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Director
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By email: AFCAreview@treasury.gov.au

AFA Submission: Review of the Australian Financial Complaints Authority

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 their wealth.

Introduction

Thank you for the opportunity to provide a submission in response to the Review of the Australian Financial Complaints Authority (AFCA).

The Association of Financial Advisers is not an Australian Financial Services Licensee, and neither are we a member of AFCA. Our experience with AFCA is through our relationship with them and the feedback that we receive from our members and from our licensee partners. We have a good working relationship with AFCA, and they are very approachable and enthusiastic to work with the financial advice community. Nonetheless, the financial advice community has long held concerns about the design of AFCA, and for that matter the previous schemes, in terms of the fact that the AFCA process is free to complainants, is binding on financial firms (whereas not on complainants) and that decisions are not appealable. Broadly the view is that the AFCA model, as defined by the Parliament, is very much designed in the favour of consumers. The financial advice community were also very concerned about the potential impact of the substantial increase in the monetary limits and compensation caps that came with the establishment of AFCA in 2018.

The financial advice community was also very concerned by the Government's decision in February 2019 to open up AFCA to consider complaints going back to 2008 for a 12 month period from 1 July 2019. This was extending the timeframe back to a point beyond where it was mandatory to retain files, and licensees could be forced to defend matters for which they no longer held the records. This was a decision of Government, however it had a broad impact. We have recently become aware of the fees that AFCA were charging for considering these older complaints, where a decision by a panel, for a complex matter, could cost \$29,860.

Whilst this is not a matter that impacts our members, who predominantly operate in the personal advice to retail clients space, we have also become aware that there is a genuine issue with respect to how AFCA has become an attractive option for wholesale clients. This seems inconsistent with the intent.

The origins of External Dispute Resolution schemes was a mechanism for consumers to seek redress with respect to less material matters, in a manner where it was not necessary to seek the support of lawyers. The limits and caps have risen significantly since that time. Seemingly the current model is very different to where this originated.

The much higher limits and the model that is strongly biased in favour of clients has a very big impact on the Professional Indemnity Insurance market for financial advice, and PI Insurance is of course mandatory. Premiums have been rising rapidly in recent years and there are serious concerns about this market going forward. AFCA is an important factor in the considerations of PI Insurers. This adds to the rapidly rising cost of financial advice and the reduction in access and affordability of financial advice.

Delivering Against Statutory Objectives

1. Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?

Some of the feedback that we receive from members and licensees could be considered to challenge this, including with respect to the following:

- Complaints that have no basis or very little basis being allowed to progress through the process longer than would be considered appropriate.
- Inadequate requirements for complainants to substantiate the claims they are making.
- The scope of the complaint changing materially during the course of the process.
- Complaints taking a long time to be processed. We understand that the average is 113 days for financial advice complaints, which we accept are often complex. We contrast this with the new maximum timeframe that ASIC is permitting for the Internal Dispute Resolution timeframe, which is being reduced to 30 days from October 2021.
- Requesting a lot of information, some of which is often not relevant or relied upon in decision making.
- Inadequate explanation of the decisions that are made in some cases.
- In some cases coaching of complainants to assist in the preparation, or the modification of complaints.

We note that the above feedback is second hand, although we have received it from multiple sources.

Some of the feedback that we receive is with respect to the prospect for the system to be manipulated by third parties, who play a role in advocating for consumers.

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

Some of the feedback that we receive from members and licensees includes inconsistent methodologies being used for the assessment of claims. There is also a view that there is a lack of consistency with outcomes, which is seemingly a factor for some licensees in not wanting to take a matter to the determination stage, where there is a reasonable risk of losing the case.

1.2. Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?

We do not have any feedback on AFCA's management of systemic issues.

1.3. Do AFCA's funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model?

One common complaint that we receive is that licensees will often settle matters early, not because they believe that there has been wrong-doing, but because the cost of settling is much less than the cost of proceeding with the matter where case fees apply and external lawyers may also need to get involved. What is equally concerning is that this is well known to a number of third parties who get involved in the AFCA process and promote strategies to achieve this outcome.

We also understand that there is an aversion in some cases by licensees to go to the determination stage, as the decision is made public and this could be used against the financial firm.

Monetary Jurisdiction in Relation to Primary Production Businesses

2. Do the monetary limits on claims that may be made to, and remedies that may be determined by, AFCA in relation to disputes about credit facilities provided to primary production businesses, including agriculture, fisheries and forestry businesses remain adequate?

We do not have any feedback with respect to the monetary limit for primary production businesses, other than to note that the limits that apply to financial advice are very high for a scheme where there is no right of review or appeal.

Internal Review Mechanism

3. AFCA's Independent Assessor has the ability to review complaints about the standard of service provided by AFCA in resolving complaints. The Independent Assessor does not have the power to review the merits or substance of an AFCA decision.

Is the scope, remit and operation of AFCA's Independent Assessor function appropriate and effective?

We see little benefit in an independent assessor only looking at the process and not having any capacity to consider the merits of the case. As we understand it, there are very few matters that end up with the independent assessor. This is not surprising, if the independent assessor has no ability to change the decision. If there was more incentive to seek a review by the independent assessor, then there might be more interest in pursuing this pathway and this might lead to more matters being brought forward and therefore more intelligence and feedback being obtained.

4. Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? How should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?

We would support the extension of the independent assessor model to enable the substance of decisions to be reviewed. This might only need to be on the basis of a selection of matters. We would also recommend that in order to properly perform this role, the independent assessor should be genuinely independent of AFCA.

Concluding Comments

We understand the importance of an ombudsman to serve a role in protecting the interests of the consumers of financial services, and we broadly support what AFCA are trying to achieve. As a result of this review, we have sought information from members and licensee partners that has revealed a level of concern about how things are operating at present. We believe that now is a good time to consider opportunities to improve the AFCA model. Some of the things that we would like to see considered as part of this process are as follows:

- Sector specific consultation panels to obtain feedback and to focus on cases where there is evidence of inequitable treatment, where a review is appropriate.
- A more deliberate triage process where baseless claims are thrown out very early in the process, rather than being allowed to flow through and unnecessarily consume time and cost.
- We would support new measures to capture information on licensees choosing to settle matters early in order to avoid the cost of proceeding with the case, even when they do not believe that there has been any wrong-doing.
- Enabling the independent assessor to consider the merits of a selection of matters.

We would be happy to discuss this matter further, or to provide additional information if required. Please contact us on (02) 9267 4003.

Yours sincerely,

Phil Anderson
General Manager Policy and Professionalism
Association of Financial Advisers Ltd