22 March 2021

Director
AFCA Review Secretariat
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Submission to Review of the Australian Complaints Authority

Please find following our submission to specific issues that Treasury is seeking to review.

1. About D H Flinders Pty Ltd

D H Flinders is a small family- owned corporate advisory business that commenced approximately ten years ago.

Our business comprises doing corporate advisory work for small ASX listed companies as well as corporate authorised representative services for investment managers.

We have been a member of AFCA since 2016.

We have gained significant insights into the culture and operation of AFCA from our experience in instituting legal proceedings against AFCA in the Supreme Court of NSW in 2020 (See D H Flinders Pty Ltd v AFCA and others).

2. Delivering against statutory objectives

AFCA is a consumer complaints body of which retail financial services participants are required to be members.

It would be a widely held view within the industry that such a body plays an important role in providing consumer confidence in the industry.

In understanding AFCA and its role, it is important to understand that AFCA is not solely focused on complaints against large financial institutions.

AFCA actually has over 40,000 members the vast majority of whom would be small family -owned businesses.

As a result, it is important that AFCA fulfills its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent to all parties.

The vast majority of members do not have either the time or financial resources to engage with lawyers in dealing with complaints.

From our experience and others who have communicated to us, AFCA appears to have morphed into a consumer advocacy body that is losing its sense of fairness and independence. It seems to actively look behind complaints to characterise them in a way which falls within its jurisdiction to the benefit of the consumers, rather than, as its own rules require, dealing with complaints impartially in the form they are received.

In the legal case mentioned above we needed to spend over $300,000 in legal fees to bring the action in order to attempt to protect our business from AFCA making an adverse decision in relation to a range of complaints. The legal costs were incurred as there is currently no automatic right of appeal if AFCA is incorrect in relation to either the law or the facts around the complaint. That members are being put to such legal costs highlights a flaw in the operation of AFCA.

In delivering his judgement in our case Justice Stevenson found that AFCA did not have authority, jurisdiction or power to deal with the complaints against D H Flinders.

Justice Stevenson also went on to say "Accordingly, it is not necessary to decide whether AFCA has acted in breach of its obligation of impartiality and fairness. Were it necessary for me to decide that question, I would have been inclined to conclude that AFCA did act in breach of those obligations".

The judgement was delivered on 26 November 2020. As at the date of this submission, some four months later, we have received no communication from AFCA in relation to how they are now going to deal with the complaints following the judgement.

In addition, whilst costs were awarded in our favour, our legal costs have still not been paid by AFCA despite our offer to discount the cost recovery by 20%.

In essence we will be out-of-pocket between $50, 000 to $100,000 in a situation where AFCA did not have the jurisdiction based on its own rules, has been told by the Court it should not have accepted the complaints, but has yet to comply with the Court's decision and exclude the complaints.

This in itself highlights that AFCA is not operating in a fair, efficient, timely or independent manner.

Following delivery of the judgement we received emails from financial services industry participants.

Amongst the comments we received were:

Comments A:
"I have just read the determination handed down by the Supreme Court of NSW.

I just wanted to thank you for the effort you went to, to run the case. Our firm has had little to do with AFCA (or its predecessors) over the years, but based on the couple of instances we have dealt with them, they have coached and led complainants, and acted way outside any reasonable person's view of their mandate. It is common knowledge that this is happening widely, and your case has brought it into the spotlight.

No-one is arguing that it is not very important to have an efficient complaints mechanism for consumers, but it is important for it to be impartial, and to not act beyond its intended mandate. Amongst other things it is this lack of boundaries that has caused PI insurance to go through the roof".

Comment B:

“I just wanted to drop you a quick note and congratulate you for taking AFCA to task recently.

As a solicitor who deals with them on a regular basis, I was pleased to see someone push back on their overstepping the mark with respect to their role”.

3. Funding structure

In our view the funding structure is flawed. An organisation that is funded by industry is not subject to the same financial disciplines and need to prioritise that a normal commercial enterprise is. AFCA is in a monopoly position. There is no other complaints body that members can join.

The incentive for management is for the organisation to get larger and larger and to chase ever smaller and more trivial complaints.

In our view regulatory bodies should be funded by government and be subject to the budget oversight government bodies are normally subject to.

As an industry participant we thought it was odd that AFCA in promoting their annual report was highlighting the number of increased complaints compared to the previous year. We would have thought the objective of every participant in the industry should be to work on reducing complaints so that consumers were comfortable with the operation of the industry.

We also submit that where are complainant is seeking a material amount of money (perhaps $100,000 or more) that the complainant themselves be charged a fee. We do not feel that the service should be totally free to consumers regardless of the amount of the claim. Members should not be subjected to the cost of trivial or vexatious complaints.

4. Internal review process

As highlighted by our case clearly AFCA should have an independent appeals mechanism like most such bodies have. Currently there is no such means of appeal which leads to determinations that are not fair to both parties, are not independent and result in significant cost to members being incurred.

Should you require any further information please let us know.

