



AFCA Rules and Operational Guidelines – Proposed amendments

FSC Submission

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1. About the Financial Services Council

The FSC is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers and financial advice licensees. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing more than \$3 trillion on behalf of over 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is one of the largest pools of managed funds in the world.

2. Introduction and Executive Summary

2.1. Introduction

The FSC welcomes the opportunity to provide feedback to the Australian Financial Complaints Authority (AFCA) on its consultation paper released on 27 March 2023 (the **Paper**) regarding proposed amendments to the AFCA Rules and Operational Guidelines.

The FSC is supportive of making changes to the AFCA Rules and Operational Guidelines to implement the recommendations set out in the Independent Review Report published by Treasury in November 2021 (**Review Report**). The FSC appreciates the opportunity to provide feedback on the 13 proposals (**Proposals**) set out in the Paper which we are pleased to set out below. We have also included further feedback in respect of an additional matter, Procedural Fairness, which we touch on in our Executive Summary and expand on in paragraph 2.16 below.

2.2. Executive summary

No party to a complaint or their representatives should be permitted to engage in abusive conduct towards anyone.

The FSC notes that, broadly, AFCA Proposals 1 and 2 seek to exclude Paid Representatives and Complainants from progressing a complaint where they are engaging in various kinds of inappropriate conduct, however the reasons for exclusion (types of conduct) for each of these groups differ markedly. Notably, while a Complainant can be excluded for a range of abusive conduct directed at AFCA staff, this is not the case with regards to Paid Representatives. In our view, the following changes should be made to these Proposals:

1. the types of abusive conduct towards AFCA staff that would justify excluding a Complainant should also be justification for excluding the Paid Representative;
2. where the representative is engaging in abusive conduct of the type outlined in Proposal 2, they should be excluded whether or not the representative is financially compensated – both Paid Representatives and unpaid representatives should be covered by the Rules: and
3. where such abusive conduct (whether engaged in by the complainant or the representative, paid or unpaid) is directed at other parties to the complaint (not just AFCA), this should also be justification for exclusion – we see no sensible reason for allowing abusive conduct directed at the staff of a Financial Firm (or other third parties such as professional advisers) during the course of a complaint to be treated differently.

Recommendation

1. All parties to a complaint who engage in misconduct towards anyone should be subject to potential exclusion.

Conduct of representatives of all parties should be covered.

Related to the above point, where an agent, officer, employee or other representative of a Complainant or a representative (Paid Representative or unpaid representative) is engaged in misconduct, this should also be justification for exclusion and the Rules amended consistently to make this clear – Proposals 1 and 2 and the Rules generally should cover not only the complainant or representative but also those persons acting on their behalf. AFCA’s Engagement Charter should also reflect these principles and there should be a clearly consistent set of provisions contained in all relevant AFCA publications (notably the Engagement Charter, the Rules and Operational Guidelines, as well as any relevant Approach Documents).

Recommendation

2. Proposals 1 and 2 and the Rules generally should cover not only the complainant or representative but also those persons acting on their behalf.

Drafting changes should be consistent and easy to navigate and key terms should be defined in the Rules.

The FSC submits that the drafting of the proposed changes to the Rules and Operational Guidelines should be revisited (as further detailed below) to try to enhance the consistency and ease of use of these documents. In addition, relevant key terms (such as the word “Claim”) should be defined in the Rules themselves, and/or explained by way of additional guidance and examples (such as what is an “appropriate settlement”).

Recommendation

3. Relevant key terms (such as the word “Claim”) should be defined in the Rules themselves

The Rules should exclude sophisticated and professional investors

In Proposal 5, AFCA proposes to amend the Operational Guidelines to confirm it will exercise a discretion to exclude sophisticated and professional investors. The FSC does not agree that a change to the Operational Guidelines alone is sufficient, but rather that the Rules themselves need to be amended.

