corporations Act, sections 761G and 761GA; *Corporations Regulations 2001*, subregulation 7.1.18(2).

200 Corporations Act, section 761GA.

201 AFCA (6 May 2021), material supplied to the Review.

202 AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rule C.2.2(j).

its discretion to exclude a complaint merely because it is submitted by a wholesale client.<sup>203</sup>

5.50 AFCA has not exercised this discretion to date. However, it was used by FOS in approximately 30 instances.

### Analysis and findings

- 5.51 The Corporations Act provides different protections for retail clients compared to wholesale clients. Similarly, the Credit Act provides protections for consumer credit that do not extend to small business lending. AFCA's jurisdiction, as it is open to certain wholesale clients and small businesses, is consistent with the proposition that some of these consumers and small businesses should have access to a free and accessible ombudsman service.
- 5.52 For example, a retiree obtaining advice in relation to their superannuation savings may be investing in a financial product in excess of the \$500,000 threshold. Similarly, a relatively unsophisticated consumer may have assets (such as their home and superannuation) with a value above \$2.5 million but be unable to navigate the complexity of the financial system.
- 5.53 Therefore the Review does not consider it appropriate that AFCA be required to exclude all wholesale investors.
- 5.54 Where possible, AFCA should look to more actively exercise its existing discretion to exclude wholesale complaints in appropriate circumstances. As they stand, the Operational Guidelines are more restrictive of AFCA's discretion than they should be. If a complaint is lodged by an apparent wholesale client, and AFCA has made sufficient enquiries to rule out that they have been incorrectly or inappropriately classified by the financial firm, AFCA should have the discretion to exclude the complaint.
- 5.55 In particular, as noted above, for the client to be classified as a sophisticated investor, the licensee must be satisfied the client has sufficient experience to understand the merits, value and risks of the investment and the client must sign an acknowledgment that the licensee does not owe them retail obligations.
- 5.56 As such, sophisticated investors are more likely to be consciously choosing to relinquish protections for retail investors. AFCA should exclude complaints from sophisticated clients as a matter of course, unless there is evidence that they have been incorrectly or inappropriately classified, for example where a firm has misled a client to carve them out of retail protections.
- 5.57 A similar proposition applies for professional investors, who again are far more likely to understand that they are obtaining financial services without the benefit of retail protections.<sup>204</sup>

## Recommendation 6

AFCA should exclude complaints from sophisticated or professional investors, unless there is evidence that they have been incorrectly or inappropriately classified.

<sup>203</sup> AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, pp 149–150.

<sup>204</sup> See Corporations Act, section 9, definition of 'professional investor'.



## CHAPTER 6: FUNDING AND FEE STRUCTURES

### INTRODUCTION

- 6.1 AFCA is required to ensure that it has adequate funding to manage its ongoing complaint resolution services. This was a factor the Minister considered as part of AFCA's authorisation.<sup>205</sup> This chapter focuses on AFCA's funding and fee structures.
- 6.2 The guidance for submissions included with the terms of reference sought views on whether AFCA's funding and fee structures impact competition, and also whether there are enhancements to the funding model that should be considered by AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model.<sup>206</sup>
- 6.3 Respondents provided feedback on a range of issues in relation to AFCA's funding and fee structures. While some aspects of the feedback directly addressed the questions around competition, much of it related to broader issues.

### ABOUT AFCA'S FEES

- 6.4 AFCA is a not-for-profit company limited by guarantee and funded by industry.
- 6.5 It is a statutory requirement that AFCA's operations are financed through contributions made by members of the scheme – that is, financial firms. It is also a statutory requirement that complainants are exempt from payment of any fee or charge to AFCA in relation to a complaint.<sup>207</sup>
- 6.6 ASIC expects that, to meet the statutory requirements, AFCA will have a funding model and funding arrangements that ensure it is sufficiently financed. ASIC's regulatory guidance sets out that the model and arrangements should:
- be adequate, fair and efficient
  - be transparently developed, reviewed and amended by reference to the statutory criteria and external operating context
  - be capable of responding to external events such as unexpected volatility in caseload
  - minimise cross-sectoral subsidisation to the extent practicable
  - be able to raise additional funds to support scheme operations, if required.<sup>208</sup>

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205 See Explanatory memorandum, Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017, [1.54].

206 The Treasury (19 February 2021) *Review of the Australian Financial Complaints Authority: Terms of Reference and guidance for submissions*, the Treasury, Australian Government, p 3.

207 Corporations Act, subsection 1051(2).

208 ASIC (June 2018) *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority*, ASIC, p 30.

- 6.7 As outlined in chapter 3, AFCA members (other than superannuation trustees) are charged a membership levy, as well as complaint fees and a user charge where applicable. Superannuation trustees are currently charged a single superannuation levy, based on their size. Chapter 3 includes a breakdown of the composition of AFCA's charges and revenue in 2019-20.<sup>209</sup>
- 6.8 AFCA's procedures for charging each component are as follows:
- AFCA sets membership levies in June prior to the commencement of the new financial year. Fee increases are set by the AFCA Board. AFCA uses an annual assessment survey to ascertain members' relative size, which is a factor in calculating how much each member pays.
  - AFCA adjusts complaint fees according to fee increases agreed by the Board.
  - AFCA calculates user charges in July for the previous financial year. No member input is required for that calculation.
  - To calculate the superannuation levy, AFCA obtains data on funds relating to the previous financial year through a data-sharing agreement with APRA. It calculates the levy in July for the previous financial year.<sup>210</sup>
- 6.9 AFCA's current charges are interim funding arrangements that were consulted on in July 2018. The interim arrangements apply for AFCA's first three years of operation, with a longer-term solution being worked through by AFCA as part of an internal funding review currently underway.<sup>211</sup>
- 6.10 AFCA's internal funding review commenced in March 2021 and, as at July 2021, was in the design phase of recommended options to be tabled to the AFCA Board. AFCA indicated that it would consult with members, industry and government stakeholders in 2021-22.<sup>212</sup>
- 6.11 Given AFCA is industry-funded, it is unsurprising that the vast majority of feedback to the Review in relation to fees came from members.

## COMPETITION IMPACTS AND INCENTIVES FOR EARLY RESOLUTION

- 6.12 Many smaller financial firms commented that AFCA's fee structure is anti-competitive as it has a greater impact on smaller firms. They said that since the same fee structure applies to all members, it is difficult for smaller firms to afford and can discourage them from operating.
- 6.13 In particular, one industry association commented that while AFCA's membership levy takes into account the relative size of the member's business (relative to other AFCA members), there can still be a significant difference in the size and scale of some financial firms required to pay the same membership levy. The respondent said that this discrepancy is unfair and should be addressed by a change in the levy structure.

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209 See figure 3.4.

210 AFCA (15 July 2021), material supplied to the Review.

211 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 39.

212 AFCA (15 July 2021), material supplied to the Review.



- 6.14 Many financial firm respondents also stated that they feel pressure to settle cases early as it is in their commercial interest to minimise the costs, time and effort involved in progressing a case through AFCA. That is, since financial firms are liable to cover the costs of a complaint, and complaints cost more as they progress further through AFCA's process, they are incentivised to settle and close the matter early even in situations where they think the case does not have merit. This was one of the most frequently raised issues by a wide range of financial firms as part of the Review.
- 6.15 More broadly, a number of financial firms (both small and large) expressed concerns about the unfairness of situations where firms have to pay substantial complaint-handling fees to go through AFCA's process, just to be found not at fault. To the extent this occurs, it was particularly of concern for smaller financial firms that indicated AFCA's fee structure has a significant adverse impact on their profitability. The superannuation sector was also concerned about this becoming an issue for it if AFCA moves to a user-pays model for superannuation trustees, especially because fees are ultimately borne by the members of the superannuation fund and superannuation trustees are required to consider the best financial interests of members.
- 6.16 Some industry associations also expressed a view that AFCA's staff are fundamentally conflicted in having an incentive to push cases through to later stages of AFCA's processes as it will result in a higher revenue stream for the organisation.
- 6.17 Some financial firms suggested introducing a more flexible or sliding fee structure that differentiates fees based on case complexity or firm size. A few suggested higher membership levies and lower complaint and user fees in the interests of removing the purported incentive for AFCA staff to progress unmeritorious cases. Others suggested lower membership levies and higher complaint and user fees in the interests of making it more reflective of a user-pays model. Finally, some financial firms suggested a funding model where they are not liable for any complaint fees in instances where a decision is in their favour.

## Analysis and findings

- 6.18 A cost recovery funding model requires costs to be attributed across AFCA's membership. Any such model is necessarily a zero-sum exercise, where any relief offered to one cohort must be borne by another, assuming aggregate costs remain constant.
- 6.19 AFCA's funding model, as outlined in chapter 3, has three core components for non-superannuation members. These components are calibrated so that AFCA is funded largely through a direct user-pays model. That is, those firms that have complaints against them pay for the costs of handling those complaints.
- 6.20 The base component of AFCA's funding model, its membership levy, accounted for 7 per cent of AFCA's revenue in 2019-20.<sup>213</sup> Although payable by all member financial firms, the membership levy is apportioned to take into account the size of financial firms. Accordingly, the membership levy that smaller financial firms pay is significantly less than that for large financial firms. For example, AFCA advised that a very large member typically pays between \$20,000 and \$27,000 as a membership levy, and a medium-size firm might

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213 See figure 3.3.

- pay a levy of several thousand dollars, while a small member pays the minimum membership levy (\$370 in 2020-21).<sup>214</sup>
- 6.21 The majority of AFCA’s members do not pay complaint-handling fees, the second component of AFCA’s funding model, as fewer than 20 per cent of members had complaints lodged against them in AFCA’s first two years of operation. Complaint-handling fees accounted for 66 per cent of AFCA’s total revenue in 2019-20, with almost 70 per cent of that coming from large or very large financial firms.<sup>215</sup>
- 6.22 The final component of AFCA’s funding model, the user charge, is payable by members who have two or more complaints closed in the relevant 12-month period. It is not based on a member’s size. The user charge accounted for 8 per cent of AFCA’s revenue in 2019-20.<sup>216</sup> This component of AFCA’s funding model seeks to reward firms who resolve complaints through IDR and reduce the need for their customers to go to AFCA. This is likely to act as a greater incentive for smaller financial firms, compared to larger firms, as many larger firms are likely to quickly surpass the two-complaint threshold given the scale of their operations.
- 6.23 It is worth noting that those financial firms that do incur a user charge are charged an amount that is calculated and proportionally allocated annually. This is based on the budgeted annual user charge amount, which is then apportioned to relevant members based on their proportion of complaints closed in the 12-month period and the stage at which they are closed as a proportion of total complaints closed in the period.<sup>217</sup> This means that a financial firm with three complaints against it in a year will pay a significantly lower user charge than a financial firm with 100 complaints against it, for example.
- 6.24 AFCA indicated that the intention of its model is to apportion and allocate cost of the service to the higher users of the service through its current funding and any future funding model changes.<sup>218</sup>
- 6.25 The structure of AFCA’s funding model means that for the vast majority of members, the only cost is the modest membership levy. In 2020-21, the minimum financial firm membership levy was \$370 and the credit representative membership levy was \$65. Even for those financial firms that are subject to AFCA’s complaint fees and the user charge, it is likely that AFCA’s dispute resolution service offers a more efficient and cost-effective outcome than the alternative if those complaints went through a court or tribunal process.
- 6.26 The Review considers that the structure of AFCA’s membership levy sufficiently takes into account firm size and impact on competition across financial firms.
- 6.27 The design of AFCA’s complaint-handling fees as well as its user charges do, as submitted by some financial firms, incentivise early resolution of complaints through firms’ IDR processes or in early stages of AFCA’s complaints processes.
- 6.28 The Review considers that while early resolution of complaints is an important and desirable feature of an ombudsman service, it is important that the cost structure for assessing complaints does not create perverse incentives for compensation to be provided to complainants where there is no merit to a claim. Such an outcome undermines the

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214 AFCA (15 July 2021), material supplied to the Review.