Yours sincerely

Craig Dunstan
Managing Director

Equity Division
Supreme Court
New South Wales

Case Name:	D H Flinders Pty Ltd v Australian Financial Complaints Authority Limited
Medium Neutral Citation:	[2020] NSWSC 1690
Hearing Date(s):	18 November 2020
Date of Orders:	26 November 2020
Date of Decision:	26 November 2020
Jurisdiction:	Equity - Commercial List
Before:	Stevenson J
Decision:	Declaration to be made that AFCA has no contractual authority, jurisdiction or power to determine the complaints made against the plaintiff by the second and fourth defendants
Catchwords:	CORPORATIONS – financial services – external dispute resolution scheme – proper construction of tripartite contract constituted by AFCA rules between financial services licensee, AFCA and complainant – whether AFCA had authority, jurisdiction or power to determine complaint – where complaint about conduct of licensee's representative – whether complaint arose from provision of a financial service by the licensee to the complainant – whether licensee a financial firm for the purpose of the AFCA rules CORPORATIONS – financial services – external dispute resolution scheme – whether AFCA had dealt with complaint in a procedurally fair and impartial manner
Legislation Cited:	Corporations Act 2001 (Cth)
Cases Cited:	Casaclang v WealthSure Pty Ltd (2015) 238 FCR 55; [2015] FCA 761 Cromwell Property Securities Ltd v Financial Ombudsman Service Ltd [2014] VSCA 179 Mickovski v Financial Ombudsman Service Ltd (2012)

	36 VR 456; [2012] VSCA 185 Patersons Securities Ltd v Financial Ombudsman Service Ltd [2015] WASC 321
Category:	Principal judgment
Parties:	D H Flinders Pty Ltd (Plaintiff) Australian Financial Complaints Authority Ltd (First Defendant) Muhammad Imad Khan (Second Defendant) Brahim Nassereddin (Third Defendant) Ahmed Ibrahim (Fourth Defendant)
Representation:	Counsel: D R Sulan with D Forrester (Plaintiff) M M Wise QC with T B Goodwin (First Defendant) Solicitors: Piper Alderman (Plaintiff) Arslan Lawyers (First Defendant) Allan McMonnies (Fourth Defendant)
File Number(s):	2020/123212

JUDGMENT

1 The plaintiff, DH Flinders Pty Ltd, holds an Australian Financial Services Licence.

2 The first defendant, the Australian Financial Complaints Authority Limited ("AFCA") is a company limited by guarantee and the operator of the "AFCA Scheme". The AFCA Scheme is a financial services external dispute resolution system authorised under the *Corporations Act 2001* (Cth) ("the Act").

3 AFCA is the single authorised operator of the AFCA Scheme.[1] There were a number of predecessor schemes that existed prior to AFCA, including the Financial Ombudsman Service Ltd.

4 As a financial services licensee, DH Flinders is required to be a member of the AFCA Scheme.[2]

5 The second and fourth defendants, Dr Muhammad Imad Khan and Mr Ahmed Ibrahim, have made complaints to AFCA regarding financial services provided to them by Equitable Financial Solutions Pty Ltd (in liq) ("EFSOL").[3]

6 Between 16 April 2016 and 28 November 2017, EFSOL was a corporate authorised representative of DH Flinders for the purposes of Div 6 of Part 7.6 of the Act, albeit only in relation to one wholesale product that was never operational.

7 During that period EFSOL allegedly made representations to a number of people, including Dr Khan and Mr Ibrahim, concerning financial products with which DH Flinders has no connection. DH Flinders had no knowledge of or dealings in association with those products prior to the steps that DH Flinders took to suspend and then cancel EFSOL's authorisation as its representative.

[1] S 1050(3) of the Act
[2] Ss 912A(1)(g) and 2(c) of the Act.
[3] The third defendant, Mr Brahim Nassereddin is in the same position but, as he has not been served in these proceedings, I will not refer further to him.

8 A number of persons, including Dr Khan and Mr Ibrahim have now brought separate complaints ("the Complaints") to AFCA against DH Flinders arising from the representations made to them by EFSOL.

9 The principal question in these proceedings is whether AFCA has authority, jurisdiction or power to deal with the Complaints.

10 Each member agrees with AFCA to be bound by the AFCA Complaint Resolution Scheme Rules ("AFCA Rules") [4].

11 Once a complaint is made to AFCA, the AFCA Rules form a binding tripartite contract between the complainant, AFCA and the member the subject of the complaint.[5]

12 Thus, now that Dr Khan and Mr Ibrahim have made a complaint to AFCA about DH Flinders, the question of AFCA's authority, jurisdiction or power to deal with that complaint is to be determined by reference to the proper construction of the contract thereby created and as set out in the AFCA Rules.

13 DH Flinders also contends that, assuming AFCA does have authority, jurisdiction or power to deal with the Complaints, AFCA has breached its obligations of independence, impartiality and fairness or procedural fairness required by the AFCA Rules[6] by "encouraging" Dr Khan and Mr Ibrahim to make their complaints against DH Flinders.

14 As I have set out at [8], persons other than Dr Khan and Mr Ibrahim have also made the Complaints. Those individuals will not be bound by the outcome of these proceedings. It is, however, common ground before me that as a practical matter the result of this case will influence the future course of events. This is, in that sense, a "test case".

