

# ASSURED SUPPORT

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Director  
AFCA Review Secretariat  
Financial System Division  
The Treasury

**BY EMAIL:** [AFCAreview@treasury.gov.au](mailto:AFCAreview@treasury.gov.au)

Dear Sir/Madam,

## **RE: Review of the Australian Financial Complaints Authority**

Assured Support appreciates the opportunity to provide feedback on the review of the operation of the Australian Financial Complaints Authority (AFCA).

Our submission will provide a unique and practical perspective drawn from experience supporting over 100 Australian Financial Services Licensees and over 1700 financial advisers. The majority of our clients are small to medium business owners and therefore provide a perspective of the financial services industry often overlooked when laws are reformed.

While we generally support the review of AFCA, we would like to draw your attention to a number of issues, consequences, and implications.

### **About Assured Support**

Recognising that the emerging advice profession needed expert advice and support to successfully manage risk, complexity and frequent change, Assured Support was established in 2012 to provide independent, innovative, expert, and commercial support to Licensees and advisers.

Now, as an established and well-regarded brand we have provided services to over 120 Licensees and over a seventeen-hundred advisers. Our deep industry knowledge, practical experience and innovative approach led to the development of regulatory technology (reg-tech) that provides a risk-based and conduct-focused approach to compliance supported by a consistent, validated and interrogable compliance platform with granular and contextualised reporting.



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We represent a large number of small, medium, and large independent licensees and can therefore provide a perspective that is too often overshadowed by the large institutions, product issuers and banks.

What follows is an address of the overarching themes rather than individual questions included in the Terms of Reference.

## **DELIVERING AGAINST STATUTORY OBJECTIVES**

### **1.1 Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes?**

AFCA's complaint resolution powers are based in contract, with its rules approved by ASIC. These, together with AFCA's Constitution, form part of a contract between AFCA and Financial Firms and Complainants. As a result of this, AFCA is not required to observe traditional judicial processes and Decision-makers need only 'have regard to' legal principles; applicable industry codes or guidance; good industry practice and previous relevant Determinations of AFCA. (Section A.14.2)

While this discretion may be considered entirely consistent with AFCA's consumer protection mandate, we note examples – similar to *D H Flinders Pty Ltd v Australian Financial Complaints Authority Ltd* [2020] NSWSC 1690 – that suggest that AFCA representatives sometimes act as advocates for complainants and operate outside of AFCA's mandate.

As you are aware, in the DH Flinders matter the Supreme Court found that AFCA had no jurisdiction to determine a dispute against an AFSL holder, where the complaint arose from the conduct of its representative acting outside their authority. AFCA was determining a series of complaints against the AFSL, DH Flinders, where it was alleged that one of its corporate authorised representatives, EPSOL, provided inappropriate and wrongful advice to several complainants.

DH Flinders objected to AFCAs jurisdiction to hear this type of complaint and objected to AFCA advising claimants to initiate a claim against another party as unfair, inappropriate, and partisan.

The Court determined that there was no jurisdiction given to AFCA to determine a complaint for conduct outside of a representative's authority and his Honour granted an injunction preventing AFCA from considering the complaints further.

This case highlights that AFCA need to be clear about its mandate, reconsider how it manages individual cases and what additional controls are necessary to ensure it appropriately balances the interests of members and complainants.

More problematically from members' perspective is that, as a direct result of *Flinders*, ASIC

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implemented ASIC Corporations (AFCA Scheme Regulatory Requirement) Instrument 2021/0002 to amend the AFCA scheme rules and remedy the jurisdictional gap. However, they do highlight AFCA's capability in producing consistent, predictable, and quality outcomes.

Cases such as these have a large and disproportionate impact on small to medium advice licensees.

In our view, any discussion of AFCAs capacity and capability needs to contemplate its future delivery against statutory objectives. We are concerned about AFCA's capacity and capability to deal with its expanding mandate as a result of the implementation of a multitude of regulatory reform driven by the Australian Securities and Investment Commission over 2021. The following regulatory change may see an increase in complaints flowing through to AFCA. In particular:

1. In accordance with ASIC Regulatory Guide 271: *Internal Dispute Resolution*, Firms will need to have a public complaint policy that explains:
  - How consumers may lodge a complaint (e.g., online, by email, by phone and in person);
  - The options available to assist complainants who might need additional help to lodge their complaint;
  - The key steps for dealing with complaints;
  - Response timeframes; and
  - Details about accessing AFCA where a complaint is not resolved.
2. Royal Commission recommendations 1.6 and 2.9 implement a specific obligation to notify clients of investigations and remediation in relation to misconduct. Australian financial services and credit licensees will be required, as a condition of their licence, to investigate potential and actual misconduct engaged in by financial advisers and mortgage brokers, and to inform and remediate affected clients.
3. Royal Commission recommendations 1.6, 2.8 and 7.2 implement an expansion and amendments of the breach reporting and remediation regime. The new regime will see an extension of the regime to cover Australian Credit Licensees, an expansion of the kinds of situations that will need to be reported to ASIC and the publishing of breach data.



We urge Treasury, when considering AFCA's capability, capacity, and jurisdiction. to be mindful of the impact of AFCA's partisanship, advocacy and discretionary conduct on advisers and small to mid-size member firms. We recommend that AFCA adopt a more predictable, and more balanced approach, to dispute resolution and implement measures, processes and procedures to reasonably ensure that it considers complaints submitted to it in a way that is independent, impartial, and fair (and more in line with Rule A.2.1 (c)(i)).

In addition, we recommend that specific attention should be directed to assessing how AFCA will deal with the potential increase in load, when the Australian Credit Licensees come into scope, and the expansion of regulatory reform over 2021.

Should you require additional information, please contact me directly.

Sincerely

A handwritten signature in black ink, appearing to read 'Sean Graham', is written over a light blue, textured rectangular background.

**Sean Graham**  
Managing Director  
Assured Support Pty Ltd