215 See figures 3.3 and 3.4.

216 See figure 3.3.

217 AFCA (15 July 2021), material supplied to the Review.

218 AFCA (15 July 2021), material supplied to the Review.

- integrity of the financial system and is particularly problematic for smaller financial firms that may not have the financial flexibility to absorb such costs. In addition, this outcome is inefficient as firms will ultimately have to factor these costs into charges to consumers, thereby increasing the costs that consumers pay for financial products and services.
- 6.29 To deal with this issue, as part of its internal funding review, AFCA should consider setting its user charge by reference to two or more complaints against a financial firm being found in favour of the complainant. Under such an approach, financial firms would only be required to pay a user charge in instances where they have two or more complaints against them upheld by AFCA. This approach would retain the incentive for financial firms to resolve meritorious complaints via IDR, but reduce the undue incentive to settle complaints that they consider to be unmeritorious.
- 6.30 Of particular concern are high-volume, low-value complaints, for example in relation to credit ratings, where financial firms could face prohibitive costs if opting to pursue the cases to determination. Such prohibitive costs may also incentivise other agents, such as paid advocates, to pursue claims knowing that it is in the firm's interest to settle the complaint where early settlement will always cost less than successfully defending a claim. The Review notes that AFCA is already considering initiatives to help deal with this issue (as outlined in chapter 4) but considers that the costs to financial firms for high-volume, low-value complaints should be a specific focus for AFCA in its internal funding review.
- 6.31 The Review also recognises that for all financial firms, and small financial firms in particular, the cost of individual complaints can have a substantial impact. While it is appropriate that financial firms at fault are responsible for paying the costs associated with their complaint, there is an inherent equity trade-off that should be considered when firms are found to not be at fault. In these situations, consideration should be given by AFCA as part of its internal funding review as to whether some or all firms should pay the cost of disputes brought against them when they are found not to be at fault or whether some form of cost sharing with other financial firms would produce a fairer outcome.
- 6.32 For example, AFCA could consider removing the complaint-handling fee for the first few complaints that they may receive about a small financial firm, or not charging complaint-handling fees when a decision is made wholly in favour of the financial firm involved in a complaint. These approaches could significantly reduce the incentive for financial firms to unduly settle cases early that they consider to be unmeritorious. However, given the nature of AFCA's funding model, this approach would mean that the costs would need to be recovered elsewhere from other members, likely from an increase to the membership levy. This would result in financial firms not involved, and also not at fault, in an individual complaint having to pay additional fees to AFCA. Such a trade-off needs to be carefully considered by AFCA as part of its internal funding review, to ensure an appropriate balance is achieved so as not to have adverse competition impacts.

## TRANSPARENCY AND ACCOUNTABILITY

- 6.33 A few financial firms and industry bodies called for greater transparency and accountability in relation to AFCA's funding. Specifically, there was interest in greater transparency in how AFCA spends its revenue, greater consultation and accountability on the quantum and methodology used to calculate its fees, and greater visibility of AFCA's fee schedule.

- 6.34 In relation to AFCA's internal funding review that is currently underway, some financial firms were aware of it while others were not.

## Analysis and findings

- 6.35 Although AFCA is subject to reporting obligations as a company limited by guarantee under the Corporations Act, it is clear that there is a desire for greater transparency on AFCA fees and funding structures from AFCA's members. It is reasonable for members, who are required to be members to maintain their financial services or credit licence, to want to have confidence and visibility of AFCA's processes since they are funding the organisation.
- 6.36 Members already have access to AFCA's fee schedule on their secure member services portal (which is not publicly available). The Review considers this to be appropriate.
- 6.37 However, AFCA should communicate more with members about its fees and charges. While AFCA, as a non-government entity, is not subject to the Australian Government Cost Recovery Guidelines, these guidelines (specifically documentation requirements associated with the cost recovery implementation statement) could provide a useful guide for AFCA as to the type of reporting and transparency that financial firms seek.<sup>219</sup> Strong oversight and transparency of AFCA's funding is appropriate given the compulsory nature of membership for financial firms.
- 6.38 There should also be greater consistency across industry in the information shared by AFCA on its initiatives, such as the internal funding review currently underway.
- 6.39 AFCA's transparency and accountability more broadly are explored in chapter 7.

### Recommendation 7

AFCA's funding model should not disincentivise financial firms from defending complaints that they consider do not have merit and should better take into account the circumstances of small financial firms.

### Recommendation 8

AFCA should improve the transparency of its fees for financial firms and how the fees are being used to support AFCA's activities.

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219 Department of Finance (30 September 2020) *Australian Government Cost Recovery Guidelines (RMG 304)*, Department of Finance website, Australian Government, accessed 28 July 2021.

# CHAPTER 7: ACCOUNTABILITY

## INTRODUCTION

- 7.1 This chapter assesses the two different elements of accountability for AFCA’s decisions and practices.
- 7.2 The first element concerns the substance or outcome of an individual AFCA determination, and whether further internal review mechanisms should be put in place. Within this first element, the chapter considers review of an AFCA determination from two perspectives – review of the outcome of the case at hand, and review of the substance with respect to its application to future cases.
- 7.3 The second element concerns the standard of service provided by AFCA during its processing of a complaint, and whether the Independent Assessor function is operating effectively in handling service complaints.
- 7.4 The chapter also discusses AFCA’s transparency, including how it conveys its decision making approaches and communicates with its membership.
- 7.5 Background information on the formal accountability mechanisms established by the legislation and the regulator is included in chapter 2.

## SUBSTANCE OF AFCA DECISIONS

- 7.6 AFCA’s determinations are binding on financial firms. Other than a limited ability for judicial review by the Courts, non-superannuation determinations cannot be appealed.<sup>220</sup>
- 7.7 An AFCA superannuation determination can be appealed to the Federal Court by either party on an error of law. The Federal Court can affirm, substitute or remit such a determination to the scheme.<sup>221</sup>
- 7.8 While AFCA determinations are binding on financial firms, complainants are not required to accept an AFCA determination. Complainants, if dissatisfied with AFCA’s determination, may pursue their dispute in court. The exception is a superannuation determination, which is binding on both parties.<sup>222</sup>

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220 Corporations Act, paragraph 1051(4)(e); AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rule A.15.3; AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 75; *Investors Exchange Limited v Australia Financial Complaints Authority Limited* [2020] QSC 74, [12]–[39].

221 Corporations Act, section 1057.

222 Corporations Act, paragraph 1051(4)(e); AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rules A.15.1 and A.15.4; Explanatory Memorandum, Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017, [1.179].

- 7.9 For non-superannuation complaints, the only changes a party can request to an AFCA determination are to correct errors under AFCA’s ‘slip rule’. This allows AFCA to correct a determination if it contains:
- a clerical mistake
  - an error arising from an accidental slip or omission
  - a material miscalculation of figures or a material mistake in the description of any person, thing or matter
  - a defect of form.<sup>223</sup>
- 7.10 There are also mechanisms to seek forward-looking review of the approach applied by AFCA in a determination, without reopening the case at hand. This involves an informal process where stakeholders raise the concern with a Lead Ombudsman or the Chief Ombudsman directly, as well as a formal process that requires the applicant to provide relevant legal advice, as explained further below.<sup>224</sup>
- 7.11 The guidance for submissions included with the Review’s terms of reference asks whether there is a need for AFCA to have an internal mechanism where the substance of its decisions can be reviewed, and if so, how it should operate to ensure that complainants have access to timely decisions by AFCA.<sup>225</sup>

## Merits review of the case at hand

- 7.12 Of those respondents that addressed review of decisions, most focused their submission on whether additional mechanisms are warranted to review and potentially change the outcome of the AFCA determination in question.
- 7.13 Several submissions from current and former complainants supported establishing further avenues for review. Many of them called for an external mechanism, expressing scepticism that an internal mechanism would have sufficient independence or yield a different result.
- 7.14 Some respondents, including consumer advocacy organisations, argued that merits review is already built into the AFCA process because it provides for determinations where the parties do not agree with a preliminary assessment. This was also a point made by AFCA.<sup>226</sup>
- 7.15 There was also a view from the consumer advocacy perspective that further review mechanisms would benefit financial firms rather than consumers, with consumers more likely to feel exhausted by the process and seek to resolve it earlier than they should.
- 7.16 Views from financial firms were mixed. Many respondents were supportive of further avenues of review. However, many financial firms and industry associations cautioned against further review mechanisms, noting the additional time and cost this could generate.

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223 AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 75.

224 AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, pp 75–76.

225 The Treasury (19 February 2021) *Review of the Australian Financial Complaints Authority: Terms of Reference and guidance for submissions*, the Treasury, Australian Government, p 3.

226 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 46.

- 7.17 Many financial firms have conveyed their unease at AFCA decisions locking in precedents without the ability to appeal, often with implications on a very large number of other complaints, products and policies.
- 7.18 For respondents in favour of further merits review, there were a variety of models put forward. Recognising the cost and time implications, some respondents thought careful limits needed to be placed on when a complaint outcome could be reviewed. For example, one financial firm suggested limiting the grounds of review to instances where an AFCA decision overrules a financial product term or condition, contradicts a legal requirement or relates to systemic issues.
- 7.19 Some proponents cited shortcomings of AFCA’s test case process as a reason why further avenues of review are necessary.<sup>227</sup> In its submission, AFCA proposed exploring a more interventionist test case model of the type adopted by the United Kingdom’s Financial Conduct Authority.<sup>228</sup>
- 7.20 In contrast, some complainants proposed a model where AFCA would itself take matters against financial firms to court on the consumer’s behalf.
- 7.21 Some respondents considered the need or perceived need for further review mechanisms would be addressed by improving the quality of decision making in the first instance, for example through greater oversight by senior AFCA officers of case managers’ decisions earlier in the process.
- 7.22 AFCA opposes further internal merits review, but proposes to review its guidance on its ‘slip rule’ for correcting certain errors in determinations and consult stakeholders on any amendment.<sup>229</sup>

## Analysis and findings

- 7.23 All models considered by the Review to add further review mechanisms would necessarily add costs and adversely affect timeliness of decisions, impacting accessibility and efficiency. Both supporting and opposing submissions highlighted these trade-offs. It would also risk AFCA’s processes becoming more legalistic, potentially reducing the willingness of consumers to engage with AFCA or alternatively resulting in consumers feeling the need to engage paid advocates or legal services.
- 7.24 Based on these considerations the Review has not identified sufficient evidence of inappropriate decision making by AFCA to recommend further review mechanisms that would reopen the decisions made on individual cases. The ability to disagree with a preliminary assessment and proceed to a determination of a complaint already provides a means of review. Further, complainants always retain the option to bring an action in the courts or take any other available action against the financial firm if dissatisfied with an AFCA determination.
- 7.25 The Review considers that making decisions consistent with recommendation 2, and with the discussion in chapter 4 about the application of the fairness jurisdiction, should act to

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227 Financial firms can make a request to AFCA that a complaint be decided as a test case in the courts, rather than by AFCA. Typically, a financial firm might seek a test case where the complaint in question raises issues that would have a significant impact on its future operations or affect a significant class of superannuation fund members (AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, pp 146–147).

228 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, pp 50–51.

229 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 51.

- limit the cases where parties might perceive merits review of an AFCA determination to be warranted.
- 7.26 The Review raises no objection to AFCA’s proposal to consult on clarifications to better articulate its ‘slip rule’ for correcting errors in determinations. However, any clarification should be consistent with the intended purpose of the slip rule and not permit AFCA to reopen a complaint for substantive revision. The independent expert assessed one case where it was clear that AFCA had used the slip rule to amend a finalised determination in circumstances where it had omitted to address a substantive component of the complainant’s claim.
- 7.27 The Review has not considered in detail alternative models for test cases, noting that the existing mechanism has so far only been engaged for two related test cases on business interruption insurance, one of which is still before the courts.<sup>230</sup> The Review also notes that the United Kingdom model raised by AFCA refers to powers exercisable by the Financial Conduct Authority, the equivalent of ASIC, rather than by the equivalent ombudsman.
- 7.28 While not considered in detail, given the role of AFCA as an independent arbiter for disputes between complainants and financial firms, the Review does not consider that it would be appropriate for AFCA to be actively undertaking legal action on behalf of complainants against members.

