

Consultation on proposed AFCA Rules

Summary of submissions and outcomes

12 September 2018

Background

AFCA's Rules will set out what complaints AFCA can consider, the procedures it can use to resolve those complaints, remedies it can provide and related matters, including its reporting obligations.

This document provides a summary overview of key issues raised in submissions and feedback provided by stakeholders during consultation on the Rules in June 2018. It also provides an overview of subsequent changes made to the Rules following consultation.

A number of issues raised by stakeholders in submissions and other feedback provided have been addressed through information we have provided in the AFCA Operational Guidelines, which provide guidance about how AFCA will interpret and apply the Rules.

A copy of all non-confidential submissions made to AFCA on the Rules during the consultation period are available on AFCA's website.

The Rules were drafted with the following guiding principles in mind:

- Consistency with legislation governing AFCA, and satisfying any requirements set by the Minister and ASIC.
- Aiming for best practice in achieving the benchmarks for external dispute resolution schemes, with no material reduction in scope compared with AFCA's predecessor schemes.
- Achieving a balance between having common provisions and application across different financial complaints, while also taking account of the differences in financial products and services across the financial industry.
- Applying plain English principles and aiming to make the Rules an accessible document.
- Applying a 'tried and tested' approach, by incorporating well established provisions of predecessor scheme Terms of Reference/Rules/legislation that currently work effectively and efficiently.

The draft AFCA Rules were published and circulated to stakeholders for consultation in June 2018, with the consultation period ending on 29 June 2018. The consultation focused on the significant changes in the AFCA Rules compared with those of predecessor schemes, and invited comment on several areas, including the following:

- whether the Superannuation Complaints Tribunal's jurisdiction had been adequately incorporated into the AFCA Rules,
- reporting obligations, and
- the general format and structure of the Rules

AFCA received 34 formal submissions, and also received feedback at meetings with consumer and industry groups, individual financial firms, and other stakeholders.

The submissions and feedback provided by stakeholders were considered by the AFCA Board, and the draft Rules were amended to take them into account, where appropriate. A number of other minor wording amendments were made to the Rules following consultation, to clarify the meaning and intent of relevant provisions.

In August 2018, AFCA submitted the amended draft Rules and the Terms of Reference for the AFCA Independent Assessor to ASIC for approval.

ASIC has now approved the Rules and the Terms of Reference for the Independent Assessor. ASIC's approval was issued in accordance with the *Corporations Act 2001*, which requires ASIC to approve any material changes made to the AFCA Scheme, such as changes made to AFCA's Rules.

AFCA Operational Guidelines

AFCA has developed Operational Guidelines to explain in more detail how AFCA will interpret and apply the Rules when considering complaints involving financial firms.

The Rules and Operational Guidelines will govern what complaints AFCA can consider and how it will deal with those complaints, once AFCA commences operation on 1 November 2018.

The Operational Guidelines developed by AFCA have now been published and are available on AFCA's website, along with the approved AFCA Rules. The Operational Guidelines is a 'living' document, which AFCA will continue to enhance and supplement with additional information. AFCA will take into account further feedback and suggestions from stakeholders about useful and relevant information that could be added into the Operational Guidelines. Further information that is subsequently added to the Guidelines will also take into account AFCA's experience in dealing with complaints, following commencement on 1 November 2018.

Summary of Rules submissions and feedback

1. Structure, format and language of the Rules

Comments from stakeholders on the structure, format and style of the Rules were largely positive, including feedback on the “Quick Guide” at the beginning of the Rules and the use of tables.

Suggestions for improvement included:

- Creation of separate industry-specific summaries and flowcharts of AFCA’s jurisdiction and compensation caps.

We are developing a guide on how the Rules apply to superannuation complaints, and we may develop other industry-specific documents. These will be issued separately from the Rules.

- Minor changes to the language.

We have adopted a number of these changes – including:

a) replacing the word ‘handle’ with the word ‘consider’, to better reflect the more active investigation and assessment of complaints AFCA will undertake.

b) using ‘Requirements’ rather than ‘Preconditions’ to refer to the requirements that must be met before AFCA can consider a complaint.

- Changes to the tables in the Rules to ensure they are as clear and easy to follow as possible.

We have made some adjustments to the format of the tables, to achieve this while not losing any necessary detail.

