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26 March 2021

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

**BY EMAIL:** [AFCAreview@treasury.gov.au](mailto:AFCAreview@treasury.gov.au)

Dear Sir/Madam

**Reference: Review of the Australian Financial Complaints Authority**

1. We refer to the independent review which the Treasury is conducting of the operation of the Australian Financial Complaints Authority (AFCA). Infocus is an AFCA member, and would like to provide the feedback below, in line with the review's Terms of Reference dated 19 February 2021. Infocus has recently submitted a letter to AFCA, dated 11 March 2021, providing details of numerous issues that it has experienced with AFCA's management of complaints ("Infocus' letter to AFCA"). We have attached this letter for the Treasury's reference, and seek to rely on the examples thereby provided, as they are noticeably related to the questions listed in the Treasury's Guidance for Submissions.
2. The details provided below are a record of the poor experience with AFCA's management of complaints. As stated in Infocus' letter to AFCA, the number of issues experienced in comparison with the number of complaints that have been raised against Infocus are unacceptable. Infocus has had to invest significant resources in addressing these matters to ensure that AFCA applies procedural fairness, and reasonable outcomes.

***Delivering against statutory objectives***

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

**Complaints' Assessment at the Initial Stage of the Complaints Process – Registration and Referral and Jurisdiction Review**

3. It is Infocus' view that complaints are not being correctly assessed once they are received from the Complainants before they are progressed to the Case Management stage. This causes a delay in their resolution, and increases the effort by presenting submissions which may not be necessary. Thus, when a complaint appears to be outside of AFCA's jurisdiction, or should have been directed



to a different financial firm, the matter should be immediately assessed by its Rules Team, and should not be progressed to Case Management.

4. For example, in [REDACTED], a Legacy complaint was submitted well after the Legacy scheme expired, and the complaint solely related to alleged losses which the Complainant was aware of more than 6 years ago, and therefore should have been excluded under the standard AFCA Rules. This complaint should have been immediately rejected. The matter was not referred to the Rules Team (even though Infocus requested AFCA to do so), and the complaint was progressed to Case Management, based on an incorrect interpretation of the AFCA Rule B.4.3.1. Infocus then had to spend time and resources preparing a further submission educating the Case Manager on the AFCA Rules, and again requesting a review by the Rules Team. The Rules Team subsequently agreed with Infocus' approach. Please refer to Case 1 in the Infocus' letter to AFCA for further details about this matter.
5. It is Infocus' understanding that AFCA has determined that Case Managers are able to complete jurisdictional reviews. However, the example above reflects that staff do not always have the appropriate expertise to consider complaints, jeopardising AFCA's obligation to resolve the complaints in an efficient and timely way. Paragraphs 14-15 of Infocus' letter to AFCA regarding [REDACTED] provide an example of how AFCA disregarded Infocus' request to have the matter reviewed by the Jurisdiction team, and the Case Manager deliberately completed the jurisdiction assessment.
6. Another example is [REDACTED], which is clearly related to the increase on the premium cost of the Complainant's insurance cover. When receiving the complaint, AFCA did not direct the complaint to the insurer, or at least considered joining the insurer to the complaint, but referred it to Infocus. The time that Infocus takes to respond to the complaint, and then what AFCA takes to assess it, delays the complaint resolution, jeopardises its efficiency, and allows the matter to progress without the relevant parties being involved in the complaint from the beginning.
7. An example that illustrates when AFCA appears to progress matters without completing an initial assessment of issues that are clearly ill-conceived and vexatious in line with AFCA's Rule C.2.2.d is [REDACTED] (paragraphs 56-58 of Infocus' letter to AFCA). In this matter, the Complainant claimed that he had paid fees and received no service; however, he had paid no fees to Infocus, and was not entitled to any services (the alleged 'fees' were commissions paid by the product provider to Infocus, which they had confirmed in writing), and there was no agreement that the commissions were a consideration in any agreement to provide financial services. Infocus shared this information with AFCA and the Complainant, and requested that AFCA ask him to produce statements showing he had actually paid fees to us. The case incorrectly progressed to Case Management Level 1, rather than to 'Rules' review', and Infocus was shortly thereafter advised by the Case Manager that the complaint had been 'withdrawn'. Infocus requested the case management fee to be waived, since our jurisdictional review request was lodged before the fee was levied. AFCA admitted they made an error, but did not reverse the invoice.
8. The Case Manager for this matter also requested Fee Disclosure Statements, which, is an error for this matter. Had the Case Manager had some understanding of ASIC's RG 245 (Fee Disclosure Statements), they would have realised they were not required for such a client.
9. In [REDACTED] (paragraph 59-60 of Infocus' letter to AFCA), the complaint was unfairly progressed to Case Management, despite there being a clear statement from both parties that they were attempting to resolve the dispute, and the matter was going to be settled (which seems to be