## Forward-looking internal review

- 7.29 AFCA’s submission to the Review noted its existing review mechanisms available to financial firms, industry bodies and consumer advocacy organisations to raise issues about the underlying approach taken by AFCA in a determination.<sup>231</sup> These mechanisms consider only whether to alter the approach for future decisions, rather than reopening the case at hand.<sup>232</sup>
- 7.30 The threshold to access these mechanisms is that the applicant seeks to raise a ‘significant concern’ about the underlying approach taken by AFCA in one or more determinations.<sup>233</sup> There is an informal process and a formal process. The informal process involves stakeholders raising the concern with a Lead Ombudsman or the Chief Ombudsman directly, for an internal review of whether AFCA should change its approach for future complaints. In contrast, the formal process is designed to be used primarily by an industry association or consumer advocacy organisation and a request for a formal review must be supported by legal advice from external counsel that AFCA made an error of law.<sup>234</sup>
- 7.31 The AFCA Operational Guidelines do not set out parameters around who conducts formal reviews (for example, particular members of the AFCA executive or a panel).
- 7.32 Only three requests for a formal review under this process have been made since AFCA’s establishment. The first was from a non-bank lender regarding AFCA’s approach to responsible lending complaints, the second was from a bank about the application of the mistaken internet payment provisions of the ePayments Code, and the final was from an

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230 AFCA (28 June 2021) *Business interruption insurance test cases*, AFCA website, accessed 7 August 2021.

231 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 22.

232 AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 76.

233 AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 75.

234 AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, pp 75–76. An error of law is a misinterpretation or misapplication of a principle of law, or the application of an inappropriate principle of law, to an issue of fact (Butt P and Hamer D (eds) (2011) *LexisNexis Concise Australian Legal Dictionary*, 4th edn, LexisNexis Butterworths, p 213).



industry association about AFCA's approach to superannuation fees and charges. Of the three, one resulted in a decision to change approach, one was considered not to warrant a change, and one is in progress.<sup>235</sup>

- 7.33 One industry association submitted that these existing mechanisms to review an approach are difficult to access and that the outcome is uncertain given limited information is available in AFCA's Operational Guidelines. The respondent also submitted that this form of review conducted internally by AFCA is not independent.
- 7.34 Another industry association called for greater detail about the formal version of these existing mechanisms and for the removal of the requirement that applicants present legal advice that AFCA made an error of law.

### **Analysis and findings**

- 7.35 Where financial firms and industry associations are seeking to pursue their concerns regarding the policy or precedent brought about by what they view as an incorrect AFCA decision, the focus should be on AFCA's existing forward-looking review mechanisms.

#### *Visibility and scope*

- 7.36 The Review did not receive sufficient submissions to determine the key driver of the low take-up of the formal review mechanism – whether it reflects a lack of awareness by financial firms and complainants, barriers to access due to the requirement to obtain legal advice, the informal review process resolving matters satisfactorily, or a combination of those or other factors.
- 7.37 In the first instance the Review considers that there is scope for AFCA to enhance the visibility, transparency and understanding of its forward-looking review mechanisms for financial firms, industry associations and consumer advocacy organisations.
- 7.38 The Review also considers the current requirement to present external legal advice that AFCA made an 'error of law' to access the formal review mechanism is potentially a prohibitive barrier for the mechanism to be accessed. In particular, the costs of obtaining such legal advice may deter smaller industry bodies, consumer advocacy organisations or financial firms from engaging with the process.
- 7.39 In addition to enhancing visibility of the process, AFCA should review the threshold for when the review mechanism can be accessed, in particular whether demonstrating an error of law is appropriate. This is particularly the case as the potential concern with AFCA's approach may lie in its application of its fairness jurisdiction, which requires AFCA to have regard to factors other than the strict application of the law.
- 7.40 In reviewing the threshold for accessing any review mechanism, the bar should not be set so low as to enable any dissatisfied financial firm to cause a review. Setting the bar too low could risk significant additional costs being introduced into AFCA's operations, which will ultimately be borne by financial firms and their consumers. Additionally, any review mechanism will necessarily divert resourcing of senior AFCA decision makers and therefore risks impacting the overall quality and timeliness of AFCA's decisions on other matters.
- 7.41 Applicants should be able to access the mechanism if they are able to demonstrate that the AFCA determination adopts an approach that could have a significant impact across a

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235 AFCA (2 June 2021), material supplied to the Review.

class of consumers, businesses or transactions, even if fair in the circumstances of the particular case. That impact could be, for example, a direct financial impact, an indirect impact on the ability to obtain professional indemnity insurance or an indirect impact on consumers' access to credit or other financial services.

- 7.42 With the greater accessibility recommended for the formal review mechanism, and noting the impact on costs, it is expected that industry bodies, consumer advocacy organisations or financial firms seeking a review should attempt to have their concerns resolved using the informal mechanism first, before engaging the formal mechanism. Both the formal and informal mechanisms should continue to be limited to approaches taken in an AFCA determination, rather than approaches taken during the case management phase or in preliminary assessments.

### *Independence*

- 7.43 The informal and formal mechanisms to review an AFCA approach are internal to AFCA. While some submissions raised concerns regarding this model, the Review does not consider a mechanism wholly external to AFCA is appropriate to review the merits of AFCA's decisions.
- 7.44 However, to enhance the independence of its formal review mechanism, AFCA should consider adopting a panel model to bring in an external perspective to the final decision about the approach, similar to the AFCA panels regularly convened to make determinations themselves. Panels would be convened where requested by the financial firm, industry association or consumer advocacy organisation bringing the issue to AFCA or where AFCA considers it necessary given the nature of the issues being raised. It would be expected that any panel convened to assess a matter would be different to any panel involved in making the principal determination.
- 7.45 As outlined in chapter 4, AFCA ombudsmen, adjudicators and panel members are all appointed by the AFCA Board. However, while ombudsmen and adjudicators are employees of AFCA, its panel members normally provide services to AFCA on a sessional basis.<sup>236</sup> As such, a model using a panel-based approach would introduce a measure of independent contribution to the process, addressing concerns that it is the same decision makers both making and reviewing the decisions.
- 7.46 The management of any increased costs associated with enhancements to the formal forward-looking review mechanism, including from using panels, is a matter for AFCA. Requiring a fee from the applicant seeking the formal review may well be appropriate, including to discourage misuse of the mechanism. However, it would not be appropriate to recover the full cost from the applicant.
- 7.47 The mechanism should be open to consumer advocacy organisations, financial firms and industry bodies, as it is now. In particular, the mechanism should be accessible to smaller organisations and firms whose challenge to an approach could have broader implications across an industry or class of consumers, rather than producing an immediate benefit for themselves.

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236 AFCA (13 January 2021) *Complaint Resolution Scheme Rules*, AFCA, rule A.21.1; AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 89.

- 7.48 It is not necessary, however, to allow access for individual complainants, given they are unlikely to have recurring involvement with the AFCA process on the same type of issue and complainants are not bound by AFCA determinations in any event.
- 7.49 Outcomes from formal reviews should be made public, similar to AFCA's approach of publishing determinations. In doing so, AFCA should seek to make clear the implications of the outcome on its approach to decisions going forward.

### Future considerations

- 7.50 The Review recommends that AFCA enhance the visibility, accessibility and independence of its existing forward-looking review mechanism. While these enhancements, in the first instance, should be made by AFCA, the Government should monitor AFCA's implementation and consider if there is need in the future for enhancements to be implemented through government-initiated reform. For example, the Government could vary AFCA's authorisation conditions to require it to set a particular threshold for accessing forward-looking review as determined by government, or consider future legislative amendments to establish a forward-looking review mechanism external to AFCA if evidence emerges to support such a change.

### Recommendation 9

AFCA determinations should continue to not be subject to merits review, but the substance of a determination should be reviewable with respect to its application to future cases. To this end, AFCA should enhance the visibility, accessibility and independence of its existing forward-looking review mechanism.

AFCA should amend its Operational Guidelines to remove the requirement for an applicant to demonstrate an error of law to access the formal forward-looking review mechanism. Applicants should be able to access it if they are able to demonstrate that the AFCA determination adopts an approach that could have a significant impact across a class of consumers, businesses or transactions.

## THE STANDARD OF AFCA'S SERVICE

- 7.51 The legislation imposes an organisational requirement on the AFCA scheme to have an Independent Assessor.<sup>237</sup> It is the Independent Assessor's responsibility to handle complaints about the standard of AFCA's service in dealing with the principal complaint lodged by the consumer or small business against the financial firm.
- 7.52 The establishment of an Independent Assessor for AFCA was a recommendation of the Ramsay Review. In the Panel's view, 'where sufficiently resourced and empowered, an independent assessor would play an important role in improving the standard of complaints handling and in enhancing accountability and transparency'.<sup>238</sup>

<sup>237</sup> Corporations Act, paragraph 1051(2)(c).

<sup>238</sup> Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, recommendation 6, p 177.

- 7.53 ASIC's Regulatory Guide 267 states that the primary role of the Independent Assessor is to:
- respond to service complaints about AFCA
  - identify, address and report on issues affecting AFCA's complaint-handling operations and performance
  - as appropriate, make recommendations in response to identified issues.<sup>239</sup>
- 7.54 The Regulatory Guide makes clear that it is not the role of the Independent Assessor to:
- undertake a merits review of an AFCA decision
  - review an AFCA jurisdictional decision
  - re-open a complaint or the outcome of a complaint
  - review an AFCA decision to report a systemic issues or serious contravention to a regulator.<sup>240</sup>
- 7.55 Complainants, representatives and financial firms directly affected by how AFCA deals with a complaint can complain to AFCA's Independent Assessor, after first raising the matter with AFCA directly.<sup>241</sup>
- 7.56 The Independent Assessor is appointed by, and reports to, the AFCA Board and works in accordance with the Independent Assessor's terms of reference (which are approved by ASIC). It considers service complaints on a case-by-case basis. The Independent Assessor is not part of the day-to-day running of AFCA and does not answer to AFCA's senior management. There is no ability to appeal the Independent Assessor's findings and recommendations.<sup>242</sup>
- 7.57 The guidance for submissions included with the Review's terms of reference sought feedback on the appropriateness and effectiveness of the scope, remit and operation of the Independent Assessor function.<sup>243</sup>
- 7.58 Respondents' criticisms of the Independent Assessor function broadly fell into three categories, and each are explored in turn below:
1. Visibility – the Independent Assessor lacks visibility or there is confusion about who can complain.
  2. Independence – the appointment of the Independent Assessor by the AFCA Board and the reporting arrangements are inconsistent with a truly independent function.
  3. Scope – the Independent Assessor should be able to assess the merits of an AFCA decision.

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239 ASIC (June 2018) *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority*, ASIC, p 44.

240 ASIC (June 2018) *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority*, ASIC, p 44.

241 AFCA (n.d.) *Independent Assessor Terms of Reference*, AFCA, p 1.

242 AFCA (n.d.) *Independent Assessor*, AFCA website, accessed 24 June 2021.

243 The Treasury (19 February 2021) *Review of the Australian Financial Complaints Authority: Terms of Reference and guidance for submissions*, the Treasury, Australian Government, p 3.

## Visibility

- 7.59 One industry association indicated that some of its members were unaware of the Independent Assessor, and another relayed concerns from its members about a lack of publicly available information on the existence and role of the Independent Assessor.
- 7.60 Similarly, a legal aid organisation noted it was unaware of the Independent Assessor's existence and called for promotion of the Assessor's service and transparency as to its role and functions.
- 7.61 Another industry association called for greater clarity on the role and performance of the Independent Assessor and proposed that AFCA report on its implementation of the Assessor's recommendations on an 'if not, why not' basis.
- 7.62 While the material presently on AFCA's website is clear that both complainants and financial firms can go to the Independent Assessor with a service complaint, there appeared to be some confusion about financial firms' entitlement to do so.<sup>244</sup> At least two respondents were under the impression that access was limited to or intended for complainants only.

## Analysis and findings

- 7.63 A recurrent theme in the Review has been that parties hold concerns about AFCA's performance or practices, but that this is not necessarily fully reflected in the uptake of accountability mechanisms already in place.
- 7.64 Consistent feedback about a lack of awareness indicates that there is a need for AFCA to better promote the Independent Assessor's visibility to both complainants and financial firms. It is particularly important that financial firms understand the Independent Assessor is a credible avenue for them to raise service-related concerns, including for example on procedural fairness.
- 7.65 AFCA should improve the visibility of the Independent Assessor as part of its communications with parties to a complaint, which should clearly inform parties of their right to make a service complaint and to escalate it to the Independent Assessor if dissatisfied with AFCA's response.
- 7.66 For example, AFCA could inform parties about service complaints as a matter of routine whenever it closes a principal complaint.
- 7.67 Any misperception about the Independent Assessor not being accessible to financial firms is of some concern. As noted above, the material on AFCA's website is clear that financial firms can go to the Independent Assessor, but routinely informing parties about their ability to make service complaints provides a means of reinforcing this.