Recommendation

4. The Rules should be amended to exclude sophisticated and professional investors where appropriate.

Procedural fairness should be broadened in some circumstances

The FSC suggests that AFCA’s Rules and/or its Operating Guidelines should be amended to include an extension of procedural fairness and due process to instances where AFCA’s

position as articulated in a case manager's Preliminary Assessment is likely to change materially by the Ombudsman prior to (or while developing) a final determination/decision. In this scenario, it would be appropriate that a draft decision or pre-decision assessment be issued to the parties, so that they can make final submissions specifically addressing the reasons for the change in position. This additional step would provide the parties with a reasonable opportunity of considering those changes and a right of reply before a final determination is made by the Ombudsman, (*Refer to paragraph 2.16 below*)

Recommendation

5. Procedural fairness and due process should be extended to instances where AFCA's position, as articulated in an initial Preliminary Assessment, changes materially prior to (or while developing) a final determination.

2.3. Proposal 1: Paid Representatives

The FSC agrees with the principle that it is the Paid Representative that should be excluded for poor conduct, not the complaint or the Complainant, and that where there is misconduct on the part of the Paid Representative, the Complainant should be provided with an opportunity to remove that Paid Representative and deal with AFCA directly, or deal with AFCA through another representative.

While we agree that Recommendation 4 of the Review Report is to some extent addressed by the proposed Rules amendments, in our view the changes described in Proposal 1 should be broadened in the following respects. While we appreciate that some of our suggestions go beyond Recommendation 4, we submit that it would be sensible to make these suggested changes at the same time as the changes that are made to directly address the content of Recommendation 4.

Paid and unpaid representatives should be covered. The FSC would suggest that the Proposal be extended to cover misconduct to *unpaid* representatives. If the Complainant enlists the help of a third party and that third party engages in misconduct, then there should be an opportunity to exclude the third party whether or not that third party is being remunerated (and irrespective of the identity of the provider of any remuneration).

Paid and unpaid friends and relatives should be covered. In addition, we note that the proposed defined term could be changes from "Paid Representative" to "Representative" and the definition be changed to reads as follows:

"... a person or service (other than a lawyer with a current practising certificate or an Accountant) who may receive financial remuneration for acting for a Complainant in relation to their complaint lodged with AFCA."

This definition would capture a person acting in the course of a business, but also a person carrying out the representation in the capacity of a friend or relative of the Complainant. While we are not clear as to whether this is AFCA's intention, the FSC would support a definition which is broadly framed in this way. To make the definition clearer, additional

words could be added, for example by including the words “whether or not acting in the course of a business” at the end of the definition. Additionally, some explanatory commentary could be added to the Operational Guidelines.

Unlicensed persons should be excluded automatically. The FSC notes that Proposal 1 is to provide AFCA with the discretion to exclude a complaint “*where the Paid Representative does not hold an Australian credit licence or Australian financial services licence where this is required by law*”. It is hard to see why this should be a matter for the exercise of discretion. In our view, in such circumstances there should be an automatic exclusion of the complaint – as a general matter it would seem inappropriate for AFCA to deal with a party that AFCA knows has failed to obtain the requisite licence. The wording in draft Rule A.8.4 states that AFCA *may* decide to exclude the Paid Representative in this situation, but we think this should be changed so that the effect is the person *shall* be excluded.

Grounds for exclusion should be extended. The grounds for excluding a Paid Representative are limited to (a) not having the requisite licence, or (b) either (i) not acting in the Complainant’s best interests or (ii) in a way that prevents AFCA from achieving a cooperative, fair, efficient and timely resolution of the Complainant’s complaint. The FSC suggests that these grounds be extended to include threatening, intimidating, abusive, bullying, discriminatory or otherwise unreasonable conduct, as well as conduct that denies parties to the complaint a safe working environment. This would thus mirror the proposed approach set out in Proposal 2 with respect to the conduct of Complainants as set out in proposed Rule 1.8.4(b). It is not clear why the misconduct outlined in respect of Complainants should not equally apply to a representative of the Complainant (whether paid or unpaid).

In addition, the Rules should make it clear that AFCA is able to exclude a representative (and a Complainant) where they fail to abide by the AFCA Engagement Charter.

Drafting approach could be reconsidered. The FSC submits that some drafting changes could be made to enhance the navigability of the approach.

Reconsideration of structure. For example, Rule B.6.5 could deal with:

- Circumstances under which AFCA *must* exclude a representative (in the case of a paid representative, if they don’t hold an AFSL or ACL)
- Circumstances where AFCA has the *discretion* to exclude a representative:
 - Not acting in the Complainant’s best interests
 - Not acting in accordance with AFCA’s Engagement Charter
 - Misconduct or abuse of AFCA’s processes.

