



## What Financial Services businesses need to know about the AFCA Complaints Process

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### Key takeaways

- Dealing with AFCA complaints can be a costly, time consuming and daunting experience. Sound legal advice and in-depth knowledge of AFCA's process is a key success factor when facing complaints.
- Ensure AFCA has jurisdiction to hear a complaint, before beginning to defend allegations.
- At least some decisions and conduct by AFCA are appealable.
- In establishing business structures, consideration should be given to minimising exposure to AFCA complaints.
- ClarkeKann has had success defending Financial Firms from AFCA complaints, particularly on the basis of jurisdiction.

### What is AFCA?

The Australia Financial Complaints Authority (**AFCA**) is a federal authority which deals with complaints against entities in the financial services and insurance industry (**Financial Firms**). AFCA was established in 2018 by consolidating a number of external dispute resolution schemes: the Financial Ombudsman Service, the Credit and Investments Ombudsman; and the Superannuation Complaints Tribunal.

### What sort of complaints can AFCA receive?

AFCA can only consider complaints made against Financial Firms that are members of AFCA. Certain types of Financial Firms such as AFSL (Australian Financial Services Licence) holders that deal with retail clients or ACL (Australian Credit Licence) holders must be members of AFCA. Other Financial Firms can choose to be members.

AFCA can deal with complaints from all over the financial services industry. Complaints vary widely in their substance and subject matter and AFCA has taken the view that it can hear complaints in relation to any financial service provided by a Financial Firm that is a member. Usually a consumer or small business will lodge a complaint in relation to a financial product or the conduct of a Financial Firm, however we have seen complaints lodged by sophisticated customers in relation to complex commercial matters in reliance on AFCA having jurisdiction because the Financial Firm is a member.

### Why would an applicant make a complaint to AFCA?

There is no fee to lodge a complaint with AFCA. Complainants are encouraged to be self-represented, with proceedings being held with minimal formality. There are no financial risks for a complainant if their complaint is unsuccessful: a Financial Firm cannot seek a costs order against a complainant. Until a complaint is finalised, the Financial Firm cannot take any enforcement or other court action against the complainant.

AFCA makes decisions on the substantive aspects of complaints based on what it views as the 'fair' outcome in the circumstances. It is not required to adhere to a strict application of the law. What makes it even more enticing to a complainant is that any decision by AFCA is not binding on the complainant. They can simply decide not to accept AFCA's decision.

Not so for the Financial Firm - under AFCA's rules a decision by AFCA is binding on the Financial Firm and cannot be appealed (although a recent Supreme Court case has opened the appeal door slightly, as we discuss below).

## What powers does AFCA have?

AFCA is bound by its Rules and its Constitution. Both dictate what type of complaints AFCA can consider, the time limits within which a complaint must be lodged for AFCA to consider them, and the type of conduct that can be the subject of a complaint which AFCA can hear.

The Rules also set up the manner in which AFCA can consider complaints. The subject matter of an AFCA complaint ought to be dealt with on its merits, supported by submissions and evidence from each party. Whilst AFCA does not have to strictly follow substantive law, AFCA *does* have to afford procedural fairness to parties, remain impartial and deal with complaints in a timely manner.

It is of key importance to assess and raise with AFCA if any part of a complaint falls outside the jurisdiction established by AFCA's Rules. There is no guarantee that AFCA will address jurisdictional and procedural fairness issues unless they are specifically raised. This should be done as soon as possible.

AFCA is able to impose a range of remedies, including a simple apology, payment of a sum of money, forgiveness of a debt and setting aside a contract. Whilst there are caps on how much compensation AFCA can award, complainants can make any number of complaints. Therefore, claims for compensation can run into the millions per complainant.

The service provides a welcome and important avenue for individuals and small businesses to pursue recourse against large and powerful firms who would otherwise stonewall complainants or drown them in complex and expensive litigation. We have assisted complainants through the AFCA process who had previously been ignored by the Financial Firm from whom relief was sought, or who were otherwise dissuaded from taking action at all, due to the cost and stress it would bring.

However, the ability to lodge a complaint without consequence *does* increase the risk of vexatious complaints being made against Financial Firms, and AFCA's informal process makes it vulnerable to abuses of its processes. Of particular concern is the use of the AFCA complaints process by sophisticated customers to frustrate efforts by a Financial Firm to exercise its contractual rights in complex commercial matters. AFCA is not equipped to handle such complaints (being a consumer focussed organisation) and the AFCA process represents a significant transaction risk that Financial Firms should take into account.

