HNW PLANNING

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The Director
AFCA Review Secretariat
Financial System Division
Treasury
Langton Cres
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Regarding – Review of AFCA

Key point summary provided from HNW Planning's direct experience with references provided:

- AFCA allows complainants to change the scope and nature of their complaints markedly and continuously when complainants are proved wrong numerous times
- AFCA complaint numbers referenced in my letter are #686248 and #676349, and substantial correspondence supporting HNW Planning's views is available at request
- AFCA has no effective filter for vexatious actions of complainants
- AFCA has actively coached complainants – evidence with complaint #676349
- There is no scope for AFCA to forgive an unfair or unreasonable charge levied on a financial services provider
- Because liability in the system is for convenience levied at AFSLs there is a moral hazard in the system
- Honest clients, whom the system is meant to assist, end up paying for complainants who game the system
- AFCA's internal review system is inadequate and the Independent Reviewer has no effective power to prevent wastage or unfairness from a party to the dispute gaming the system. I see no evidence the role actually "independent".

Dear Sir/Madam

HNW Planning is an Australian Financial Service Licensee (AFSL 225216). We have 30 advisers geographically spread through Australia. We are located on the Central Coast of NSW and employ 14 people from an office in ERINA. Our direct employees and advisers, and the employees of our advisers and their families, depend on HNW Planning's continued viability. That viability is challenged by AFCA inadequacies we can demonstrate.

Not all clients understand the advice they are provided several years after it was provided. Laws and personal situations and priorities change; memories fade and relationships change. This is a key reason for requiring written Statements of Advice, contemporaneous notes, research and the like which is codified in legislation known as the "Best Interest Duty".

HNW Planning has two recent cases that act as clear examples that AFCA is inadequately which and leads to them being empowered to deal with unreasonable complainants.

HNW can provide more detail of two examples (AFCA #686248 and #676349) where;

- The original advice was sound and advantageous to the client,
- The client some 4 or 5 years later no longer valued the advice that was provided (although they did not say anything at the time) and requested the return of fees by complaining to AFCA,
- In both cases the client's original complaint to AFCA was allowed to change markedly in nature 3 or 4 times as evidence was put forward to disprove one complainant after another,
- In both cases the complainants were provided by AFCA with reasons why we as the financial services provider were correct in the advice that was provided,
- In both examples the complainants were offered the chance to say if they were satisfied or not with AFCA's findings and each client then said they were not satisfied with AFCA's findings. In both examples no justification for not being satisfied was provided but because of this position the cases HAD TO go the Ombudsman for confirmation we had done nothing wrong. This then created significant cost and created a dispute between the adviser (in both cases no longer with us) and HNW Planning as it is the AFSL which carries the cost of proving we did nothing wrong while the original remuneration was years earlier passed to the advisers.
- In one case, the complainant didn't object to AFCA's findings within the 30 days required by AFCA and the case was dismissed only to be recommenced after;
    - AFCA went against their own rules in recommencing,
    - AFCA chose to misread their own notes that are in future tense which they read in present tense and they continued to do so even though this error was pointed out to AFCA by HNW Planning,
    - AFCA clearly coached and harassed the complainant to submit an objection to suite the agenda of one of AFCA's managers who used this process to grand-stand over a junior case manager,
- In this last example, HNW Planning's submissions to the Independent Assessor demonstrate the Independent Assessor to be more ceremonial than useful.
- There remains a clear asymmetrical power balance. Our experience leads us to believe that AFCA will do all things necessary for a complaint to be progressed through all stages of arbitration (increasing our costs and their revenue each step of the way) and where an AFSL

has defences then AFCA pull out all stops and invoke claimant coaching with any escalation of the AFSL's concerns surrounding "due process" merely falling on deaf ears.

- And to cap it all of;
    - HNW Planning understands the Case Manager herself resigned due to what appears to be an internal case of a junior suffering the consequences of outshining her senior officer,
    - HNW has been threatened with termination of membership for non-payment of an invoice in spite of HNW pointing out to AFCA on several occasions that there is no such published invoice on the AFCA web site for us to pay.
- But wait there's more
    - When we pointed out there was no invoice published, yet we were being threatened with expulsion, then this case went into "review" for weeks.
    - Sometime later we received a letter from AFCA confirming that AFCA thought they'd done a good job and also confirming the invoice was on the portal but under a different login. Great, so I logged into my AFCA portal but it was;
        - Showing the $3,500 odd invoice that had been paid as unpaid
        - Not showing the $5,500 odd invoice we were being threatened with expulsion for.
        - FINALLY, EVENTUALLY, I got through to AFCA that there was no unpaid invoice published.
    - But the issue with the invoice is tangible evidence that AFCA does not check information. It simply accepts that it is faultless and pontificates accordingly. It underscores the point that AFCA refused to accept that notes saying something would happen in future tense do not mean the same thing as it did happen in present tense and thus costing HNW $5,500.
    - By the way, while there is clear evidence of coaching, AFCA has refused to supply the email they sent to the complainant #676349 and have only provided the complainants reply which references the AFCA email. Treasury should be concerned by this client coaching.

Our experience is that the mere process of the financial adviser being forced as far as the Ombudsman may cost $20,000. AFCA do not provide an estimate of costs to enable the financial services provider to make a commercial determination as to whether to defend the claim or not. They provided un-itemised costs at the end of each stage but this is vastly inadequate.