AFCA's preference to grant extension as stated below), and both the financial firm and the Complainant requested AFCA to hold off on progressing the matter.

### Conciliations and demands to make offers to settle the complaints

10. A major concern that has been raised with AFCA, is that Infocus was forced to attend several conciliations in matters where the issues of the complaint had not been fully identified, and the Complainants have not substantiated the alleged loss. It appears that AFCA progresses the matters to the conciliation stage for the sake of meeting their timeframes, and by doing this undermines the purpose of the conciliation itself.
11. The lack of relevant information regarding the complaint when the matters are progressed to conciliation diminish the objectives of this alternative dispute resolution mechanism. As the conciliators seem to be at a loss as to how to address the session, the conciliation then becomes a negotiation for how much the financial firm is willing to offer, and the Complainant willing to accept. This approach has several negative effects in the next steps of the complaint, including the creation of an expectation for the Complainants that the financial firm has to always make an offer to resolve the matter; in complex matters where the claimed compensation is high, the conciliators and Case Managers do not seem to understand the 50%/50% approach that they seek to use is appropriate to address these complaints; and the involvement of the Case Manager in the conciliations and access to the conciliation notes diminishes the impartiality at the time of making a recommendation on the matter.
12. In [REDACTED] (paragraph 28 of Infocus' letter to AFCA), the Case Manager organised a conciliation conference, despite the pending decision from AFCA regarding the joinder of other financial firms to the complaint. Infocus had advised AFCA of its concern regarding the lack of clarity with the issues AFCA had decided to hear, and the losses claimed by the Complainants. The Complainants had not quantified their alleged loss, nor provided supporting documentation to substantiate their claims against Infocus. They continued to refer to events and alleged losses caused after 2013, which fell outside the complaint. Infocus noted that clarity as to the issues in the dispute were essential for the conciliation to be successful, and sought for AFCA to reassess its jurisdiction, and consider joining the parties to the complaint. Infocus also requested that the Complainants provide sufficient evidence of the alleged loss and the relevant supporting documentation. Infocus consequentially asked AFCA to hold off on proceeding with the proposed conciliation meeting; however, they disregarded this request.
13. As foreshadowed, the conciliation did not result in the parties reaching an agreement, nor having a better understanding of their positions as both Infocus and the Complainants were at a loss as to what AFCA's position was regarding joining the other parties to the complaint. There was no discussion whatsoever of a possible resolution with the Complainants directly, or the parties' intention to do so. This not only wasted all of the parties' time (including the AFCA conciliator), but also suggests that AFCA is preoccupied with progressing matters through the different stages of the dispute resolution process, all the while undermining the principles of procedural fairness.
14. In the matter above, AFCA determined not to join other financial firms to the complaint, and Infocus was asked to confirm: "whether Infocus is making an offer in an attempt to resolve the complaint. Otherwise, I will progress the complaint to preliminary stage on Monday, 25 January 2021". When Infocus sought clarification of this timeframe, the Case Manager advised that Infocus had 1 day to do so. Infocus then had to make a submission to AFCA regarding how unreasonable this timeframe was, and noted, again, that the Complainants have not substantiated their claims

against Infocus. Discussions regarding the loss calculations were not fully conducted during the conciliation (and could not be), as noted above.