## What impact can AFCA complaints have on a Financial Firm?

AFCA complaints can be disruptive to businesses, particularly if the Financial Firm does not have the resources to deal with them. Many Financial Firms are small businesses, and also include funds, which means that the other investors in the fund can be indirectly affected by an AFCA complaint. We have also observed that the presence of open AFCA complaints against a Financial Firm can contribute to higher premiums or non-renewal of insurance, even after the majority of complaints are withdrawn. It can also result in a serious negative impact on a firm's reputation, or a firm's ability to raise capital, seek investors, market products and dispose of assets. Given the uncertainty as to how and when a complaint will be resolved, it is very difficult for Financial Firms to manage the fallout from having complaints lodged against it.

In our experience, a thorough knowledge of the AFCA Rules and sustained advocacy to ensure that AFCA abides by its rules can make all the difference to ensure that Financial Firms are treated fairly and complaints are dealt with efficiently. Isolating business lines by setting up separate entities to provide financial services that do not require membership of AFCA is another way of avoiding costly and time consuming AFCA complaints.

## Can AFCA's decisions be appealed?

Up until November 2020, it was widely considered that AFCA's decisions could not be appealed: their Rules provide that AFCA decisions are final.

In the NSW Supreme Court's November 2020 decision in *DH Flinders Pty Limited v Australian Financial Complaints Authority Limited*,<sup>1</sup> the Court confirmed that at least certain decisions of AFCA were open to appeal

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<sup>1</sup> [2020] NSWSC 1690.

to the Courts. The Court confirmed that AFCA is bound to follow their Rules and Constitution, and only has jurisdiction to the extent that their Rules and Constitution say they do. The Court declared that AFCA did not have jurisdiction over DH Flinders Pty Ltd (**DH Flinders**) with respect to certain complaints, because the person whose conduct formed the basis of the complaints, was not acting within the authority of DH Flinders.

DH Flinders also raised a range of allegations of failures by AFCA to afford it procedural fairness and to be impartial. The evidence showed that AFCA had been encouraging complainants to bring a complaint against DH Flinders despite the fact that the original complaint was made against another party. The Court considered that AFCA had " 'entered the fray' and was acting in an advisory relationship with the Complainants."<sup>2</sup> In obiter, the Court said AFCA would have been found to have acted "in breach of its obligation of impartiality and fairness" had a ruling on that point been necessary.<sup>3</sup>

It remains to be seen what would happen if a party sought relief from a Court solely on the basis of AFCA's failure to afford procedural fairness or to be impartial. Reassuringly, we now at least have confirmation that AFCA *can* be held to account, and it appears that Courts will also be willing to provide relief where natural justice has been denied to a party in an AFCA complaint.

### **Where to from here?**

AFCA is also taking industry feedback on board. It recently concluded a pilot program for triaging insurance related complaints, where a complainant suffered no loss, or the Financial Firm had not made an error. The program commenced after insurance brokers alleged that complainants were gaming the system with baseless claims and firms were paying disproportionate costs for complaints with no merit. The pilot program successfully declined 106 complaints for lack of merit, and AFCA intends to make the program a permanent part of their procedure.

We have seen how effective a tribunal like AFCA can be, to restore some balance to 'David and Goliath' negotiations between consumers and Financial Firms. Nevertheless, some Financial Firms are *not* 'Goliaths', and it can require advocacy and knowledge of AFCA's rules and processes to ensure that AFCA's rules and jurisdiction are respected and fairness is afforded to all parties, including the Financial Firm.

As a Financial Firm, the key to successfully dealing with a complaint is having a thorough understanding of AFCA's rules and how AFCA has interpreted those rules. If you are a Financial Firm that is dealing with an AFCA complaint we can help you. We have been successful in having multiple complaints closed without any adverse decision against the Financial Firm.

If you would like any further information or would like to discuss your legal requirements, please contact [Miles Anderson](#) on 02 8235 1244 or your usual ClarkeKann contact.

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<sup>2</sup> Ibid [135] (Stevenson J).

<sup>3</sup> Ibid [16] (Stevenson J).