

5 July 2018

Mike D'Argaville
Legal Counsel
Australian Financial Complaints Authority

By email: submissions@afc.org.au

Dear Mr D'Argaville

AFA Submission – Consultation: AFCA Rules Consultation Paper

The Association of Financial Advisers Limited (**AFA**) has served the financial advice industry for over 70 years. Our objective is to achieve *Great Advice for More Australians* and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

The Board of the AFA is elected by the Membership and all Directors are currently practicing financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting wealth.

Introduction

The AFA supports the design principles as set out in the Background section of the AFCA Rules Consultation Paper.

We note that some of the key issues with respect to the establishment of AFCA and the new Rules of AFCA are not part of the scope of this consultation. However, we believe that it is important that we express our concerns with these elements:

- The AFA has serious concerns about the consequences of raising the monetary limit and the compensation cap and the resultant impact on Professional Indemnity Insurance for Financial Advisers. The PI Insurance market for financial advisers is already under significant pressure and these reforms will have further consequences. This might be in the short term or it may take longer to play out, however we expect that the outcome will be a reduction in the providers of PI Insurance and a significant increase in the cost of that insurance.

- The AFA is supportive of the role of an Independent Assessor, however we believe that the benefits of such a role will be lost as a result of the exclusion of the Independent Assessor from looking at the merits of the matter. In our view, this fundamentally reduces the value of such a role. We also note the point in A.16.5 that the recommendations of the Independent Assessor are not binding on AFCA. In the context of the inability for financial advice licensees to appeal a decision that they believe is materially flawed, this would have been a good option. In our opinion the limitations placed on the role of the Independent Assessor significantly diminish the ability of this role to make a difference and influence improvements in AFCA

We have primarily focused our feedback on the implications for the financial advice sector.

Response to Questions Raised in the Consultation Paper

1. Do the AFCA Rules achieve a reasonable balance between user-friendliness and detail?

We believe that there is a good balance, noting that consumers are going to want less detail and financial firms are going to want more detail. This will therefore be a delicate balancing act. From our perspective and as set out below, we would like to see more detail and clarity in some areas, which will only come with the addition of greater detail.

2. Before the Table of Contents is a “quick guide” summarising the key aspects of the Rules and their location. Is this helpful?

We support the intent of a summary table at the start of the AFCA Rules document that will assist users to more readily find the section that is most relevant to them. It is unclear whether the diagram in the Quick guide is intended to be a flow chart or some other form of a guide. We agree that the information currently contained in the Quick guide is useful information, however we would suggest that further consideration is required with respect to the design of this diagram and whether it is complete in terms of all key considerations.

3. The Rules contain a number of tables (for example, summary tables of the time limits to submit a complaint to AFCA and of the monetary restrictions on AFCA’s jurisdiction and compensation powers). Are the tables helpful in explaining these areas? How could they be improved?

The use of tables is effective, however just as the Quick guide is provided at the start of the document, tables that summarise the content such as the timeframes table in B.4.5.2 and the Remedies table in Section D should be placed prior to the detailed description rather than at the end.

4. Are there aspects of the Superannuation Complaints Tribunal’s jurisdiction that have not been adequately incorporated into the AFCA Rules?

We are not aware of any aspects of the SCT jurisdiction that have been excluded.

5. Do the AFCA Rules adequately provide for AFCA to meet its reporting obligations under the Corporations Act?

We believe that the AFCA Rules in A.17 to A.20 provide AFCA with the powers to meet its reporting obligations under the corporations Act, including with respect to Section 1052E. We do have some comments with respect to the rules addressed in A.17 to A.20, including the following:

- It is our view that the definition of a Systemic Issue as addressed in A.17.1 is not appropriate. This suggests that a matter of two issues of a similar nature for the one financial adviser would constitute a systemic breach. We appreciate that in practice it may not work that way, however we believe that this definition needs to be reviewed to ensure that the matters that get picked up as a result of this definition, are genuinely systemic.
- We have concerns about the extent of the powers enabled through A.17.4. It seems excessive that AFCA can require a Financial Firm to do or refrain from doing any act that AFCA considers necessary to address the items raised in A.17.4(a) – (f). We make the following further comments with respect to A.17.4(a) – (f):
 - “Improving industry practice and communication” appears to have the potential to go above both the law and best practice. This is too open ended and ambiguous.
 - The use of the term “disadvantage” has not been defined. It might be that a piece of advice involves making a decision that will result in some advantages and some disadvantages, where the net result is a material advantage. It should not be possible for AFCA to only consider the disadvantages. Alternatively, it may be that the disadvantage was as a result of market movement, when the financial advice was still appropriate and it was unreasonable to hold the financial adviser accountable.
 - We question the power for AFCA to require the remedy of disadvantage in the absence of a complaint. Is this the intention of an EDR scheme?
- A.17.5 identifies the requirement for AFCA to report systemic issues to “any body” and then lists four regulators. We believe that “any body” needs to be clarified. This might be changed to “any regulatory body” or more precisely “any financial services regulatory body”.
- We note that A.17.5 refers to the Office of the Australian Information Commissioner, whereas A.18.1 does not. It seems that it would be better to standardise the examples provided.
- A.18.1 under the heading of “Serious contraventions and other breaches” discusses referring certain matters to “any body” including ASIC, APRA and the ATO. Section 1052E of the Corporations Act does not refer to “any body” and only refers to APRA, ASIC, and the Commissioner of Taxation. This seems inconsistent. We also question the use again of “any body” and the lack of definition with respect to “Serious contraventions” and “certain matters”. We also note the heading refers to “other breaches”, yet A.18.2 refers to “serious breaches”. How does the requirement of A.18.1 differ from the requirement of A.18.2? We believe that this Rule needs to be clarified.
- A.19.1(b) refers to the collection of information on the “demographics of the complainant”. We make the point that the AFSL may not know information on the demographics of the complainant. What type of information is classified as demographics in this Rule? We would recommend that this requirement be reviewed or at least clarified.
- We would assume that public reporting by AFCA would be at a high level. A.20.1 refers to a comprehensive summary, yet then goes on to talk about the number of complaints per firm, the number closed and the outcome of those complaints. The reference to a comprehensive summary and then particular detail seems inconsistent. We believe that this should be high level reporting and that greater clarity is required.