[4] Clause 3.2G of the AFCA Constitution.
[5] AFCA Constitution cl 12.1(d) and Rule A.1.2; and see *Cromwell Property Securities Ltd v Financial Ombudsman Service Ltd* [2014] VSCA 179 at [87] (Warren CJ and Osborne JA); *Patersons Securities Ltd v Financial Ombudsman Service Ltd* [2015] WASC 321 at [62] (Mitchell J).
[6] Rule A2.1(c).

Decision

15 AFCA does not have authority, jurisdiction or power to deal with the Complaints.

16 Accordingly, it is not necessary to decide whether AFCA has acted in breach of its obligation of impartiality and fairness. Were it necessary for me to decide that question, I would been inclined to conclude that AFCA did act in breach of those obligations.

The proceedings

17 The proceedings before me were conducted with admirable economy by Mr Sulan, who appeared with Ms Forrester for DH Flinders, and by Mr Wise QC, who appeared with Mr Goodwin for AFCA.

18 Dr Khan entered a submitting appearance. Mr Ibrahim's solicitor entered an appearance but did not participate in the hearing before me.

19 I was also greatly assisted by counsel's written submissions. Much of what follows, especially as to uncontroversial background matters, is drawn, with gratitude, from those submissions.

Background

The AFCA Rules

20 The AFCA Scheme commenced operation on 1 November 2018. The AFCA Rules bear that date.

21 Financial service licensees who provide services to retail clients are required to obtain AFCA membership as a condition of their financial services licence.

22 AFCA can implement a variety of remedies against financial service licensees including, relevantly, monetary compensation up to $500,000 per claim and any remedy where the value can be readily calculated, such as the waiving of a debt.

23 Any determination made by AFCA is, if accepted by a complainant, final and binding.[7] The financial services licensee does not have a discretion as to whether to accept a determination of AFCA. Once a determination is made and accepted by the complainant, the licensee is bound with no right to appeal within the AFCA Scheme.

24 If a financial service provider does not comply with a determination made by AFCA, it may be expelled as a member of AFCA. This would result in a breach of the financial services licensee's licence.

EFSOL's status as a corporate authorised representative of DH Flinders

25 DH Flinders appointed EFSOL as a corporate authorised representative on 16 April 2016 for the sole purpose of acting as investment manager of a product known as the "EFSOL Income Fund".

26 The EFSOL Income Fund was established as a wholesale debt fund but never became operational.

27 On 26 April 2017 DH Flinders suspended EFSOL's representative authority as DH Flinders had identified that EFSOL had conducted business in addition to and unrelated to its sole role as the investment manager of the EFSOL Income Fund.

28 On 28 November 2017, DH Flinders terminated EFSOL's appointment as its authorised representative.

The EFSOL Ameen Investment Program

29 On 1 October 2015, prior to EFSOL's appointment as corporate authorised representative of DH Flinders, EFSOL issued a Product Disclosure Statement in relation to the "EFSOL Ameen Investment Program".

[7] Rule A.15.13.

30 The complaints that Dr Khan and Mr Ibrahim and others have made to AFCA against EFSOL relate to representations made by EFSOL concerning the EFSOL Ameen Investment Program and to EFSOL's failure to return funds invested in relation to that product.

EFSOL financial failure

31 On 23 October 2019 administrators were appointed to EFSOL. On 26 November 2019 EFSOL was placed into liquidation.

32 The liquidators estimate that, as at 9 December 2019, 127 complaints had been lodged with AFCA against EFSOL.

33 According to the statutory report of the EFSOL liquidators dated 26 February 2020, the amount owing to unsecured creditors is some $21.8 million.

34 There does not appear to be any prospect of there being any return to unsecured creditors.

EFSOL related complaints to AFCA

35 A common feature of the complaints made to AFCA concerning EFSOL is that EFSOL has failed to repay investments when due.

36 Mr Ibrahim made a complaint to AFCA on 22 March 2019. Dr Khan made a complaint on 17 April 2019.

37 Each of Dr Khan and Mr Ibrahim complained that EFSOL failed to complete requests made by them to withdraw their investments from the EFSOL Ameen Investment Program.

EFSOL related complaints to AFCA against DH Flinders

38 A number of EFSOL customers who have made complaints against EFSOL have now made the Complaints to AFCA against DH Flinders. These include Dr Khan and Mr Ibrahim

39 There are 24 active Complaints, all of which arise out of the complainants' investment in the EFSOL Ameen Investment Program and not in relation to any financial service offered by DH Flinders.

40 It is common ground that EFSOL did not have actual authority from DH Flinders to offer the EFSOL Ameen product to its clients. There is no suggestion in the evidence that DH Flinders did anything to hold out EFSOL as having its authority to offer the EFSOL Ameen product to its clients, or which would otherwise suggest EFSOL had ostensible authority from DH Flinders concerning the EFSOL Ameen product. Indeed, as I have said, DH Flinders had no knowledge or involvement in such matters until it took steps to suspend and then cancel EFSOL's authority to act as its representative.

41 I will return to the detailed circumstances in which Dr Khan and Mr Ibrahim made their Complaints against DH Flinders when considering DH Flinders' alternative case that, assuming that AFCA has authority, jurisdiction or power to deal with the Complaints, it has acted in breach of its obligations of impartiality and fairness.