So while HNW were correct, diligent, and efficient and have offered advice meeting the Best Interest of both clients as supported by the findings of AFCA Case Managers and later the Ombudsman, the cost to us was an un-itemised $20,000 and $10,000 respectively in the referenced cases. The noted cost does not count our own time or associated costs in defending our position. In both cases noted the complainants essentially wanted fees of roughly $3,500 returned. It's obvious that commercially we would have been better to just pay the money; but all that will do is create more issues for us and others over time. We have a duty to the industry to defend ourselves.

Hidden costs may also come later with Professional Indemnity implications. AFSL holders continue to face significant increases in premiums due to a reduction in available providers and the claims experience of those who remain. Vexatious claims through AFCA have a second penalty for licensees as they may be seen as indicating higher risk businesses.

The financial planners from across Australia who trust HNW Planning to provide licensing services are small business people working out of home or small offices. Along with education costs (FASEA), ASIC levy increases, higher PI costs and increased compliance costs following the Royal Commission; a $20,000 fee to justify they've done absolutely nothing wrong is obscene.

It is counterproductive to honest compliant behaviour. It is likely to be the entire operating profit of many advisers for a whole financial year. In both cases had the adviser not done the right thing and had not had a Best Interest compliant file, then we would have simply paid back the client fees and been close to $20,000 better off.

There is another dimension to this. I am as the main shareholder of HNW Planning also a small business person. And if an adviser has left us and either moved to another AFSL or has left the industry it's my company, HNW Planning, which has to meet the $20,000 cost of defending the appropriate actions of the adviser. I cannot afford to do this for 30 advisers and as many ex-advisers. So as needs must I am responding by changing my own business model.

With no requirement for at least a reasonable argument by a complainant, and as there is no cost at any stage to the complainant, the system is unreasonably stacked in favour of a potentially vexatious complainant. Some complainants may choose to 'game' the system.

In addition, the Ombudsman's valuable time is spent on minute complaints that have been dealt with already by the apparatus of AFCA. HNW Planning believe the ombudsman is unnecessarily tasked with small claims that are better dealt with, and are in any case already dealt with, by AFCA case managers.

AFCA fees are unannounced and unknown at the start of any journey and remain un-itemised. Two quite similar complaints can (as with the numbers identified in this letter) vary in cost by 100% with no reason evidenced. There is irony in AFCA checking financial planning fees are correctly agreed to and are fair and reasonable when they don't do any of the things that they check for.

From what I understand AFCA is "clogged up" with complaints. This is of no surprise if AFCA fundamentally does not believe, or is forced not to believe and respect its own case managers.

From an industry wide perspective I understand most AFSLs now simply 'do all things necessary' to stop a complaint going to AFCA. The disregard whether or not the claim(s) has substance and simply pay. As costs must be passed on they pass the costs to their advisers rather than waste their time in a fight that costs more to win than to lose. In turn advisers must pass on the cost to their other clients. This pattern of action is unsustainably inefficient for the industry and goes hard-against the principals of being "fair, efficient, timely and independent" (AFCA Act 2018; part 1051 (4) (b)).

AFCA legislation outlines general considerations as part of its authorisation. The considerations include fairness. Unfortunately as directly evidenced by the examples where I can provide substantially more detail if required, AFCA takes no account of fairness to the financial adviser or AFSL. There is no filter for small, incomplete, illogical, vindictive or vexatious complaints to avoid them being passed to the Ombudsman. There is no protection for the financial services provider from a complainant who has no risk at all to themselves such that the costs of defending even the most ridged, correct, compliant and appropriate advice can blow out.

The reality of individuals at AFCA dealing with complaint after complaint and never seeing the "positive" good financial advice has in our communities leads to an apparent bias within the system. This bias ensures that an AFSL is assumed guilty of charges before a defence has been put forward. More work needs to be done in this space so case managers all the way up to the top handle each case on its merits alone.

Advisers are taught not start a meeting with a solution in mind. It is not lost on me that case managers and others involved in the AFCA apparatus appear to make their minds up before a first step is taken or without reference to the evidence presented to them. I for one, have totally lost faith in AFCA's ability to fairly assess a complaint for the reasons outlined above (all evidence available on request)

HNW Planning believe appropriate solutions to AFCA fairness and transparency issues include;

1. Where there is evidence of AFCA operating outside their role there needs to be a mechanism triggered for the case to be moved to a separate area or case manager,
2. The provision of an estimate of fees if a complaint is moved forward to allow the AFSL to consider the commerciality of contesting the complaint,
3. AFCA must publish their costs on their web site and they must separately itemise what services have been provided when they invoice the AFSL,
4. Any complaint below a certain threshold should not automatically be moved to the Ombudsman to then tie up such a valuable resource. Instead a properly supervised Case Manager's decision should be relied upon for matters perhaps less than $10,000 (as indexed) thus avoiding the circa $5000 cost for the Ombudsman's mere involvement,
5. There should be an effective mechanism for the Independent Reviewer to have meaningful input to the process. The Independent Reviewer should be truly independent. Or otherwise you should get rid of this ceremonial position, and
6. Ongoing work needs to be done in the space of ensuring case managers are commencing each complaint with an open mind and treating the case on its merits without bias, coaching and over-reach and without internal pressure to simply get the case moved up the chain for closure through determination.

In addition.

Many ASIC challengers to AFSLs and decisions seem to happen behind closed doors with a small cohort of specialist lawyers the only ones knowing about these liaisons. Not all ASIC liaisons with industry are published so like AFSLs and advisers, AFCA is also cut off from these decisions.

HNW believe that ASIC should model itself on the ATO and fund 'test cases' that can provide published precedent from the courts. This would provide a virtuous cycle of clarity of laws to the assistance of all participants in the industry.

Thank you

Robert Cumming

Director