## Independence

- 7.68 The views among the small number of complainant submissions specifically addressing this matter were that the Independent Assessor is not independent and not transparent.

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244 AFCA (n.d.) *Independent Assessor*, AFCA website, accessed 24 June 2021.

- 7.69 Some industry respondents also questioned whether the Independent Assessor is truly independent given they are appointed by and report to the AFCA Board, who can reject their recommendations.
- 7.70 Two industry respondents considered that the Independent Assessor should be appointed externally, for example by ASIC.
- 7.71 As noted in chapter 3, just over half of the service complaint assessments issued by the Independent Assessor had at least one element substantiated.<sup>245</sup> AFCA says it has accepted all recommendations made by the Independent Assessor on substantiated service complaints to date.<sup>246</sup>

## Analysis and findings

- 7.72 The Review has not seen sufficient evidence to support respondents' proposals to appoint the Independent Assessor externally. It is unclear that ASIC appointing the Independent Assessor would materially alter the outcomes or operation of AFCA. The Review considers there is adequate separation, noting the Independent Assessor is appointed by and reports to the Board, rather than AFCA senior management.

## Scope

- 7.73 Among the submissions addressing the Independent Assessor's role, respondents commonly thought the Assessor's scope was too narrow. One industry association cited, as an indication that the remit may not be broad enough, the closure of 65 per cent of complaints to the Independent Assessor in 2020 for being outside the Assessor's terms of reference.<sup>247</sup>
- 7.74 Several respondents proposed that the Independent Assessor should be able to consider the merits of an AFCA decision. Some suggested this could be done on a limited basis for a sample or selection of matters, or where an AFCA decision is inconsistent with laws or practice and has industry-wide ramifications.
- 7.75 One proposed model involved an independent assessor with previous judicial experience regularly reviewing the merits of a representative sample of preliminary assessments and possibly determinations, with the outcomes shared with members alongside AFCA's response to any recommendations.
- 7.76 There is a low take-up of the Independent Assessor function by financial firms. As noted in chapter 3, in the first two years of AFCA's operation, the Independent Assessor received only 14 service complaints from parties that were the financial firm in the principal complaint, representing 5 per cent of the total number of service complaints received by the Independent Assessor. This compared to 262 from parties that were the complainant in the principal complaint against a financial firm (94 per cent of the total).<sup>248</sup>

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245 AFCA (4 March 2021), material supplied to the Review.

246 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 23.

247 See AFCA (2020) *Annual Review 2019-20*, AFCA, p 117.

248 AFCA (4 March 2021), material supplied to the Review. This data includes a small number of service complaints relating to CIO and FOS financial firm complaints.

## Analysis and findings

- 7.77 From the discussion above about further internal review of the substance of AFCA decisions, the Review concludes that merits review to reopen the outcome of a particular case is not warranted, whether undertaken by the Independent Assessor or otherwise.
- 7.78 Even if the case could be made for such an expansion, it would not be feasible to expect the Independent Assessor to have the resources and expertise to review the merits of any AFCA case put forward. The Independent Assessor is currently one individual with a supporting staff member. There would need to be a stronger justification for the added costs associated with appointing additional assessors.
- 7.79 Financial firms should make greater use of the Independent Assessor, following complaint to AFCA internally, as an existing mechanism. Making a service complaint to AFCA, and taking it to the Independent Assessor in the event of an unsatisfactory response, can influence future practice. That could in turn have a flow-on impact on substantive complaint outcomes, even though it cannot change the outcome of the case that gave rise to the concern. For example, a financial firm concerned about the procedural fairness afforded to it by AFCA could pursue an appropriate service complaint in this way.
- 7.80 The Review finds the scope, remit and operation of the Independent Assessor function to be appropriate. In the context of the function being designed for service matters and the arguments against introducing further merits review, there is not a compelling case at present to change the Independent Assessor's terms of reference.
- 7.81 AFCA senior management should continue to take the Independent Assessor's findings seriously and there should continue to be a direct line to the Board. AFCA should ensure the function is appropriately resourced to handle service complaints, including to reflect any increased take-up as called for by the Review.

### Recommendation 10

Complaints about AFCA's service should remain the responsibility of the Independent Assessor. AFCA should improve the Independent Assessor's visibility as part of its communications with parties to a complaint.

## TRANSPARENCY

- 7.82 The Corporations Act requires AFCA to operate in a way that is accountable. In turn, AFCA's Operational Guidelines state that accountability requires it to operate as transparently as possible, while maintaining appropriate privacy and confidentiality for parties to a complaint and meeting its other obligations.<sup>249</sup>

<sup>249</sup> Corporations Act, paragraph 1051A(d); AFCA (21 April 2021) *Operational Guidelines to the Rules*, AFCA, p 10.

- 7.83 There were recommendations from individual complainants and consumers for:
- a dedicated day for AFCA to be questioned by a Parliamentary committee
  - AFCA’s annual general meeting to be open to public and consumer observation and participation
  - publishing numbers of payouts in dollar figure bands, listed separately for each financial institution
  - a comprehensive ‘descriptive roadmap’ outlining applicable rules and processes for AFCA complaints, to assist complainants
  - clearer timelines and guidelines of what is relevant for a case to be fast-tracked.
- 7.84 One legal aid organisation called for greater transparency on decision making and case management processes, as well as clearer guidelines on how and when AFCA considers compensation for direct and indirect financial loss, and the methods to calculate those losses.
- 7.85 In a similar vein to some of the concerns about internal AFCA guidance, there were calls in a general sense for more transparency on the internal benchmarks and key performance indicators for AFCA and AFCA staff, particularly on timeliness.
- 7.86 One industry association called for AFCA to be subject to the same accountability and oversight mechanisms that are required of regulators.
- 7.87 There were also proposals from industry respondents for more transparency on specific matters such as allocation to fast-track, standard and complex processing streams, the meaning of financial difficulty, the methodology used to award compensation for non-financial loss, AFCA’s approach to credit reporting complaints and the interpretation of legislation such as the *Insurance Contracts Act 1984*.
- 7.88 Chapter 6 covers respondents’ submissions addressing AFCA’s transparency on fees.
- 7.89 In responding to the 2021 AFCA-initiated member survey, members rated their satisfaction with AFCA’s transparency among the lower of a list of attributes. Further details of the member surveys are at Appendix C.

## Approach Documents

- 7.90 AFCA’s Rules and Operational Guidelines are available to the public on AFCA’s website. AFCA also maintains a series of ‘Approach Documents’ setting out how it approaches common or recurring issues in complaints.<sup>250</sup>
- 7.91 A full list of current AFCA publications, including Approach Documents, is at Appendix G.
- 7.92 Acknowledging the various factsheets, Approach Documents and response guides that AFCA publishes, one industry association was concerned that there appeared to be further internal AFCA guidance or positions that are not made public, referring in particular to what constitutes good industry practice on responsible lending. The association suggested

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250 AFCA (n.d.) *AFCA Approaches*, AFCA website, accessed 7 July 2021.



- public consultation on guidance documents and mechanisms for regularly reviewing and updating them in consultation with industry and consumer advocates.
- 7.93 Consumer advocacy organisations also recommended that, following consultation with stakeholders, AFCA should publish its approach to responsible lending complaints.
- 7.94 Similarly, another industry association recommended AFCA improve its processes to identify new issues requiring an organisational approach and that formal stakeholder consultation be required before finalising approach documents.
- 7.95 AFCA said in its submission that:
- AFCA regularly consults with consumer and industry representatives in relation to our published Approaches for specific types of complaints and our Approaches constantly develop to reflect legal, regulatory and industry best practice developments.<sup>251</sup>

### Analysis and findings

- 7.96 Generally, parties will have a legitimate expectation that the material relied on by the decision maker is available to them, including policies, procedures or guidance being applied by the decision maker.
- 7.97 The Review considers it appropriate that AFCA has internal operational material and policy documents for staff that are not made public, provided that they are not inconsistent with the content of AFCA's publicly available materials, and that the publicly available materials are clear in setting out the approaches that AFCA will take in making decisions. This is a necessary part of the operation of any entity – for example, financial firms have a range of internal procedural and operational documents that are not shared with consumers.
- 7.98 However, the Review recommends that AFCA should take a more proactive approach in identifying which aspects of its operations would benefit from further transparency. It is appropriate for AFCA to publish documents that set out how it treats parties' evidence, that explain how it determines compensation and that otherwise assist complainants and financial firms to understand how complaints will be resolved.
- 7.99 In particular, AFCA should incorporate formal consultation on its Approach Documents to ensure that any unintended consequences of adopting a particular approach are identified. While AFCA indicates it regularly consults consumer and industry representatives on its Approach Documents at present, AFCA should ensure a formal process is in place for consultation on each Approach Document before final release.
- 7.100 The Review also notes that AFCA's Approach Documents are intended to make clear how AFCA will consider a complaint or award compensation, rather than to set policies that are properly a matter for government.
- 7.101 The Review notes that several submissions focused on the importance of AFCA publishing its Approach Document on how decisions will be made in relation to credit disputes. However, in this particular instance, it is understandable that AFCA is cautious about releasing guidance given consumer credit law reforms are currently before Parliament.

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<sup>251</sup> AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 47.

## Recommendation 11

AFCA should ensure consultation is undertaken on each Approach Document prior to final publication.

## Member communication

- 7.102 Some financial firms had specific suggestions for AFCA to improve its communication with members, including:
- appointing a dedicated industry liaison executive
  - establishing an industry advisory panel equivalent to the existing Consumer Advisory Panel
  - providing access to relationship or industry managers who are not involved in the decision making process and could provide further explanation for decisions and how they were reached
  - outlining clear escalation points for firms to raise concerns about the handling of particular complaints before they reach preliminary assessment or determination.
- 7.103 AFCA's submission referred to a range of member engagement activities it currently undertakes including regular member forums and industry liaison group meetings for specific sectors several times a year.<sup>252</sup> AFCA also appointed a Head of Membership Services in August 2020.<sup>253</sup>

## Analysis and findings

- 7.104 The Review notes that AFCA already engages extensively with members and has some formalised structures in place. Larger financial firms and some more sophisticated industry sectors appear to have well-established access to relevant ombudsmen, and AFCA's appointment of a Head of Membership Services should assist those firms and sectors that lack this capacity.
- 7.105 While respondents have made constructive suggestions for improvements, it is not clear that further formal mechanisms are warranted at this stage, or that the associated costs in establishing them would be justified.

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252 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, pp 64–65.

253 AFCA (3 August 2020) *AFCA appoints Head of Membership Services* [media release], AFCA.

## CHAPTER 8: OTHER MATTERS

### INTRODUCTION

- 8.1 This chapter sets out a range of other matters that were raised by respondents to the Review – AFCA’s identification of systemic issues, the capabilities of AFCA’s staff and requirements for authorised credit representatives.

### SYSTEMIC ISSUES

- 8.2 The legislation requires AFCA to refer the particulars of an issue to the relevant regulator if it considers that there is a systemic issue arising from the consideration of complaints.<sup>254</sup>
- 8.3 AFCA’s ability to deal with and report systemic issues to the relevant regulators was also a factor the Minister considered as part of AFCA’s authorisation.<sup>255</sup>
- 8.4 This reflects the Ramsay Review’s recommendation that AFCA has the ability to monitor, address and report on systemic issues, as a way to improve industry practice.<sup>256</sup> While this was a new feature for the superannuation sector (as the SCT did not have a mandate to investigate systemic issues), it had been a feature under FOS and CIO (and earlier industry-based EDR schemes).
- 8.5 ASIC’s regulatory guidance defines a systemic issue to be an issue that may:
- affect more than one complainant
  - involve many complaints that are similar in nature
  - affect all current or potential complainants at a particular firm
  - affect more than one firm.<sup>257</sup>
- 8.6 As outlined in chapter 3, in AFCA’s first two years of operation, 2,287 possible systemic issues were identified by AFCA complaint resolution teams and referred to AFCA’s systemic issues team. Over 80 per cent were identified during the case management and preliminary view stage of complaints. Banking and finance, and general insurance product areas had the most referrals.<sup>258</sup>
- 8.7 The majority (78 per cent of systemic issue closures) were closed after the systemic issues team’s review and without further investigation required, or at the point the case was first referred to them.

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254 Corporations Act, subsection 1052E(4).

255 See Explanatory memorandum, Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017, [1.56].

256 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, recommendation 2.