Statutory attribution of liability

42 In circumstances that I consider below, on 3 September 2019 AFCA wrote to DH Flinders contending that it had authority, jurisdiction and power to consider Dr Khan's complaint against DH Flinders Pty Ltd. In that letter, AFCA stated:

> "I understand [DH Flinders] says it is not responsible for EFSOL's conduct because it only provided limited authority to EFSOL as its [corporate authorised representative]. In addition, [DH Flinders] received quarterly compliance reports signed by EFSOL's Board which stated EFSOL has not provided any financial service not authorised by [DH Flinders] and that EFSOL had complied with all financial services laws.
>
> The operation of sections 917A and 917B of the *Corporations Act 2001* (Cth) means that [DH Flinders] is liable for EFSOL's conduct, to the extent:
>
> - the conduct relates to a financial service,
> - during the period EFSOL was a representative of [DH Flinders]; and

- the client relied on that conduct in good faith.

On this basis, the scope of the authorisation provided by [DH Flinders] to EFSOL and whether it was known to the clients has no bearing on [DH Flinders'] liability for EFSOL's actions during the period EFSOL was a [corporate authorised representative]. While EFSOL was a [corporate authorised representative] of [DH Flinders], [DH Flinders] is responsible for EFSOL's actions regardless of the fact that marketing material did not disclose [DH Flinders] as providing EFSOL with any financial services licence."

43 As that letter shows, and as was put before me, AFCA's position is that DH Flinders is liable to EFSOL's conduct, whether or not EFSOL was acting with DH Flinders' authority and that AFCA thereby has authority, jurisdiction and power to deal with the Complaints.

44 Division 6 of Part 7.6 of the Act provides for the "Liability of Financial Services Licensees for Representatives" and provides for a statutory attribution of responsibility for Australian Financial Services Licensees for the actions of their Corporate Authorised Representatives, whether or not those actions were within authority.

45 Section 917A provides:

Application of Division

(1) This Division applies to any conduct of a representative of a financial services licensee:

(a) that relates to the provision of a financial service; and

(b) on which a third person (the client) could reasonably be expected to rely; and

(c) on which the client in fact relied in good faith.

(2) In this Division, a reference to a representative's conduct being within authority in relation to a particular financial services licensee is, subject to subsection (3), a reference to:

(a) if the representative is an employee of the licensee or of a related body corporate of the licensee – conduct being within the scope of the employee's employment; or

(b) if the representative is a director of the licensee or of a related body corporate of the licensee – conduct being within the scope of the director's duties as director; or

(c) in any other case – conduct being within the scope of the authority given by the licensee.

(3) If:

(a) a person is the representative of more than one financial services licensee in respect of a particular class of financial service; and

(b) the person engages in conduct relating to that class of service; and

(ba) the conduct relates to a particular kind of financial product prescribed by regulations made for the purposes of paragraph 917C(3)(ba); and

(c) any one or more of the licensees issues or transfers a financial product of that kind as a result of the conduct;

then, for the purposes of this Division:

(d) the person is taken, in respect of the conduct, to have acted within authority in relation to the licensee or to each licensee who issued or transferred a financial product of that kind as a result of the conduct; and

(e) the person is, in respect of the conduct, taken not to have acted within authority in relation to any licensee who did not issue or transfer a financial product of that kind as a result of the conduct.

46 Section 917B provides:

Responsibility if representative of only one licensee

If the representative is the representative of only one financial services licensee, the licensee is responsible, as between the licensee and the client, for the conduct of the representative, whether or not the representative's conduct is within authority.

(Emphasis added.)

47 Section 917D provides that a financial services licensee is not responsible under s 917B if:

(a) the conduct is not within authority in relation to the licensee (or in relation to any of the licensees, if there were more than one); and

(b) the representative disclosed that fact to the client before the client relied on the conduct; and

(c) the clarity and the prominence of the disclosure was such as a person would reasonably require for the purpose of deciding whether to acquire the relevant financial service.

48 Section 917F(1) provides:

> If a financial services licensee is responsible for the conduct of their representative under this Division, the client has the same remedies against the licensee that the client has against the representative.

49 Section 917F(3)(b) provides that nothing in the Division imposes any civil liability under a provision of this Act apart from this Division on a financial services licensee that would not otherwise be imposed on the licensee.

50 In *Casaclang v WealthSure Pty Ltd*[8] Buchanan J explained the effect of these proceedings as follows:

> "The effect of s 917F(3) is to ensure that neither criminal responsibility or civil liability imposed elsewhere in the *Corporations Act* is extended or added to. Hence, nothing in the Division imposes a liability which would not otherwise be imposed. Within that limit, however, in my view, the provisions in Division 6 apply according to their plain terms to give effect to an evident statutory intent that for all purposes (but without extending liability) conduct of a representative within or without authority is also the responsibility of a licensee for which a licensee is directly liable to a client. A licensee retains rights of action against the representative (s 917F(4)). The purpose is to provide protection for clients."

51 The effect of these provisions is that, were Dr Khan or any other of the complainants to bring proceedings against DH Flinders, DH Flinders may be liable for the conduct of EFSOL while it was DH Flinders' corporate authorised representative, notwithstanding the fact that EFSOL did not have DH Flinders' authority to make representations concerning the EFSOL Ameen Investment Program.

52 Whether these provisions are relevant to AFCA's contractual authority jurisdiction or power to deal with the Complaints is a different matter to which I will now turn.