6. Are there any other issues that require consideration?

In addition to the points raised above with respect to the proposed AFCA Rules, we would like to make the additional points:

- We note the reference in A.1.3 that complainants do not generally need legal or paid representation to submit or pursue a complaint. We have been concerned in terms of the increasing prevalence of lawyers being involved in insurance claims, where the matter is straight forward and they are doing little more than assisting with completing the paperwork. We are concerned about the scale of fees that are often paid when little support is required. We believe that it would be beneficial for AFCA to report on the extent of lawyer

involvement in the pursuit of EDR complaints with a view to providing increased guidance for consumers on the options available to them

- Whilst we support AFCA playing a role in assisting complainants to submit a complaint, we do receive feedback from financial advisers about the extent to which EDR staff might be providing advice on the best strategy to maximise any compensation. Support should be predominantly education and procedural, not strategic.
- We are concerned by the statement in A.14.3 that AFCA is not bound by previous AFCA decisions. Financial Firms require some level of certainty and suggest that precedent should apply unless something fundamental has change that would warrant a precedent no longer applying.
- We question D.2.1(i) and the reference to making an order generally consistent with the declarations available to the Information Commissioner. We question why AFCA having the power to make such an order may be viewed necessary, and whether such orders should be made by the OAIC rather than AFCA. We also note that the Mapping of the AFCA Rules to the FOS and CIO Terms of Reference incorrectly refers to D.2.1(i) as “apology” (which is actually D.2.1(j)). It would appear that a similar power did not exist previously.
- In the context of the significant increase in the compensation caps, we believe that any payment made under D.5 (cost of pursuing complaints) or D.6 (interest) should be included within the compensation cap.

Independent Assessor Terms of Reference

We provide the following feedback on the draft Independent Assessor Terms of Reference:

- This document uses the term financial firm to refer to the recipient of an AFCA complaint. Paragraph 2 refers to a ‘person or business’ who may make a complaint to the Independent Assessor. Does this specifically exclude a financial firm, or is this unintentional? We believe that this should more specifically refer to a financial firm as they too should be entitled to submit a complaint to the Independent Assessor.
- We question the appropriateness of only enabling a complainant to make a complaint to the Independent Assessor within three months of the completion of the AFCA internal process. This seems to be unreasonably short, as it is possible that the complainant will become aware of other factors after the conclusion of this short time period.
- As previously stated, the exclusions in paragraph 7, in our view diminish the value of having an Independent Assessor.
- We believe that the “exceptional circumstances” referred to in paragraph 9 should be further explained.
- We question whether paragraph 12 should also refer to the Internal Assessor asking the financial firm for further information. It is uncertain whether the reference to the individual or business was intended to include a financial firm.
- In terms of the Paragraph 16, we question the appropriateness of the Chair making decisions on their own with respect to agreeing with the recommendations of an Independent Assessor and whether this should be the full Board. We are also concerned about the risk of this placing executive responsibilities on a non-executive Chair. We further question in paragraph 17 whether it should be the Chair of AFCA who responds to the complainant.

Concluding Remarks

As stated above, the AFA continues to have some important concerns about the impact of the proposed increases in the monetary limit and compensation cap on the cost of PI insurance for financial advice businesses. This concern is also directly related to the inability to appeal decisions, particularly where it is felt that strong grounds exist. We also question the proposed role of the

Independent Assessor, where we believe that the proposed scope of this party removes the likely benefits that would emerge if they could review the merits of cases.

The AFA welcomes further consultation with AFCA should it require clarification of anything in this submission. If required, please contact us on 02 9267 4003.

Yours faithfully

Phil Anderson

General Manager Policy and Professionalism
Association of Financial Advisers Ltd