257 ASIC (June 2018) *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority*, ASIC, p 42.

258 Note: The statistics in this section include some systemic issues referred or identified by FOS and later finalised by AFCA.

- 8.8 AFCA’s systemic issues team considered the remaining 433 (22 per cent of systemic issues closures) to be possibly systemic and referred them to the financial firm seeking further information to determine whether it was a definite systemic issue.
- 8.9 Of the 433 possible systemic issues AFCA identified, 193 systemic issues were considered definite and therefore met the threshold to be reported to the regulator. Of the 193 definite systemic issues, AFCA resolved 166 with the financial firms.
- 8.10 The most common topics of the definite systemic issues referred to ASIC are:
- breaches of the Corporations Act
  - misleading conduct
  - conduct of employees or authorised representatives.<sup>259</sup>
- 8.11 AFCA currently publishes some high-level information about its systemic issues work, primarily through its Annual Review. For example, the 2019-20 report included information on AFCA’s obligations, statistical information on its achievements and a brief case study.<sup>260</sup>
- 8.12 ASIC’s misconduct and breach reporting team receive and triage AFCA systemic issues reports. Outcomes from ASIC’s initial triage processes can include:
- referral to a stakeholder team as general intelligence or intelligence to inform an existing surveillance activity
  - referral to an enforcement team as relevant to a current investigation or other enforcement activity
  - intelligence that does not precipitate any additional or immediate regulatory action but that may be relevant in the future and to inform ASIC’s risk analysis and assessment processes.<sup>261</sup>
- 8.13 AFCA says it has a range of internal processes and mechanisms in place to assess whether its systemic issues function is operating as intended. These include the Lead Ombudsman reviewing all possible systemic issue investigations and reports made to regulators, quality assurance reviews of case work and frequent reporting to senior management, the Board and ASIC.
- 8.14 AFCA also commissioned Ms Debra Russell in January 2021 to undertake a review of its systemic issues, serious contraventions and remediation work. Ms Russell made 17 recommendations in her report handed to AFCA in April 2021. Her key findings were that AFCA’s systemic issues function has achieved good outcomes, but that AFCA will have to work harder to add value in this area, as financial firms are being expected to do more to self-identify systemic issues and serious contraventions. AFCA has accepted all 17 recommendations, including ones that AFCA be clearer about its functional responsibilities and better manage stakeholder expectations.

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259 AFCA (4 March 2021), material supplied to the Review.

260 AFCA (2020) *Annual Review 2019-20*, AFCA, pp 68–70.

261 ASIC (16 July 2021), material supplied to the Review.

- 8.15 As part of the Review, respondents provided limited feedback on AFCA's processes in relation to systemic issues. Key feedback from those respondents that did provide input, predominantly financial firms, is below.

## Duplication of roles and transparency of process

- 8.16 Financial firms raised a number of areas of concern with AFCA's systemic issues identification processes. These broadly related to the clarity of roles between AFCA and ASIC, and the level of transparency in how and when systemic issues are identified.
- 8.17 There was concern around a lack of clarity and duplication between AFCA and ASIC's role in the investigation of systemic issues, particularly following referral to the regulator, resulting in confusion for AFCA's members.
- 8.18 Some financial firms considered that AFCA should have no role in the continued monitoring or investigation of a systemic issue after it has been referred to a regulator. On the other hand, one consumer advocacy organisation suggested that AFCA should remain involved in the investigation of systemic issues in the interests of efficiency, and another consumer advocacy organisation suggested that AFCA should in fact have greater powers to look at systemic issues.
- 8.19 One industry association commented that there should be better information sharing between ASIC and AFCA because they consider it to be an undue impost on financial firms to be asked for the same information multiple times. A few financial firms commented that they have been in a position of corresponding with both AFCA and ASIC about potential systemic issues. One industry association indicated that AFCA's requests for information relating to systemic issues are excessive and too open-ended.
- 8.20 There were concerns from some financial firms about AFCA using a single complaint to identify and investigate potential systemic issues. Their feedback was that one complaint cannot and should not be the basis of opening an investigation for a systemic issue.
- 8.21 Of the 67 systemic issue notifications that AFCA sent to ASIC in 2020-21, 14 matters were referred to and accepted by ASIC specialist teams for further investigation and appropriate action. All other matters were assessed and recorded by ASIC and contribute to the general intelligence base that the regulator holds about financial firms. One matter was outside ASIC's jurisdiction.<sup>262</sup>
- 8.22 A few industry respondents also suggested that AFCA should not investigate or report possible systemic issues until a final determination has been made and all circumstances are known by the relevant team. However, at the same time, one industry association also expressed concern about the length of time that had elapsed between a case closing and the financial firm being alerted to a possible systemic issue.

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262 ASIC (13 July 2021), material supplied to the Review. Where a case is accepted as a referral by an ASIC stakeholder team, that team will conduct further investigations/surveillance and consider any possible regulatory/enforcement actions.

- 8.23 In relation to AFCA's approach to identifying and referring systemic issues, a few respondents mentioned concerns around a lack of transparency and consistency, noting opaque processes. For example, the superannuation sector called for greater clarity on AFCA's threshold for referring a systemic issue and one complainant commented that there should be greater visibility of AFCA's approach to addressing systemic issues and the outcomes once an issue has been identified.
- 8.24 ASIC indicated that in many cases, a systemic issue that is identified and reported to ASIC by AFCA would relate to a financial firm or individual that is already known to ASIC. However, ASIC stated that notifications from AFCA were of significant value to ASIC, as they may relate to new conduct that is separate to, or elaborates on, conduct that ASIC may already be aware of, and may provide new evidence, analysis and perspective.

## Analysis and findings

### *Financial firms have primary responsibility*

- 8.25 AFCA, through its dispute resolution function, may be in a position to identify potential systemic issues that firms may not have identified or where the issue has not been reported to the relevant regulator. However, submissions to the Review made clear that AFCA's exact role in the identification, resolution and monitoring of systemic issues is not always well understood.
- 8.26 Before a complaint is lodged with AFCA, it encourages complainants to go through the financial firm's IDR process. All financial firms that are required to be AFCA members must have IDR processes set up to try and resolve complaints with consumers internally in the first instance.<sup>263</sup> ASIC's regulatory guidance on IDR makes clear that consumer complaints are a key risk indicator for systemic issues within a financial firm and the early identification and resolution of these issues by financial firms should minimise complaints escalating to AFCA. The regulatory guidance also says that financial firms must have robust systems in place to ensure that possible systemic issues are investigated, followed up and reported on.<sup>264</sup>
- 8.27 As such, the dispute resolution framework is set up so that financial firms are responsible for identifying, investigating and resolving possible systemic issues in the first instance, but when this does not occur or breaches of the law are identified, AFCA and ASIC may have a role to play. The Review also notes that from 5 October 2021, new IDR standards and requirements will apply to financial firms that deal with retail clients, including a requirement to record all complaints that a firm receives.<sup>265</sup>
- 8.28 The Review notes that the Government has recently clarified and strengthened the breach reporting framework for financial services licensees and credit licensees. These reforms commence on 1 October 2021 and will widen the scope of situations that need to be reported to ASIC, particularly those that may result in consumer detriment.<sup>266</sup> Once the new breach reporting regime is in force, in addition to the enhanced IDR reporting requirements discussed above, the Review considers that it would be appropriate for ASIC

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263 See Corporations Act, paragraph 912A(1)(g) and subsection 1017G(1); Credit Act, paragraphs 47(1)(h) and (i); SIS Act, subsections 101(1) and (1A); *Retirement Savings Account Act 1997*, subsections 47(1) and (2).

264 ASIC (July 2020) *Regulatory Guide 271: Internal dispute resolution*, ASIC, p 34.

265 ASIC (July 2020) *Regulatory Guide 271: Internal dispute resolution*, ASIC.

266 *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*, schedule 11.

to have regard to whether AFCA's systemic issues reporting function, which remains in force, is duplicative of the requirements of financial firms.

- 8.29 The Review also notes that ASIC is currently in the process of updating its guidance on remediation and this may factor into future settings for the handling of systemic issues.

***Clear separation between AFCA and regulator roles***

- 8.30 Consistent with the legislation underpinning AFCA, the primary purpose of AFCA's reporting requirements in relation to systemic issues is to ensure that the relevant regulator has the information it needs to take regulatory action as necessary. This purpose is also reflected in AFCA's Annual Review for 2019-20.<sup>267</sup> ASIC's regulatory guidance further requires that AFCA have systems in place to identify systemic issues and to refer these matters to the financial firm for response and action.<sup>268</sup>
- 8.31 While AFCA has an important role in the identification of potential systemic issues that may have caused consumer detriment, beyond an individual complaint, it is important that there is a clear and transparent separation between the role of AFCA and the role of regulators.
- 8.32 The Review considers that once a systemic issue has been referred to a regulator, AFCA should not be playing an active role in continuing an investigation of the systemic issue, and should leave it to the regulator to take appropriate action as it sees necessary.
- 8.33 This would not affect AFCA's obligation to resolve the principal complaint or complaints lodged with AFCA from which the systemic issue was identified.
- 8.34 In turn, ASIC (and other regulators as relevant) should advise AFCA of the outcomes of systemic issue referrals.
- 8.35 It is expected that ASIC as the regulator would not take regulatory action in relation to all matters reported to it, including from AFCA. ASIC necessarily must adopt a risk and harms-based approach in determining which matters are to progress for further action. However, AFCA and ASIC should monitor the alignment between matters being reported by AFCA to ASIC, and those that ASIC considers merit further regulator involvement, as a means to test whether AFCA is appropriately setting the threshold for identifying an issue as systemic and referring it.
- 8.36 The clear separation recommended is not to devalue the contribution AFCA makes to identifying possible systemic issues. AFCA has specialised expertise in systemic issues with dedicated staff for the function and has visibility of issues across the financial sector. Acknowledging that ASIC receives a large volume of information from many sources, including through breach reporting and directly from consumers, it should treat information from AFCA with an appropriately high priority.

***Transparency of process***

- 8.37 It is also essential that AFCA is clear with financial firms on its processes, thresholds and triggers for the identification of issues as systemic issues. The Review notes that there is limited information available publicly that would assist financial firms in understanding the

267 AFCA (2020) *Annual Review 2019-20*, AFCA, p 68.

268 ASIC (June 2018) *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority*.

circumstances in which AFCA may refer a matter as a systemic issue, and the ensuing process.

- 8.38 Similar to publication of determinations, the Review also considers that AFCA should publish a greater level of detail on the types of issues identified as systemic issues, in particular those referred to regulators. While noting AFCA's constraints around its confidentiality restrictions, the Review considers that there is scope for further transparency in AFCA communicating with its users by sharing information on a de-identified basis.

### Recommendation 12

Where a systemic issue has been referred to ASIC or another regulator, AFCA should cease its investigation of the systemic issue. ASIC and other regulators should advise AFCA of the outcomes of the referrals they receive. However, AFCA should continue to resolve any relevant individual complaints.

### Recommendation 13

AFCA should be more transparent in its public reporting of systemic issues, including on a de identified basis as appropriate. This would encompass factors such as the industry to which the systemic issues relate, the nature of the complaints, the number of affected consumers, total value of remediation and reporting to the regulators.

## CAPABILITIES OF AFCA'S STAFF

- 8.39 The capabilities of AFCA's staff, particularly that of case managers and decision makers, was an issue that drew considerable feedback in the Review. A range of respondents, both complainants and financial firms, expressed concerns about the skills, expertise and turnover of some staff. A few respondents also pointed to the very high caseload of some AFCA staff as something that affects their capacity to do their job effectively, including being prepared for conciliation conferences and reading relevant information beforehand.
- 8.40 A number of financial firm respondents called for AFCA's staff to have greater expertise or for AFCA to have dedicated specialised staff in their particular field due to the unique complexities involved in areas such as superannuation, medical indemnity, debt management and fintech.
- 8.41 Some respondents suggested case managers should have greater interaction with ombudsmen to help build their capacity. Reflecting this, respondents tended to be more positive when referring to the capabilities of ombudsmen. AFCA also makes use of experienced and respected panel members for complex matters that require specific expertise, and industry respondents were generally satisfied with the outcomes in cases that were decided by panel members as well as ombudsmen.<sup>269</sup>

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269 Panel members, ombudsmen and adjudicators are the decision makers in cases that progress to the determination stage.