[8] (2015) 238 FCR 55; [2015] FCA 761 at [199].

AFCA's Authority, jurisdiction or power to deal with the Complaints

53 AFCA is a complaints-handling body, not a regulator, and it derives its authority to determine complaints solely as a matter of contract.

54 The tripartite contract represented by the AFCA Rules defines the limits of AFCA's authority.

55 The AFCA Rules are divided into a number of sections including:

(1) Section A – Complaint Resolution Processes

(2) Section B – Requirements

(3) Section C – Exclusions

(4) Section D – Remedies

(5) Section E – Defined Terms

56 The rules provide that:

> "A complaint is within AFCA's jurisdiction provided it meets the requirements (as set out in section B) unless it is outside jurisdiction (as set out in section C)."[9]

57 It is common ground that the exclusions in Section C are not relevant to the matter before me.

58 Rule A.4.2 provides, under the heading "Complaints that AFCA considers":

> "A complaint must be about a Financial Firm that is an AFCA Member at the time that a complaint is submitted to AFCA (even if not an AFCA Member at the time of the events giving rise to the complaint)."

59 Rule A.4.3(a) provides:

[9] Under the heading "Quick Guide"

> "The complaint must arise from a customer relationship or other circumstance that brings the complaint within AFCA's jurisdiction."

60 The requirements for AFCA's authority, jurisdiction or power to deal with a complaint are set out in Section B, the relevant provision of which is cl B.2.1 which provides:

> "A complaint…must arise from or relate to:
>
> (a) the provision of a Financial Service by a Financial Firm to the Complainant."[10]

61 There is no dispute that the Complaints relate to a "Financial Service", namely, the EFSOL Ameen Investment Program.

62 The critical question is whether the Complaints relate to the provision of that Financial Service "by" DH Flinders "to" Dr Khan and the other complainants.

63 DH Flinders did not itself provide the EFSOL Ameen Investment Program to Dr Khan and the other complainants so it did not, itself, provide the Financial Service "to" those complainants.

64 The question is, whether by reason of the extended definition of "Financial Firm" to which I will shortly refer, DH Flinders is taken to be the Financial Firm that provided financial service "to" those complainants.

65 "Financial Firm" is defined to mean, first, "an AFCA Member".

66 Thus there is no doubt that AFCA has authority, jurisdiction or power to deal with complaints against EFSOL because, on any view of the matter, EFSOL provided the relevant Financial Service "to" the complainants.

67 Mr Sulan submitted that, because there is no dispute that DH Flinders did not, itself, provide that financial service "to" those complainants, that the enquiry as to AFCA's authority, jurisdiction or power to deal with the Complaints ends at this point.

[10] Separate provisions are made for "Superannuation Complaints" and need not be considered here.

68 I think that submission begs the question of the effect of the extended definition of Financial Firm to which I now turn.

69 Subclause (d) of the definition of Financial Firm provides that, for relevant purposes, "Financial Firm":

> "…also includes any employee, representative, agent or contractor of the Financial Firm including any person who has actual, ostensible, apparent or usual authority to act on behalf of the Financial Firm… in relation to a financial service."

70 The effect of subclause (d) of the definition of Financial Firm is, amongst other things, to include as Financial Firm a "representative" of the Financial Firm.

71 AFCA's position is that the effect of this provision is that, because EFSOL was DH Flinders' corporate authorised representative during the period when EFSOL made the impugned representations to the complainants, EFSOL is taken to be DH Flinders for the purposes of Rule B.2.1 and DH Flinders is thus taken to be the Financial Firm that provided the impugned financial services "to" the complainants.

72 In effect, this involves reading the word "representative" in subparagraph (d) of the definition as including, by reason of s 917B of the Act, a representative acting without authority.

73 Indeed, that is AFCA's precise point as was made clear when Mr Wise and I had this exchange during submissions:

> "[WISE] …The first argument is that the complaint falls within the terms of the rules for contractual jurisdiction on a plain reading on those rules. That's the first point. The second point is that the attribution of liability arising under s 917B to E, we say that those provisions inform the meaning of the word representative in the definition of financial firm in the rules for the purposes of determining whether under r B2.1 the complaint relates to the provision of a financial service by the financial firm to the complainant. It's a second …
>
> HIS HONOUR: It's extrinsic material, do you say, that [is] available to construe the contract. That is, are the statutory provisions - 917A ,et cetera - extrinsic material available to construe the tripartite contact?

> WISE: That is one way of putting it. Yes, it informs the meaning of the word representative in …
>
> HIS HONOUR: What other way could there be?
>
> WISE: I think your Honour is right. It's a good way of putting it. That's the broad outline of the argument."[11]

74 I do not accept that submission.

75 Many of the defined terms in Section E of the AFCA Rules are expressed by references to provisions in the Act.

76 Thus:

(1) "Foreign Collective Investment Scheme" is defined to mean, amongst other things, "a managed investment scheme under section 9 of the Corporations Act";

(2) "Incorporated" is defined to mean "registered under the Corporations Act…"; and

(3) "Regulated Superannuation Fund", "Related Body Corporate", "RSA Provider", "Superannuation Provider", and "Traditional Trustee Company Service or Services" are defined to have "the meaning in the Corporations Act."