2. Superannuation complaints

Submissions from stakeholders indicated the Superannuation Complaints Tribunal jurisdiction had been carried across appropriately in the Rules, with only minor changes subsequently made following consultation. Changes made include minor wording changes to the superannuation complaint definition in relation to financial advice complaints, and a minor amendment to the definition of a complainant as it relates to joined parties and death benefit complaints. Other than this:

- Some submissions expressed concern over some AFCA powers to commission experts, and to award costs or interest that are not expressly part of the SCT’s current powers.

AFCA will exercise the power to award costs and interest in superannuation complaints consistent with the scope and limits of its decision-making powers power in such complaints, under the Corporations Act. Further guidance is also

being provided in the Operational Guidelines in relation to the commissioning of experts to provide AFCA with specialist advice in appropriate circumstances.

3. Reporting obligations and systemic issues

A number of submissions sought clarification of aspects of the proposed framework for investigating and reporting systemic issues, along with reporting of serious contraventions.

We have amended rules A.17.5 and A.18 to make it clear that AFCA will report to ASIC, APRA, the ATO, the OAIC, and (where relevant) any other appropriate body, and to ensure the reporting framework is consistent across both areas.

We have also made amendments to the systemic issues provisions in A.17, to clarify that financial firms will have a reasonable opportunity to respond to a potential systemic issue prior to any reporting to the relevant regulator.

In addition, we have provided information and guidance in the Operational Guidelines about AFCA's approach to systemic issues to address the concerns raised and clarification sought about how we will interact with financial firms during the investigation and resolution of a systemic issue. Clarification has also been included in the Operational Guidelines regarding the handling and reporting of serious contraventions and other breaches.

We have also ensured that the systemic issue provisions in the Rules are consistent with the requirements of ASIC RG 267, and the existing provisions in the FOS Terms of Reference (11.2) and the CIO Rules (41.3 - 41.7).

4. General

Other issues raised in submissions within the scope of the consultation included the following:

- AFCA's focus on continuous improvement and independent reviews to be measured against all the benchmarks for external, industry-based customer dispute resolution, not just effectiveness.

We have amended rule A.2.1(j) to reflect this.

- Reinstating the existing provision within the FOS Terms of Reference to exclude complaints about financial services if they are made by wholesale clients.

This discretion has been inserted into Rule C.2.2.

- Clarifying who can complain to the Independent Assessor about the quality of the service AFCA has provided, and the role and powers of the Independent Assessor.

We have amended the provisions of A.16 in the Rules to clarify who can complain to the Independent Assessor and the function of this role. The role, procedures and powers of the Independent Assessor are also dealt with in more detail in the Independent Assessor's Terms of Reference.

- Clarifying AFCA jurisdiction in relation to privacy complaints.

We have amended rule B.2.1 to expressly include complaints about privacy breaches, and breaches of the proposed Consumer Data Framework.

- Confirmation that a complainant must sign a release if requested by the financial firm, as a condition of the firm complying with AFCA's determination.

We have amended the wording of Rule 15 to make this clearer.

- Confirming AFCA's ability (in non-superannuation complaints) to vary or set aside (as well as reinstate or rectify) a contract, if this is required to provide a fair outcome to a complaint.

We have amended rule D.2.1(e) to clarify this.

- Clarifying A.10 of the Rules in relation to the exchange of information by AFCA and the application of special circumstances in which information will not be exchanged by AFCA.

We have amended rule A.10 to clarify AFCA's approach to exchange of information and the application of special circumstances. Guidance in relation to the exchange of information by AFCA is also provided in the Operational Guidelines.

5. Concerns that could not be considered

Some submissions called for changes to AFCA's jurisdiction or process which would have been contrary to the governing legislation, the Minister's requirements for the scheme, and/or the requirements in ASIC Regulatory Guide 267. These included:

- No increase to AFCA's monetary jurisdiction and compensation limits for non-superannuation complaints, compared with FOS and the CIO.
- Excluding complaints where the financial firm has already obtained a default judgment against the complainant.
- Allowing the Independent Assessor to review the merits of AFCA outcomes, or otherwise providing an appeal process (beyond an appeal on questions of law available in superannuation complaints, which is specifically provided for under the Corporations Act).

Because these changes would be contrary to the requirements that AFCA is required to meet in accordance with the Corporations Act, the Ministerial requirement and/or ASIC Regulatory Guide 267, we have not adopted them.