There should be no need to duplicate the above content included in B.6.5 again in A.8.4. Instead (although we note that, as a matter of detail, the drafting is slightly different in terms of paragraphs and other small differences, and it is not clear why there should be such differences). The FSC submits that A.8.4 need deal only with excluding a complaint because the representative is excluded (and not the conditions that will cause a representative to be excluded).

Notice to Complainant. In addition, we note that draft Rule A.8.5 requires AFCA to inform *the Complainant* in writing that it intends to close the complaint where the Paid Representative has engaged in misconduct as described in draft Rule A.8.4. It would seem more logical for both the Complainant and the Paid Representative to be notified. The Complainant may not even be aware of the problematic conduct in issue and may not pass the notice on to the Paid Representative (or indeed, understand the implications). Accordingly, we suggest this drafting be changed so that the Paid Representative is the person that receives the notice, with a copy being provided to the Complainant.

Similarly, in draft Rule A.8.6, the Paid Representative may well be the person who objects (not the Complainant) and this should be reflected in the drafting.

2.4. Proposal 2: Complainants

The FSC agrees with the principle that where the Complainant is acting inappropriately, AFCA should be able to exclude the complaint. However, the inappropriate conduct should not be confined to conduct directed towards AFCA. Inappropriate conduct directed towards other interested parties, including the relevant Financial Firm, should also be considered a ground for AFCA to exercise its discretion to exclude the complaint. Proposal 2 would appear to only consider inappropriate conduct directed towards AFCA staff and fails to consider the harmful effects of inappropriate conduct directed at others, such as the Financial Firm's staff.

In this regard the FSC submits that the proposed new provisions in relation to Complainant conduct should be revisited in the following respects.

Misconduct directed at all parties (not just AFCA) should be covered. AFCA receives Internal Dispute Resolution (**IDR**) as well as External Dispute Resolution (**EDR**) referrals. As there is no option in ASIC RG 271 for the Financial Firm to suspend dealing with a Complainant during IDR because of unacceptable conduct, AFCA should consider to what extent misconduct directed towards Financial Firms can be more explicitly addressed in the Rules and Operational Guidelines. In addition, AFCA should be mindful of the impacts on the Financial Firm if it excludes a Complainant. AFCA's decision to exclude a complaint may in fact exacerbate the Financial Firm's representatives' exposure to unreasonable Complainant behaviour. In the situation where a Financial Firm has dealt with a complaint as required under RG 271, but has advised the Complainant that they are suspending any further dealings with them due to unreasonable Complainant conduct during the internal dispute resolution process, the Financial Firm should not be disadvantaged if the complaint is escalated to AFCA.

One suggested simple improvement would be to amend the proposed drafting of A.8.4(b) as follow:

b) in AFCA's reasonable opinion: (i) the Complainant's conduct to a party to [the complaint AFCA's staff](#) is threatening, intimidating, abusive, bullying, discriminatory or otherwise unreasonable; or (ii) the conduct denies [a party to the complaint AFCA's staff](#) a safe working environment, and (iii) the Complainant has failed to substantively cooperate with or respond to attempts (if any) by AFCA to manage the conduct.

As noted above, the FSC submits that this type of poor behaviour should also be relevant to the conduct of a representative set out in Proposal 1.

Incidentally, we note that the wording in the Paper is slightly different from the wording in the marked-up Rules: in the draft Rules, the wording reads “*the Complainant has failed to respond to substantively cooperate with or respond to attempts...*”, i.e. the reference to “substantively cooperate” is missing. In addition, in our view the choice of the phrase “manage the conduct” is not the best choice of words, given that the goal should be to cease the misconduct, not merely manage it. An alternative suggestion could be simply “*to stop the relevant conduct*”.

Communication protocols should apply to assist all parties. If AFCA is to agree a set of communication protocols to protect its employees from unreasonable Complainant behaviour, it should advise the Financial Firm accordingly, so that the Financial Firm can assess whether it should be adopting the same protocols, in the interests of protecting Financial Firm representatives from the same behaviour that AFCA employees are finding objectionable.

Vulnerable persons. In addition, we note that vulnerable Complainants may display inappropriate Complainant conduct due to their vulnerability, and AFCA’s operational guidance should explicitly address this point.