77 Section E makes no separate provision for the definition of "representative" and thus does not suggest it has a meaning "informed" by s 917B of the Act. The absence of any such provision, when contrasted to the numerous incorporations by reference of definitions from the Act, suggests that "representative" has its usual meaning: "a person chosen or appointed to speak or act for another or others"[12]. That is, a person acting with authority.

[11] T33.50 to T34.16.
[12] Concise Oxford Dictionary.

78 There are no words in the definition of "Financial Firm" itself which suggest that "representative" includes a representative acting without or beyond authority.

79 The words in subclause (d) of the definition of "Financial Firm" following the word "including" expand the extended definition of "Financial Firm" beyond any "employee representative, agent or contractor of the Financial Firm" to "any person who has actual ostensible or apparent or useful authority" to act on behalf of the Financial Firm. Their effect is to include as a Financial Firm any person who has authority to act on behalf of the Financial Firm, whether or not that person is an employee, representative, agent or contractor of the Financial Firm.

80 The words do not, in my opinion, have the effect of including as a Financial Firm any employee, representative, agent or contractor of the Financial Firm which or who or that did *not* have such authority.

81 Indeed, in my opinion, those words emphasise that, in order to be deemed to be the Financial Firm in question, the entities named in subparagraph (d) must be acting within authority.

82 The construction of subclause (d) for which AFCA contends would involve reading it as if it provided:

> "…also includes any employee, representative, agent or contractor of the Financial Firm <u>whether or not that</u> person who has actual, ostensible, apparent or usual authority to act on behalf of the Financial Firm…in relation to a financial service."

83 Mr Wise drew my attention to Rule E.2.4 of the Rules which provides:

> "The words 'including', 'such as' or 'for example', when introducing an example, does [sic] not limit the meaning of the words to which the example relates, that example or examples of a similar kind."

84 I do not see that this provision takes the matter any further. Its effect so far as concerns subclause (d) is that what follows in subclause (d) beyond the word

"including" does not limit the meaning of that which precedes it, namely "any employee, representative, agent, or contractor of the Financial Firm".

85 For these reasons, my opinion is that, on the proper construction of these provisions, a "representative" of a Financial Firm is only taken to be that Financial Firm if the representative was acting within authority.

86 Accordingly, in circumstances where the Financial Firm in question did not itself provide the relevant Financial Service "to" the complainant for the purposes of Rule B.2.1 it is only taken to do so by reason of the conduct of its representative if that conduct was within the representative's actual, ostensible or apparent use of authority.

87 There is no question here that EFSOL had authority from DH Flinders to make any representations to the Complainants concerning the EFSOL Ameen Investment Program.

88 Thus, the Complaints are not with respect to the provision of the Financial Service "to" the complainants "by" DH Flinders.

89 Accordingly, AFCA Rule B.2.1 is not enlivened and AFCA has no authority, jurisdiction or power to deal with the Complaints.

90 Mr Wise submitted that "even an error by an AFCA decision maker regarding jurisdiction is one within the ambit of the decision-making power pursuant to the tripartite contract [comprised by the Rules] and is not reviewable" because the appropriate standard of review of a decision of AFCA, including a decision not to exercise its discretion to exclude a complaint (and thereby assert jurisdiction), is legal unreasonableness.

91 In support of that proposition, Mr Wise referred to *Cromwell Property Securities Ltd v Financial Ombudsman Services Ltd*[13]*, Mickovski v Financial*

[13] [2014] VSCA 179.

Ombudsman Service Ltd[14]*,* and *Patersons Securities Ltd v Financial Ombudsman Service Ltd*[15]*.*

92 However, unlike those cases, this is not a case where AFCA is said to have:

(a) wrongly exercised its discretion, for example to not entertain a complaint (as was the case in *Cromwell*), or

(b) determined that a complainant ought reasonably have known of relevant facts prior to the expiry of a time limit (as was the case in *Mickovski*);[16] or

(c) determined a particular basis upon which a licensee should compensate the complainant (as was the case in *Patersons*).

93 For that reason, the observations made in those cases concerning judicial restraint and intervention only in the case of legal unreasonableness are not to the point.

94 Here, the question is whether AFCA had authority to consider the Complaints. It could only have such authority under the AFCA Rules and, in my opinion, on their proper construction, it does not.

95 Having come to that conclusion, it is not necessary for me to consider DH Flinders' alternative case concerning procedural fairness. However, in deference to the detailed submissions made by counsel, I will do so, albeit briefly.

Procedural fairness

96 The AFCA Rules provide that AFCA will consider complaints submitted to it:

[14] (2012) 36 VR 456; [2012] VSCA 185 ("Mickovski").
[15] [2015] WASC 321 ("Patersons").
[16] Although in that case the Court decided it should not intervene in any event because the determination in question was declared by the relevant rule to be "viable" – at [37].

(a) in a way that is independent, impartial and fair;[17] and

(b) in a manner that provides procedural fairness to the parties.[18]

97 The AFCA Rules also provide that AFCA:

(a) will make the scheme appropriately accessible to persons dissatisfied with a Financial Firm's response to their complaint by "helping Complainants submit a complaint";[19] and

(b) may "assist Complainants to submit a complaint".[20]

98 The AFCA Rules referred to in the preceding paragraph are directed to assisting complainants with the task of submitting a complaint they had themselves decided to make about a Financial Firm; hence the reference to a complainant's anterior dissatisfaction with the Financial Firm's response to their complaint.