- 8.42 As noted in chapter 3, of the complaints finalised by determination, a small proportion (9 per cent) overturned a preliminary assessment provided to the parties, with around half of these occurring as a result of a different interpretation by the decision maker.
- 8.43 Information provided by AFCA shows that most staff have relevant qualifications and previous experience in dispute resolution, legal and consumer support services or dispute/complaint investigations.<sup>270</sup>
- 8.44 AFCA's submission highlights some initiatives it has underway to further hire appropriately qualified staff and upskill its existing staff. These include:
- targeted workforce planning and recruitment across the financial services and dispute resolution sectors
  - ongoing training and coaching of staff in all aspects of AFCA's jurisdiction
  - increased collaboration between case managers and decision makers to support the quality of outcomes at the case management stage
  - strengthening its capability and quality assurance program for case managers and decision makers.<sup>271</sup>

## Analysis and findings

- 8.45 As noted in chapter 3, the majority of AFCA's staff hold a legal, financial planning, finance/business or dispute resolution qualification. This suggests that AFCA's staff are appropriately qualified.
- 8.46 It is essential that AFCA's staff have the necessary qualifications, experience and capabilities to undertake their role. It is equally important that staff receive adequate support and training to develop over time.
- 8.47 Since establishment, AFCA's overall workforce has more than doubled, with some hiring spikes to deal with changes to AFCA's jurisdiction and higher than expected complaint volumes. The Review considers that it will naturally take some time to train new people before they are able to perform at optimal levels. However, at the same time, it is essential that AFCA appropriately manage its resources to allow for quality and timely resolution of disputes.
- 8.48 The Review is satisfied that AFCA currently has several strategies in place to develop and retain its staff, which should help deal with capability issues into the future. Nevertheless, given the critical importance of this issue, regular reviews of staff capabilities are important going forward.

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270 AFCA (21 April 2021), material supplied to the Review.

271 AFCA (2021) *AFCA Independent Review: AFCA Submission*, AFCA, p 18, 33.

## AUTHORISED CREDIT REPRESENTATIVES

- 8.49 Under the Credit Act, both credit licensees and authorised credit representatives are required to maintain separate memberships of AFCA. In contrast, under the Corporations Act, only financial service licensees are required to maintain AFCA membership.<sup>272</sup>
- 8.50 The Review heard feedback from the credit representative sector that requiring authorised credit representatives to maintain AFCA membership was an unnecessary cost, as credit representatives made up a small number of complaints considered by AFCA and that the credit licensee is ultimately responsible and liable for any conduct of its representatives.
- 8.51 The Ramsay Review considered this matter and recommended removing the requirement on the basis that it did not enhance consumer protection or access to redress, but imposed substantial costs on the representative in the form of annual membership fees.<sup>273</sup>
- 8.52 The Ramsay Review also noted that the requirement places significant administrative and legal burdens on licensees and ASIC, as they need to certify and monitor the membership requirements under the Credit Act.<sup>274</sup>
- 8.53 As noted in chapter 3, there are currently over 29,000 authorised credit representatives who are required to pay an annual AFCA membership fee (\$65 in 2020-21).
- 8.54 In the first two years of AFCA's operation, approximately 30 authorised credit representative members had a complaint against them. AFCA reports that these complaints were lodged directly against the authorised credit representative instead of the licensee 'either because they concerned activity unrelated to the licensee (for example, unregulated business finance activity) or because the licensee was no longer in existence and/or was no longer a current AFCA member'.<sup>275</sup>

### Analysis and findings

- 8.55 The Review considers that there is no reason, beyond precedent, why authorised credit representatives should continue to be required to hold AFCA membership.
- 8.56 As outlined in the Ramsay Review, credit licensees are responsible for the conduct of their authorised credit representatives and are separately required to be AFCA members. As such, requiring credit representatives to hold AFCA membership provides limited benefit in terms of enhanced consumer protection or access to redress.
- 8.57 The removal of the requirement would provide clarity in the responsibilities between the credit licensee and the authorised credit representative. It would also ensure consistency with IDR requirements, where credit licensees are already required to ensure IDR procedures cover disputes relating to its authorised credit representatives.<sup>276</sup>

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272 Credit Act, paragraphs 47(1)(i), 64(5)(c) and 65(6)(c); Corporations Act, paragraphs 912A(2)(c) and 1017G(2)(c).

273 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, p 209.

274 Ramsay I, Abramson J and Kirkland A (2017) *Final Report: Review of the financial system external dispute resolution and complaints framework*, report to the Minister for Revenue and Financial Services, p 206.

275 AFCA (4 March 2021), material supplied to the Review.

276 ASIC (July 2020) *Regulatory Guide 271: Internal dispute resolution*, ASIC, p 6.

- 8.58 The AFCA data also shows that AFCA received a low number of complaints about authorised credit representatives and that most of the complaints were in relation to unregulated credit or activity outside the authority of the credit licensee, and so outside AFCA’s jurisdiction.
- 8.59 The removal of credit representatives from AFCA’s membership would require legislative amendments. In addition, their removal could have an impact on the revenue AFCA collects given AFCA is member-funded.<sup>277</sup> This is a consideration for AFCA, possibly as part of its internal funding review that is currently underway (discussed further in chapter 6), but is not of itself grounds for maintaining the status quo for authorised credit representative membership.

#### Recommendation 14

The *National Consumer Credit Protection Act 2009* should be amended to no longer require authorised credit representatives to be members of AFCA.

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277 See paragraph 3.16.



## APPENDIX A: ABOUT THE INDEPENDENT EXPERT CASE ASSESSMENT

- A.1 As noted in chapter 1, the Review received over 200 case examples from respondents to support their submissions.
- A.2 The Review selected a sample of 20 cases within the themes of fairness (specifically, procedural fairness, consistency of decisions, and approach to apportioning liability) and timeliness as they represented some of the key concerns raised in submissions.
- A.3 The Review engaged an independent expert, the Hon Julie Dodds-Streeon QC, to assess the validity of the concerns raised by respondents in each of these cases. Ms Dodds-Streeon is a former judge of the Court of Appeal, Supreme Court of Victoria and the Federal Court of Australia. Ms Dodds-Streeon was assisted by Mr Ahmed Terzic, Barrister at the Victorian Bar.
- A.4 The sample of cases was selected to be representative of case examples provided by stakeholders to the Review. It included cases from both complainants and financial firms from different industry sectors. In selecting cases, the Review notes that some respondents only provided case examples on a confidential basis and were unwilling to have their case independently reviewed. Some respondents provided case examples relating to disputes that are still ongoing, and these cases were generally (though not always) excluded on the basis that the AFCA process is not yet complete.
- A.5 The nature of this sample is that it is a selection of what respondents identify as examples of poor outcomes or poor performance, out of 153,246 complaints received by AFCA to October 2020. It is to be expected that industry respondents, who receive or have visibility of a large volume of complaints, would identify the examples they consider most illustrative of the concerns they hold about AFCA. That is, examples identified and case studies selected are more likely to represent cases for which outcomes or processes could be problematic than a random sample of cases resolved by AFCA.
- A.6 However, this does not detract from the utility of the exercise in testing respondents' claims. The case assessment provides useful information with wider implications for analysing AFCA's performance, even though it must be viewed in the context of sampling the least satisfactory experiences.
- A.7 In reviewing the cases, the independent expert was confidentially provided with the assertion from the submitter relating to AFCA's handling of the complaint, the AFCA determination, and all original case material (including correspondence) relevant to the case. The independent expert identified and read through the relevant case material to make an informed assessment about the validity of the concern(s) raised by respondents. The volume of documents deemed to be relevant varied according to the nature of the assertion being tested. For example, an allegation of a lack of procedural fairness required examination of an entire file, while a criticism based on inconsistent outcomes generally only required a comparison of the allegedly conflicting decisions.
- A.8 After reading all relevant material available, the independent expert analysed whether the available evidence supported the assertion in the submission, taking into account applicable principles, relevant data and AFCA's functions, Rules, guides and objectives. The independent expert was also concurrently alert to general considerations of independence

and any other relevant issue, including whether any obvious steps could be taken to improve AFCA’s processes and service.

A.9 No specific case information has been included in this report to protect the privacy of the parties involved.

A.10 Overall, the findings of the independent expert are that stakeholders’ assertions about AFCA’s performance or decision making were borne out in six cases, partially borne out in two cases, and not borne out in the remaining 12 cases.

A.11 Further details are provided in chapter 4.

Case	Assertion by respondent (submitter)	Independent expert’s finding
1.	<b>Procedural fairness</b> – industry respondent claimed that AFCA did not accord procedural fairness or demonstrate consistency in its handling of a complaint; argued it was inconsistent with procedural fairness that a pre-determination phone call from AFCA (advising the determination would overturn the preliminary assessment) did not provide an opportunity for further submissions before finalisation.	The assertion <i>is not</i> borne out. While the determination overturned the preliminary assessment, ‘the final decision maker did not determine the complaint on the basis of novel issues that could be said to take the financial firm by surprise’. Affording the unsuccessful party an opportunity to make submissions ‘at such a late stage of AFCA’s processes’ was not essential to comply with procedural fairness.
2.	<b>Procedural fairness</b> – complainant respondent expressed dissatisfaction with deficiencies in AFCA’s processes, among other things.	The assertion <i>is not</i> borne out. It was probable that the complainant experienced repetition of various inquiries and steps (the complaint having been reopened after initially being discontinued), but doubtful that the suggested process changes would have avoided repeated questions in the circumstances.
3.	<b>Procedural fairness</b> – complainant respondent claimed that AFCA failed to accord them procedural fairness (noting the financial firm had provided AFCA with a document that it resisted sharing with the complainants), among other things.	The assertion <i>is not</i> borne out. The essential dissatisfaction was with the outcome, but the decision was well-reasoned.
4.	<b>Procedural fairness</b> – industry respondent complained that an AFCA case manager failed to follow a consistent process in accordance with procedural fairness. During this complaint, AFCA conceded a lapse in its usual practice for pre-determination phone calls.	The assertion <i>is</i> borne out. AFCA appears to follow a consistent practice of notifying both parties if it proposes to deviate from a preliminary assessment on the basis of a new or unanticipated point. However, AFCA failed to follow that practice in this particular case due to oversight.
5.	<b>Apportioning liability</b> – industry respondent claimed that AFCA’s determination of a consumer’s complaint ignored the terms of a contract, and criticised AFCA’s apportionment of liability.	The assertion <i>is not</i> borne out. The determination appeared to appropriately ‘balance the competing considerations in a complex context where a perfect solution satisfactory to both parties was clearly unachievable’. The decision did effectively override contractual terms, but the outcome ‘nevertheless appears to fall within the scope of AFCA’s decision making power pursuant to the proper application of its unique fairness jurisdiction’.

Case	Assertion by respondent (submitter)	Independent expert's finding
6.	<b>Apportioning liability</b> – industry respondent complained of AFCA's award to victims of a scam, through which 100 per cent of funds were lost, and an award of compensation for non-financial loss.	The assertion <i>is not</i> borne out. The determination 'recognised a somewhat fuller obligation than that imposed ... pursuant to purely legal requirements', but the outcome appeared to be a proper exercise of the fairness jurisdiction. It was appropriate that AFCA did not apportion liability in this case.
7.	<b>Apportioning liability</b> – industry respondent complained about AFCA's determination to award the complainant 100 per cent of a life insurance policy that had been cancelled; respondent claimed AFCA case manager had indicated it was a marginal or close-call case.	The assertion <i>is not</i> borne out. It would not have been appropriate for AFCA to apportion liability in this case. Any suggestion that it was a marginal case would be incorrect.
8.	<b>Apportioning liability</b> – industry respondent complained of an uplift AFCA awarded following an insurance dispute on the method of settlement and the extent of the insurer's liability.	The assertion <i>is not</i> borne out. The uplift was a proper exercise of AFCA's fairness jurisdiction. The uplift was within a reasonable range of what could have been imposed where AFCA perceived 'some unfairness to a complainant in adhering strictly to the terms of the policy'.
9.	<b>Apportioning liability</b> – industry respondent complained of an uplift AFCA awarded under a home insurance policy where the insurer had reached its maximum liability under the policy; respondent considered this unfair on the basis that AFCA was holding the insurer to account for the complainant's failure to insure their property for its full value.	The assertion <i>is not</i> borne out. The imposition of the uplift was not based on any provision in the policy documents, but 'the basis for the uplift was an obligation of fairness that AFCA found the insurer owed to the complainant' in the exercise of its discretion on method of settlement. This was a proper exercise of AFCA's fairness jurisdiction.
10.	<b>Consistency of outcome</b> – industry respondent claimed two AFCA decisions were inconsistent. Both cases raise the same question of who should be liable for loss arising from the electronic transfer of funds to the account of an unintended recipient.	The assertion <i>is</i> borne out. The different outcomes could not be 'satisfactorily explained by the factual differences'. It was apparent that 'the principles that AFCA applied and the factors to which it gave weight in coming to its decision were different'. In one of the determinations, it was not clear 'whether the decision maker relied on any particular matters in departing from established legal principles'.
11.		
12.	<b>Consistency of outcome</b> – respondent claimed two AFCA determinations were inconsistent. In both cases, the trustee of a superannuation fund transferred money from the complainant's account to the ATO, and later declined to recover those funds. The decisions differed on whether the trustee was required to give notice.	The assertion <i>is not</i> borne out. The determinations are not mutually inconsistent – the trustees relied on different statutory provisions and 'therefore different considerations applied in the assessment of what was a fair outcome in all the circumstances'.
13.		
14.	<b>Consistency of outcome</b> – industry respondent claimed inconsistency of outcome in two AFCA determinations relating to insurance complaints. One decided in the insurer's favour because the	The assertion <i>is not</i> borne out. '...[T]he different outcomes can be credibly explained by the different facts and circumstances, as opposed to irreconcilable inconsistency in the relevant principles or their application. While the decision in [the complainant's
15.		