2.5. Proposal 3: Appropriate settlement offers

The FSC agrees with the Paper’s stated aim of encouraging fair settlement of meritorious complaints at an early stage. On a practical point, when the Financial Firm has already made an offer of, or paid compensation that they believe is an appropriate settlement, we suggest that AFCA clarify that it will subject these cases to an immediate merits review (avoiding what can otherwise become a protracted case management process).

In terms of considering the appropriateness of the compensation made or offered for the Complainant’s complaint to AFCA, it will be important for AFCA to assess whether such compensation was offered or paid to remedy the same issues raised by the Complainant with the Financial Firm during the IDR process. This will need to be considered properly in order for AFCA to be able to assess the reasonableness of the compensation paid or offered in the light of the complaint that has actually been dealt with by the Financial Firm through its IDR processes. The Rules and the Operational Guidelines should make this clear.

From the foregoing it is clear that further guidance (perhaps with illustrative examples) on what the meaning of “appropriate” is would be helpful.

2.6. Proposal 4: Previous settlement agreements

Similar to the point raised above, if AFCA chooses to set aside a settlement agreement, it should be clear that AFCA is required to assess whether the settlement offer made (and the reasonableness of the amount of compensation paid) was appropriate given the specific facts and circumstances of the complaint as known to the Financial Firm at the relevant time.

2.7. Proposal 5: Sophisticated investor and professional investor complaints

The FSC does not agree that a change to the Operational Guidelines alone represents a sufficient response to the corresponding recommendation made by Independent Review, but rather that the Rules should themselves be amended. We note that the independent review provides:

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

We submit that AFCA should deal with the exclusion of sophisticated and professional investors in rule C.1.5, via adding for example:

“e) a complaint made by a sophisticated or professional investor, unless there is evidence that the investor concerned has been incorrectly or inappropriately classified”.

AFCA could also make the following additional adjustments to Rule C.1.5 in bold below:

*“For the avoidance of doubt, rules C.1.5 (a), (b), and (d) apply to a Superannuation Complaint. **Rule C.1.5 (e) applies to a complaint about investments held through a Superannuation Account.**”*

In addition, the reference to sophisticated or professional investors could be further explained in the Operational Guidelines to make it clear that the intention is only to exclude individuals “acting in the capacity of” a sophisticated or professional investor (as the case may be) and not where the legal categorisation of being a sophisticated or professional investor is not relevant. For example, a person who is a claimant in the context of an investment made by her as a professional investor should be excluded, but not where that person is making a complaint because of a dispute with a Financial Firm unrelated to whether or not she would fall within the category of a professional investor (for example, a complaint about an incorrect fee charged to the person by her credit card issuer, a complaint about a death benefit determination made by a Superannuation Trustee or a complaint about a declined insurance claim or the value of an insurance claim).

2.8. Proposal 6: Forward Looking Review mechanism

The FSC suggests that in addition to the suggested changes set out in Proposal 6, the Operational Guidelines should also require some post implementation review when changes arising from the Forward Looking Review are implemented, to ensure that these have not created any inefficiencies or unintended consequences.

2.9. Proposal 7: Complainant non-acceptance of determination

No comment.

2.10. Proposal 8: Accidental error in a Determination – slip rule

The FSC suggests that the following minor drafting suggestion be considered in respect of the proposed Rule A.14.6 (recognising that a typographical error might include punctuation that if misplaced, can change the intended meaning):

“.....This includes, for example, where there is a miscalculation of figures, a typographical error, or mistake in the description of a person, thing or matter.”

In addition, the Rules or Operational Guidelines could also make it clear that in the case of a manifest error, there should be a correction made, and perhaps provide some examples of situations where the slip rule would come into play.

2.11. Proposal 9: Consistency of language about AFCA’s monetary limits

Claim should be defined in the Rules. The FSC supports the intent of clarifying the wording in Rule D.4. However, for the purposes of the monetary limits, we note that the word ‘Claim’ is not a defined term in AFCA’s Rules. While the FSC recognises that there is an AFCA Approach Paper dealing with the meaning of “Claim”, we suggest that the Rules would be more transparent, accessible and easier to navigate if the meaning of this important term is included in the Rules themselves. It would not be apparent to a reader that the definition of Claim is included in the Approach Paper. Indeed, most Complainants would be unlikely to have any familiarity with the Approach Papers at all.