99 I do not see these rules as contemplating AFCA giving advice as to whether a complaint about one Financial Firm might better, or alternatively, be directed to another Financial Firm.

100 Indeed, in AFCA's "Operational Guidelines to the Rules" it is stated:

> "Our role is to assist parties to reach agreement about how to resolve the complaint. We are impartial and do not act for either party to advocate their position …
>
> We are not a government department or agency, and we are not a regulator of the financial services industry … "

101 Mr Sulan submitted that AFCA had "stepped beyond its complaint-handling role to facilitate claims" by:

[17] Rule A.2.1(c)(i).
[18] Rule A.2.1(c)(ii).
[19] Rule A.2.1(b)(ii).
[20] Rule A.3.2.

(a) actively taking steps to encourage the Complainants to file a complaint against DH Flinders;

(b) expressly or impliedly suggesting to the Complainants that they file a complaint against DH Flinders; and

(c) failing to confine its role to the provision of information to Complainants about the AFCA Scheme and its processes and procedures.

102 To consider the submission it is necessary to look at the circumstances leading up to the making of the Complaints.

103 It is convenient to do so by looking at the events leading to the complaint by Dr Khan.

104 On 10 October 2016 a representative of EFSOL sent Dr Khan a product disclosure statement for the EFSOL Ameen Investment Program.

105 On 29 December 2016 Dr Khan entered into an Investment Management Agreement with EFSOL concerning the EFSOL Ameen Investment Program.

106 On 8 May 2019 Dr Khan wrote to EFSOL:

> "Your AFCA deadline is today. I expect you to redeem my sum of money, $55,641.75 as of my request to Withdraw of Feb 7th 2019. Furthermore, I am seeking compensation for the breach of contract via AFCA which you have already received from AFCA. If I do not get my money back by COB today, I will exercise further options I have."

107 Dr Khan did not receive repayment of his funds and, on 13 June 2019, had a telephone conference with Mr Ian Donald from AFCA.

108 In an internal memorandum written by Mr Donald a few days later[21] Mr Donald reported:

> "On 13 June 2019, Ian Donald (on a whim) performed free ASIC searches to see if EFSOL had ever been authorised by an [Australian Financial Services Licensee] or a Credit licensee."

109 Those searches revealed that EFSOL was a corporate authorised representative of DH Flinders Pty Ltd from 16 March 2016 to 27 November 2017.

110 Mr Donald's note of his telephone conference with Dr Khan included:

> "I asked him about what he was told about the ability to withdraw money before he entered the Ameen program. He said he was told 30 days from receipt to the withdrawal form and could even pay within the 30 days. He also has emails confirming this.
>
> We also discussed the [Product Disclosure Statement] and whether it should have been registered with ASIC.
>
> We then discussed EFSOL being an [authorised representative] of DH Flinders at the time he received the representations about the Ameen program.
>
> I said *we can open a complaint against that entity as well*. I explained that *we could join DH Flinders to this complaint* in due course.
>
> He will email me to open the DH Flinders complaint."
>
> (Emphasis added.)

111 It is clear from Mr Donald's note that by the time he spoke to Dr Khan he had done the ASIC searches of which he wrote a short time later and had ascertained that EFSOL had been a corporate authorised representative of DH Flinders between 16 March 2016 and 27 November 2017 (having conducted those searches "on a whim").

112 Further, I would infer from the terms of Mr Donald's note that Dr Khan had no prior knowledge of that fact.

113 Later on 13 June 2019 Dr Khan wrote to Mr Donald:

[21] On 20 June 2019.

> "Thank you very much for your phone call full of solace.
>
> I authorise you to open a complaint against DH Flinders Pty Ltd."

114 Later on 13 June 2019 Mr Donald wrote to Dr Khan setting out his understanding of the nature of Dr Khan's complaint concerning the EFSOL Ameen Investment Program and also enclosing:

> "ASIC search showing EFSOL was a corporate authorised representative of DH Flinders at the time you entered the Ameen Investment Program."

115 Mr Donald continued:

> "As discussed, you may lodge a complaint against DH Flinders and I can assist you with lodging that complaint."

116 On 17 June 2019 AFCA wrote to DH Flinders stating that a complaint against it had been lodged with AFCA by Dr Khan.

117 Under the heading "Time Frame" the letter stated that "relevant information provided to us by the Applicant is outlined below" following which there was a table as follows:

Date the complainant first complained	13 June 2019
How the complainant complained	
Has there been a final written response	No
Product(s) and Issue(s)	Investments/Disclosure

118 Somewhat coyly, AFCA left blank the provision in the table for information concerning "how the complainant complained".

119 Under the heading "Complaint summary" the letter recited the representations made by EFSOL to Dr Khan and concluded:

" [DH Flinders] was responsible for the conduct of EFSOL and its employees on [29 December 2016, being the date of the allegedly false representation by EFSOL]."

120 This letter suggested AFCA had already concluded DH Flinders was responsible for EFSOL's conduct.

121 On 20 June 2019 Mr Donald prepared the Internal Memo to which I have referred, and which was addressed to Ms June Smith, the Lead Ombudsman and Ms Ennis, the Senior Manager, in which he also recorded:

- "We have received 30 complaints against [EFSOL] since 20 December 2018".