Case	Assertion by respondent (submitter)	Independent expert's finding
	complainant's claim did not meet the terms of the policy definition. The other decided that fairness in all of the circumstances required a payout, despite the policy definition.	favour] may well deny insurers certainty that a definition included in a policy will be upheld as the sole determinant of their liability, that appears to be an inevitable consequence of AFCA's fairness jurisdiction.'
16.	<b>Timeliness</b> – industry respondent criticised AFCA's handling of a case, citing a failure to provide a timely and cost-efficient outcome.	The assertion <i>is</i> borne out. 'There were a series of repeated, unduly long delays in AFCA's handling of a relatively simple complaint relating to a modest quantum, which the costs greatly exceeded.'
17.	<b>Timeliness</b> – consumer advocacy respondent claimed that AFCA's undue and indefinite delay in completing its determination forced the complainant to settle early on sub-optimal terms. The complaint was settled just under a year after lodgment.	The assertion <i>is partially</i> borne out. The complaint was handled expeditiously until the preliminary assessment, but not after that time. Accepting that AFCA experienced an increased volume of complaints proceeding to determination, AFCA's communications were sparse and 'left the parties in a position of total uncertainty as to when they could expect an outcome, or even their progress "in the queue".'
18.	<b>Timeliness</b> – complainant respondent criticised AFCA's prolonged delay in determining a complaint about the death benefit of a superannuation fund.	The assertion <i>is</i> borne out. The complaint was handled expeditiously until the preliminary assessment, but not after that time. Some delay may have been attributable to the relative complexity of the case but that 'cannot satisfactorily account' for the delay in AFCA reaching a determination, 'in a case where delay clearly has a particularly severe impact on the complainant'.
19.	<b>Timeliness</b> – industry respondent criticised the length of time taken to determine the complaint and the conduct of the complainant's advocate. The complaint closed more than one year after lodgment.	The assertion <i>is partially</i> borne out. The complaint was handled expeditiously until the preliminary assessment, but not after that time. There were a few factors contributing to delays in this case, and AFCA bears responsibility for some of them.
20.	<b>Timeliness</b> – industry respondent criticised AFCA for its lack of timeliness in managing the case. The complaint closed more than two years after lodgment.	The assertion <i>is</i> borne out. 'The file reveals a number of successive delays, repeated failures to respond to queries, failures to seek necessary clarifications and failures proactively to manage the matter, by multiple AFCA officers. While the parties also contributed to confusion and delay, ultimately AFCA alone had both the obligation and the power to assert or address those problems.'



# APPENDIX B: INDEPENDENT EXPERT'S OVERVIEW OF CASE ASSESSMENT

## TREASURY REVIEW OF THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY – REPORT ON REVIEW OF 20 SELECTED CASE STUDIES

### OVERVIEW – CONCLUSIONS

1. We considered 20 cases in detail, in order to assess whether complaints or criticisms made about AFCA's management or handling of the matters were made out.
2. We were instructed that the complaints were representative of broad categories of a total of approximately 200 complaints received by the Treasury Review about AFCA.
3. The complaints we examined arose in an extremely small proportion of the large number of cases handled by AFCA. As they were cases where a party was sufficiently dissatisfied to take the unusual step of lodging a critical submission with the Treasury Review, they are not representative of AFCA's performance as a whole, and as a result an element of selection bias is present in the study.
4. Despite this, we found that the complaints were fully established in only six<sup>1</sup> of the 20 case studies, while another two were borne out in part. Most of the established complaints relate to lack of timeliness.
5. On detailed examination of the files, we were, overall, favourably impressed by the apparently orderly process, the consistent concern to provide procedural fairness and the respectful communication with all parties, including unsophisticated and demanding participants. We did not find, in the 20 cases we examined, a single instance of apparent bias or lack of independence.
6. We considered that the written preliminary assessments and determinations were of a consistently high quality, clearly written and logically reasoned.
7. We observed that some complaints, however formulated, were essentially expressions of dissatisfaction with an adverse outcome and, in many instances, were directed at the fairness jurisdiction itself.
8. When assessing the relevance of the complaints in which lack of timeliness was established (and indeed, was not disputed by AFCA), the following factors should be borne in mind:

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<sup>1</sup> Two case studies related to a single complaint of inconsistency.

- (a) Perspective – the cases found to involve undue delay comprise only a very small proportion of the cases that AFCA otherwise handles within a relatively short period of time.
  - (b) Delay may be a consequence of the complexity of the dispute that comes before AFCA and of balancing expedition against the need to allow the parties fully to put their case in accordance with procedural fairness. In a jurisdiction where the parties may be unsophisticated consumers, and any right of appeal or review is extremely limited, some latitude in allowing extensions, revision of arguments and additions to or alterations of claims may be necessary. This may impact adversely on the time taken to dispose of a complaint. However, it represents a balancing of competing considerations, in which more weight is accorded to ensuring that the right to be heard is upheld.
  - (c) AFCA has recognised the potentially problematic gap between the delivery of a preliminary assessment and the completion of a final determination. It has addressed this by significantly increasing the number of ombudsmen. It is also considering various means of maintaining communications with parties whilst they are awaiting determination.
9. We note that some of the case studies raised several important broader issues beyond our terms of reference. They included:
- (a) whether there should be a right of appeal or review from an AFCA determination;
  - (b) the extent to which AFCA should impose deadlines and procedural sanctions on parties;
  - (c) the use of the “slip” rule in amending or issuing a new determination and whether its application should be expanded; and
  - (d) how AFCA should approach the role of paid advocates.

**29 July 2021**

**The Hon. Julie Dodds-Streeon QC**

**Ahmed Terzic, Counsel**

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## APPENDIX C: FINDINGS OF AFCA-INITIATED REVIEWS/SURVEYS

### Complainant feedback

- C.1 AFCA has a complainant feedback program in place that involves three separate survey components: registration complaints, closed complaints and discontinued complaints. The program is designed to collect feedback from complainants covering the full complaints process, with the questions applicable to each complainant dependent on how the complaint was processed and resolved.
- C.2 Customer Service Benchmarking Australia (CSBA), which is a customer service consulting company, independently runs the program. The most recent results were provided to AFCA in December 2020 and have been provided to the Review.
- C.3 Noting the 24 per cent participation rate, the results are quite positive, with the overall satisfaction rate with the entire AFCA experience being 73 per cent. Other indicators are also trending upwards, suggesting complainant satisfaction with their experiences with AFCA are improving over time.

### Member feedback

- C.4 AFCA has also engaged Kantar, which is a data, insights and consulting company, to independently conduct member satisfaction research. The most recent results were provided to AFCA in January 2021 (after an earlier report in April 2019), and have been provided to the Review. Feeding into this report, a total of 706 members completed a 10-minute online survey.
- C.5 Key insights include:
- The majority of members are confident in AFCA's dispute resolution process and rated most member services positively. However, they were significantly less satisfied with the general communications about AFCA and consultation on policy and process changes compared to 2019.
  - Many members have no complaints against them, but members that do have a complaint lodged with AFCA reported moderate levels of satisfaction with their interaction with AFCA at each phase of the complaints process. However, there was a significant decrease in satisfaction in the perceived fairness of the outcome of the complaints lodged with AFCA compared to 2019.
  - Further, while members' satisfaction with the understanding of the process, responsiveness of AFCA's staff and secure services was strong, they were concerned about having access to escalation reports when they had issues or concerns around timeliness with their outcomes.

### Previous reviews

- C.6 AFCA has also engaged independent experts on two occasions (2019 and 2020) to conduct a review of a sample set of determinations made by adjudicators, ombudsmen and panels. Reports from both reviews have been provided to this Review, noting that they were prepared for AFCA's internal use. The reviewers assessed whether the determination

outcome was appropriate and whether the AFCA process was fair. Consistency between the reviewed determinations was also taken into account.

C.7 Overall, the 2020 report found:

- Determination outcomes were overwhelmingly fair, consistent with the factual information and applied the law and good practice appropriately. Determination outcomes were also clearly set out.
- Decision makers did not exhibit bias and it was apparent that the AFCA process was fair. The parties were made aware of the pivotal issues so that they could make their arguments and provide relevant material. The parties were also given a fair opportunity to comment on each other's submissions.
- Determinations typically made the decision logic explicit and were reasonably reader-friendly.
- Weaknesses identified in the 2019 report seemed less prevalent in the 2020 sample (noting the 2020 sample was considerably smaller).
- Some opportunities for improvement were identified, with recommendations to improve: timeliness; procedural fairness and fairness more broadly; handling of complaints from complainants experiencing vulnerabilities; dealing with unusual or complex complaints; determinations; and quality assurance.

C.8 AFCA advised the Review that it has accepted all the recommendations in the above reports and has already implemented or is currently working to implement them.

## **APPENDIX D: AFCA'S MANDATORY REQUIREMENTS AS SET OUT IN THE LEGISLATION**

*Corporations Act 2001: Part 7.10A, Subdivision B, Section 1051 – Mandatory requirements*

### ***Organisational requirements***

- The membership of the scheme is open to every entity that is required, under law, to be a member of an external dispute resolution scheme.
- The operations of the scheme are financed through contributions made by members of the scheme.
- The scheme has an independent assessor.
- Complainants are exempt from payment of any fee or charge, to the operator of the scheme or to any other entity, in relation to a complaint.

### ***Operator requirements***

- The operator of the scheme commissions the conducting of independent reviews of the scheme's operations and procedures.
- The operator of the scheme is a company limited by guarantee.
- The operator's constitution provides that the operator must not be operated for profit.
- The operator's constitution provides that the number of directors of the operator who have experience in carrying on the kinds of businesses operated by members of the scheme must equal the number of directors who have experience in representing consumers.
- The operator's constitution provides that the Chair of the board of the operator must be an independent person.
- The operator's constitution provides that, within six months after the scheme is authorised, the Minister:
  - (i) May appoint an independent person as the Chair of the board of the operator; and
  - (ii) May appoint any director, if the total number of directors (including that director) whom the Minister has appointed, as mentioned in (i) and (ii), is less than half the total number of directors.

***Operational requirements***

- The complaints mechanism under the scheme is appropriately accessible to persons dissatisfied with members of the scheme.
- Complaints against members of the scheme are resolved (including by making determinations relating to such complaints) in a way that is fair, efficient, timely and independent.
- Appropriate expertise is available to deal with complaints.
- Reasonable steps are taken to ensure compliance by members of the scheme with those determinations.
- Under the scheme, determinations made by the operator of the scheme are binding on members of the scheme but not binding on complainants under the scheme.
- For superannuation complaints, there are no limits on the value of claims that may be made under the scheme or the value of remedies that may be determined under the scheme.

***Compliance requirements***

- The operator of the scheme is to ensure that the following are complied with:
  - Conditions of the authorisation of the scheme.
  - Regulatory requirements issued by ASIC.
  - Directions given by ASIC.
  - Certain matters are referred to appropriate authorities.