More broadly, the FSC submits that all definitions of key terms such as this should be included in the Rules. Where necessary, the Rules can refer to more detail or explanation included in the Operational Guidelines, or, as in this case, an Approach Paper.

Without an easily accessible definition in the Rules, or at the very least a clear note indicating where the definition can be found, the reader will find it difficult to understand the way the Rules work. For example, on the face of the Rules alone, the following questions arise: is each complaint a claim? Or is each specific financial loss event alleged by the Complainant a potential claim? If there are multiple Complainants to a complaint, is this one claim, or multiple claims?

With regard to Question 10 of the Paper (asking whether there are other areas in the AFCA Rules that require similar administrative or minor changes), we raise the following two additional issues.

Improve drafting of Rule D.5.1 Rule D.5 and in particular D.5.1 read as follows:

“Rule D.5 Costs of pursuing complaint other than a Superannuation Complaint

Rule D.5.1 An AFCA Decision Maker may decide that the Financial Firm is to contribute to the legal or other professional cost or travel costs incurred by the Complainant in the course of the complaint.”

To minimize any potential ambiguity it may cause, Rule D.5.1 could be amended by adding at the end "for any complaint other than a superannuation complaint". This would thus accurately reflect the heading to Rule D.5.

AFCA's jurisdiction and [REDACTED] decision. We refer to the footnote on page 18, which reads as follows:

"If AFCA cannot accept the complaint as a Superannuation Complaint, AFCA may accept the complaint under its non-superannuation jurisdiction. An example is where the complaint relates to the payment of a disability benefit and the complaint could be accepted against the insurer but not the superannuation trustee"

Our understanding is that this footnote is inconsistent with AFCA's jurisdiction as confirmed in the case of [REDACTED]. That case determined that AFCA could not use its general jurisdiction for dispute involving life insurance in superannuation where the dispute was time barred.

For the same reason, we also submit that the following paragraph appearing on page 115 of the Operational Guidelines (as marked up) should be deleted:

"If the fund member does not meet the time limits for a Superannuation Complaint, we will not be able to accept a complaint against the superannuation trustee, but we may be able to accept a complaint against the insurer under our general jurisdiction."

2.12. Proposal 10: Clarifying the objection process for Rule A.8.3

No comment.

2.13. Proposal 11: AFCA Banking and Finance Panels

No comment.

2.14. Proposal 12: Definition changes

See comments regarding defining "Claim" above in response to Proposal 9.

2.15. Proposal 13: Annual reporting

No comment.

2.16. Additional comment: Procedural fairness

The FSC suggests that AFCA consider issuing a revised draft decision or pre-decision assessment as well as a preliminary assessment in certain circumstances.

Background: AFCA's current practice of providing a Preliminary Assessment prior to a matter going to a final and binding determination is ostensibly and correctly to provide procedural fairness and due process to all parties to a complaint under review. By doing this, parties are able to address the evidence being relied upon by AFCA in making a determination so as to provide further evidence, explanation in the interests of achieving an

appropriate outcome and is based on the common and administrative law principle that an individual has a right to examine and answer the evidence against them. Given the finality of and limited scope for review of a final determination issued by AFCA, this opportunity is critically important. Other advantages are gained by this, such as providing the parties an opportunity to review their approach and consider alternatives for a settled outcome that can be voluntarily entered into, which is arguably a better outcome for all involved.

Proposal: to amend AFCA Rules and/or Operating Guidelines to include an extension of this procedural fairness and due process to instances where AFCA's position, as articulated in a case manager's Preliminary Assessment, is likely to be changes materially in the Ombudsman (or while developing) a final determination. In this scenario, it would be appropriate that a draft decision or pre-decision assessment be issued to the parties to afford procedural fairness and due process to the parties and thereby retain the benefits and remain consistent with the initial process. Given the current experienced time interval between the time an initial Preliminary Assessment is provided, and a final determination is issued, it is reasonable to say that the introduction of this additional step in these infrequent circumstances would not add significantly to the length of the overall process and avoid parties being unfairly blindsided.

If you have any queries in relation to this submission, please contact FSC by return email through David McGlynn, FSC Senior Legal Counsel on [REDACTED] or Ashley Davies, FSC Legal Policy Manager, on [REDACTED].