- "We have issued eight determinations under the AFCA Rules ordering compensation totalling $556,018.08 (with interest). EFSOL has failed to implement any determinations."

- "We currently have 17 open cases against EFSOL."

- "Where the complainant makes an allegation that EFSOL made a false representation during the period 16 March 2016 to 27 November 2017, *we [are] asking them if they would like AFCA to open a complaint* against DH Flinders Pty Ltd (as the [Australian Financial Services Licensee] responsible for EFSOL's conduct). So far three complaints have been opened. Three more will be opened in the next week or so.

  We are also looking at whether complainants with unpaid determinations can lodge complaints against DH Flinders.

  We will certainly look to join DH Flinders and EFSOL complaints where appropriate.

  I have spoken with DH Flinders and they will deal with each complaint in the usual way."

- "Where the alleged false representations were being made during the period 14 March 2016 to 27 November 2017, complaints against DH Flinders *must be considered* and if appropriate, opened and joined to the EFSOL cases."

  (Emphasis added.)

122 On 31 July 2019 DH Flinders wrote to AFCA contesting its responsibility for EFSOL's conduct, stating:

> "Following the [internal dispute resolution] referral by AFCA, [DH Flinders] attempted to contact EFSOL to provide further information in respect of the Current Complaints. EFSOL's only response was to dismiss our concerns and state categorically that the complainants were in no way related to [DH Flinders]… EFSOL have otherwise been completely uncommunicative.
>
> [DH Flinders] reject any liability for the conduct of EFSOL in relation to the various arrangements referred to in the Current Complaints…"

123 AFCA responded on 3 September 2019 in the terms that I have set out at [42] above.

124 The letter also stated that:

> "…conduct relating to the EFSOL Ameen investment is [DH Flinders]'s responsibility while EFSOL was a [corporate authorised representative]…
>
> The complaint will now be re-allocated to a new caseworker for further review…"

125 AFCA adopted a similar course in relation to Mr Ibrahim. Mr Donald had a telephone conversation with Mr Ibrahim on 9 July 2019, evidently with the assistance of an interpreter.

126 Mr Donald's note includes:

> "I explained EFSOL's relationship with DH Flinders at the time [Mr Ibrahim] was making the decision to invest. I said DH Flinders may be responsible for EFSOL's conduct as a corporate authorised representative."

127 On 16 July 2019, AFCA sent a letter to DH Flinders stating Mr Ibrahim's complaint in the same format as its 17 June 2019 letter concerning Dr Khan and, again, left blank the provision in the table for an explanation as to "how the complainant complained".

Consideration

128 In these circumstances, my conclusion is that Mr Sulan was correct to say that Dr Khan and Mr Ibrahim only brought their complaints against DH Flinders after DH Flinders' existence and role was expressly brought to their attention by Mr Donald.

129 Mr Sulan submitted that this occurred only after Mr Donald actively encouraged the expansion of the complaints that Dr Khan and Mr Ibrahim wished to make about EFSOL to include a complaint about DH Flinders.

130 In my opinion there is substance to this submission.

131 Thus, in the case of Dr Khan:

- Mr Donald had "on a whim" decided to conduct an ASIC search to see whether EFSOL had been authorised by Australian Financial Services Licensee.

- Mr Donald told Dr Khan that "we can open a complaint" against DH Flinders.

- Mr Donald told Dr Khan that "we could join DH Flinders to this complaint in due course".

- On 13 June 2019 Mr Donald wrote to Dr Khan saying that he "may" lodge a complaint against DH Flinders and the Mr Donald could "assist" Dr Khan in lodging that complaint.

132 By following this course, AFCA was going a good deal further than assisting Dr Khan, as a person dissatisfied with EFSOL's response to his complaint about EFSOL, to submit a complaint about EFSOL.

133 AFCA was positively suggesting to Dr Khan that he also submit a complaint about DH Flinders, evidently because AFCA had formed the view, which I

infer it conveyed to Dr Khan, that DH Flinders "was responsible for the conduct of EFSOL".[22]

134 More generally, Mr Donald had recorded, evidently without demur from Ms Smith and Ms Ennis, that by 20 June 2019 AFCA was "looking at" whether EFSOL complainants could make complaints against DH Flinders and had decided that where complaints of false representations by EFSOL were made during the period between 16 March 2016 and 27 November 2017, complaints against DH Flinders "must be considered" and where appropriate "opened and joined to the EFSOL cases"[23].

135 This was hardly behaving in a manner procedurally fair to DH Flinders nor in a manner that was impartial. I think Mr Sulan was correct to submit that AFCA had here "entered the fray" and was acting in an advisory relationship with the Complainants.

136 However, having concluded that AFCA has no contractual authority, jurisdiction or power to deal with the Complaints, it is not necessary for me to say anything further about this.

Conclusion

137 I propose to make a declaration to the effect that AFCA does not have contractual authority, jurisdiction or power to determine the Complaints.

138 I invite the parties to confer and agree on what other orders are necessary to give effect to these reasons.

****

[22] As stated in its letter to DH Flinders of 17 June 2019: see [116] - [118] above.
[23] See [121] above