# APPENDIX E: LIMITS APPLYING TO COMPLAINTS SUBMITTED TO AFCA

BEFORE 1 JANUARY 2021

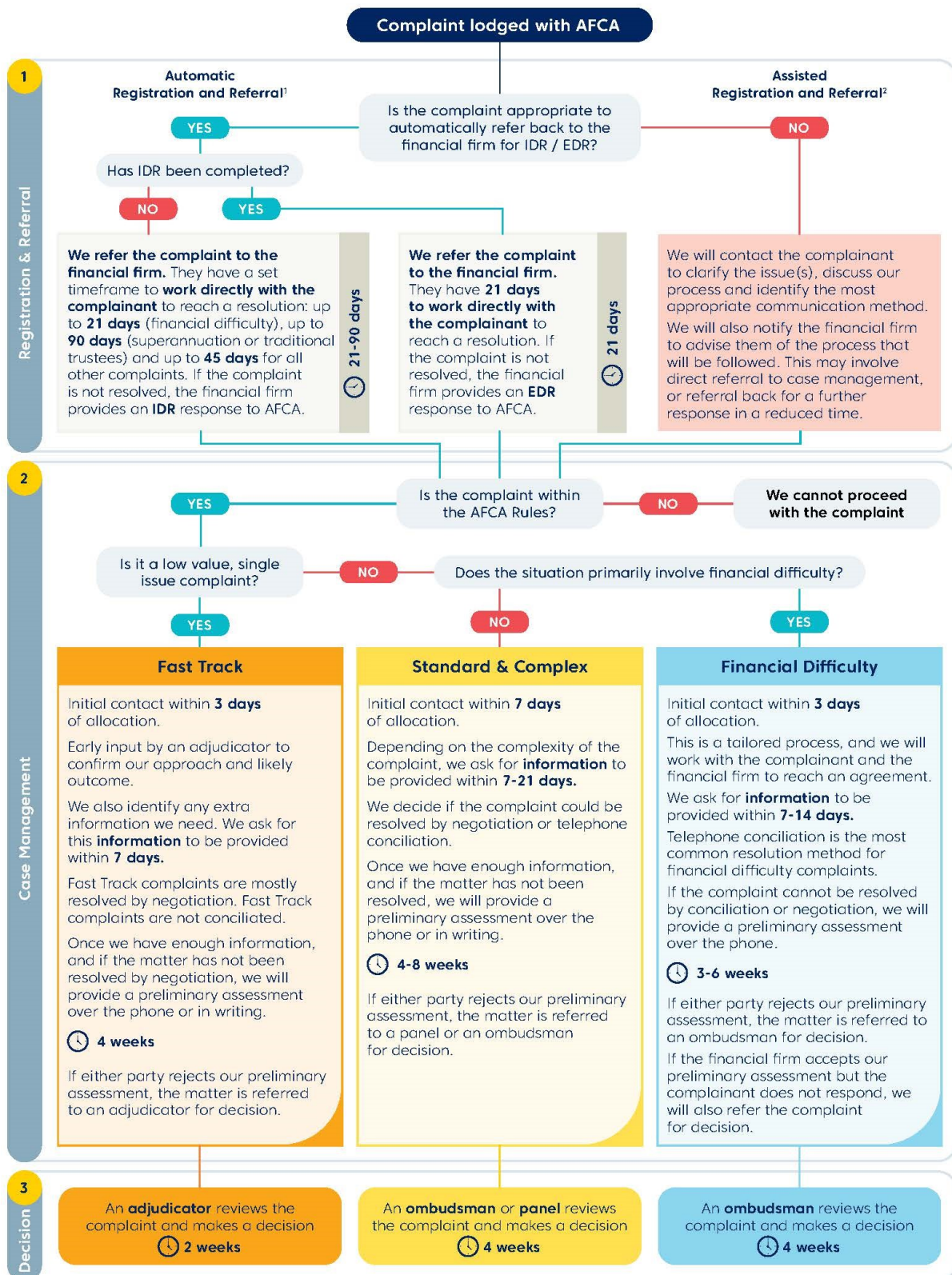
	Row	Type of claim	Compensation amount limit per claim	Monetary restriction on AFCA's jurisdiction			
Claim for direct financial loss	1	<b>Income Stream Insurance</b> Claim on a Life Insurance Policy or a General Insurance Policy dealing with income stream risk or advice about such a contract. If the claim is in excess of this monthly limit, the monthly limit will apply unless: <ul style="list-style-type: none"> <li>the total amount payable under the policy can be calculated with certainty by reference to the expiry date of the policy and/or age of the insured; and</li> <li>that total amount is less than the amount specified in row 6.</li> </ul> If this is the case, then the limit will be the amount in row 6.	\$13,400 per month	Amount claimed by Complainant must not exceed \$1 million			
	2	<b>General Insurance Broking</b> Claim against a General Insurance Broker except where the claim solely concerns its conduct in relation to a Life Insurance Policy (in which case row 1 or 6 applies, as the case may be).	\$250,000	Amount claimed by Complainant must not exceed \$1 million			
	3	<b>Uninsured Motor Vehicle</b> Claim under another person's Motor Vehicle Insurance Product for property damage to an Uninsured Motor Vehicle caused by a driver of the insured motor vehicle – see B.2.1 f)(i)	\$15,000	Amount claimed by Complainant must not exceed \$1 million			
	4	Credit Facility	Claim arising from a credit facility provided to a Small Business or Primary Producer – see C.1.2e and C.1.3b	by a borrower	of a Small Business loan	\$1 million	Credit facility must not exceed \$5 million
					of a Primary Producer loan	\$2 million	
				by a guarantor to set aside a guarantee supported by security over	the guarantor's principal place of residence	unlimited	Credit facility must not exceed \$5 million
					other security	for a Small Business loan	
		for a Primary Producer loan	\$2 million	Credit facility must not exceed \$5 million			
	5	Credit Facility	Claim arising from a credit facility that was provided to someone other than a Small Business or Primary Producer	by a borrower		\$500,000	Amount claimed by Complainant must not exceed \$1 million
				by a guarantor to set aside a guarantee supported by security over	the guarantor's principal place of residence – see C.1.2e	unlimited	unlimited
other security					\$500,000	Amount claimed by Complainant must not exceed \$1 million	
6		<b>All other claims (excluding Superannuation Complaints)</b> In any other circumstance by any Complainant (whether or not a Small Business or Primary Producer)	\$500,000	Amount claimed by Complainant must not exceed \$1 million			
7		Claim for indirect financial loss	\$5,000	not applicable			
8		Claim for non-financial loss	\$5,000	not applicable			

## AFTER 1 JANUARY 2021

Row	Type of claim	Compensation amount limit per claim	Monetary restriction on AFCA's jurisdiction		
1	<b>Income Stream Insurance</b> Claim on a Life Insurance Policy or a General Insurance Policy dealing with income stream risk or advice about such a contract. If the claim is in excess of this monthly limit, the monthly limit will apply unless: <ul style="list-style-type: none"> <li>the total amount payable under the policy can be calculated with certainty by reference to the expiry date of the policy and/or age of the insured; and</li> <li>that total amount is less than the amount specified in row 6.</li> </ul> If this is the case, then the limit will be the amount in row 6.	\$14,500 per month	Amount claimed by Complainant must not exceed \$1,085,000		
2	<b>General Insurance Broking</b> Claim against a General Insurance Broker except where the claim solely concerns its conduct in relation to a Life Insurance Policy (in which case row 1 or 6 applies, as the case may be).	\$271,500	Amount claimed by Complainant must not exceed \$1,085,000		
3	<b>Uninsured Motor Vehicle</b> Claim under another person's Motor Vehicle Insurance Product for property damage to an Uninsured Motor Vehicle caused by a driver of the insured motor vehicle – <a href="#">see B.2.1 f(i)</a>	\$16,300	Amount claimed by Complainant must not exceed \$1,085,000		
4	<b>Credit Facility</b> Claim arising from a credit facility provided to a Small Business or Primary Producer – <a href="#">see C.1.2e</a> and <a href="#">C.1.3b</a>	by a borrower	of a Small Business loan	\$1,085,000	Credit facility must not exceed \$5,425,000
			of a Primary Producer loan	\$2,170,000	
		by a guarantor to set aside a guarantee supported by security over	the guarantor's principal place of residence	unlimited	Credit facility must not exceed \$5,425,000
			other security	for a Small Business loan	\$1,085,000
		for a Primary Producer loan		\$2,170,000	
		5	Claim arising from a credit facility that was provided to someone other than a Small Business or Primary Producer	by a borrower	
by a guarantor to set aside a guarantee supported by security over	the guarantor's principal place of residence – <a href="#">see C.1.2e</a>			unlimited	unlimited
		other security		\$542,500	Amount claimed by Complainant must not exceed \$1,085,000
6	<b>All other claims (excluding Superannuation Complaints)</b> In any other circumstance by any Complainant (whether or not a Small Business or Primary Producer)	\$542,500	Amount claimed by Complainant must not exceed \$1,085,000		
7	Claim for indirect financial loss	\$5,400	not applicable		
8	Claim for non-financial loss	\$5,400	not applicable		



# APPENDIX F: AFCA's COMPLAINT RESOLUTION PROCESS



Advertised timeframes are targets. Case complexity and AFCA complaint volumes may affect the time taken to handle individual complaints.

<sup>1</sup> Most complaints will progress through the automatic Registration and Referral process.

<sup>2</sup> Some complaints may not be appropriate to automatically refer back to the financial firm because of the subject matter, urgency or the accessibility needs of the complainant.



## APPENDIX G: AFCA PUBLICATIONS

Source: AFCA Publications webpage<sup>278</sup>

### AFCA operational information

AFCA Rules

Operational Guidelines

Superannuation Transitional Guidelines

### Brochures

How to resolve a complaint

How to resolve a small business complaint

A guide to dealing with financial difficulty

A guide to conciliation conferences

### Factsheets

Account closure

Attending a conciliation conference

Bankrupt individuals

Breaking a fixed rate loan

COVID-19: Breaking a fixed rate loan

Class actions affecting AFCA complaints

Default judgment and financial difficulty

How we resolve complaints and our Rules

How AFCA will assess the information you give us

Income protection benefits in superannuation

Insolvent companies

Insurance in superannuation

Insurance premium increases in superannuation

### Factsheets (continued)

Joining a death benefit complaint

Managing financial advice

Managing your privacy

Mistaken internet payments

MySuper

Natural disasters: are you experiencing financial difficulty?

Superannuation advice

Systemic issues

### Approach Documents

The 2013 Code of Banking Practice

Adequacy of statements of advice

Assessing special circumstances

Awarding interest in insurance

Calculating loss in financial advice

Cancellation of instalment contracts

Cancellation of insurance policies for non-payment of premiums

Complaints lodged by guarantors

COVID-19 travel insurance complaints

Delayed insurance claims in superannuation

Excluding complaints

Financial difficulty series - our power to vary credit contracts

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278 AFCA (n.d.) *Publications*, AFCA website, accessed 13 August 2021.

### **Approach Documents (continued)**

Financial difficulty series - principles, code and good practice

Financial difficulty series - working together to find solutions

Financial difficulty series - dealing with common issues

Financial difficulty series - early release of super

Financial elder abuse

Fixed interest investments

Identifying a claim

Insurance broker disputes

Joint facilities and family violence

Misleading conduct

Mortgagee sales

Motor vehicle insurance claim delays

Motor vehicle insurance disclosure and ridesharing

Non-disclosure and misrepresentation

Non-financial loss claims

Proof of despatch

Section 47 (of the *Insurance Contracts Act 1984*)

Section 54 (of the *Insurance Contracts Act 1984*)

Terms of settlement

Superannuation death benefit complaints

Superannuation fees and charges

**EDR response guides**

Best practice for AFCA members - submissions to AFCA

Claim amount (General Insurance)

### **EDR response guides (continued)**

Complainant chargeback

COVID-19 travel insurance complaints

Credit enquiries

Credit listings

Delay

Financial difficulty

Fraud

Denial of claim (General Insurance)

Avoidance of policy (Life Insurance)

Delay (Life Insurance)

Denial of claim (Life Insurance)

Inappropriate advice

Merchant chargeback

Misleading representations of conduct

Mortgagee sale

Non-disclosure

Superannuation complaints

### **Process guides**

AFCA complaint resolution process map

### **Forms**

AFCA complaint form

Independent Assessor Feedback form

Statement of financial position

Agent authority form

### **Reports**

AFCA's six month report

Monthly statistics

Public Report: Independent Assessor