15. In [REDACTED] (paragraph 41-46 of Infocus' letter to AFCA), the Complainants had not identified the loss they claim to have suffered, nor had they provided any evidence to support this. A conciliation was scheduled with Infocus' request for this critical information relating to the loss assessment being disregarded. The Complainants provided a further email, which was subjective at best, and did not provide any further information in terms of their loss, or how it was calculated.
16. The conciliation proceeded, and again, despite Infocus having no clarity as to the claimed loss. The conciliation conference ended with AFCA's inappropriate suggestion that the financial firm may wish to make an offer, ostensibly seeking to close an unreasonable claim of \$211,000 without regard for what was correct and fair. The objective of the conciliation to have the parties reach an agreement was not achieved, and as with the matter above, Infocus had to proceed with further requests for information from the Complainants to be able to understand their position.
17. Similarly, in [REDACTED] (paragraph 47048 of Infocus; letter to AFCA), Infocus raised with the Case Manager that it was inappropriate to proceed with the conciliation as there was no clarity of the Complainant's alleged losses, as the documentation previously requested from the Complainants had not been provided. Infocus was then forced to attend a conciliation where the issues of the complaint had not been defined, and the loss calculations from the Complainants were far from being clear. The file for this matter evidences that due to its complexity, numerous exchanges were required for the parties to review the alleged losses, and how the calculations were reached by the Complainants.
18. It is open to interpretation if the Case Managers assigned to these complex matters had the expertise to identify and address the issues involved, then they would be in the position to request the relevant information and documentation with the initial letter sent to the parties, or at least before the conciliation. It appears that they progress matters to conciliations in a failed attempt to have the complaint resolved, and therefore avoid the task of reviewing the issues raised.
19. The rushing of the conciliations, without first determining the alleged loss and issues in dispute and parties to the matter, undermine the conciliation's purpose (resolving the complaint) as per AFCA Rule A.8. AFCA's conduct suggests no intention to assist negotiations between the parties (in line with AFCA Guidelines A.8). AFCA's unreasonable deadlines question AFCA's genuine interest in a fair resolution to the matter.
20. While AFCA indicates that the financial firm should attend the conciliation, it seems to apply more flexibility when it comes to the Complainants' availability or disposition to attend the conference call. For an example, please refer to Infocus' letter to AFCA, paragraph 19 regarding [REDACTED]

#### **Joinder of other financial firms to the complaint**

21. It has been Infocus' experience that AFCA is unfairly declined its requests to join financial firms to complaints where it is clear that they have potentially contributed to the alleged loss claimed by the Complainants. In [REDACTED] (please refer to paragraphs 26-32 of Infocus' letter to AFCA), Infocus has provided AFCA with details of how the complaint would be resolved more efficiently and effectively if the additional financial firms whose contribution to the alleged loss were joined as a party to the complaint (in line with AFCA Operational Guidelines (A.6.2)). Infocus



has submitted further information regarding the joinder of other parties on several occasions following AFCA's requests.

22. AFCA's responses to Infocus' request to join the other financial firms seems to have a twist to their initial position with respect to their own Operational Guidelines, and in a broader interpretation of their ability to join parties has stated that "in order to join the Financial Firms to the complaint, there needs to have been an alleged breach of obligations by the Financial Firms. You have not provided any new information or identified any breach of a legal obligation". AFCA's letter goes on to say that [AFCA] "acknowledge your claim as a matter of fairness, [but] we need to understand how the interaction and conduct of the Financial Firms contributed to the alleged loss". However, AFCA then states that they will not join the parties "in the absence of a defined allegation of breach".
23. There is direct and indisputable evidence in the matter mentioned above that other financial firms contributed to the alleged losses. It has been AFCA's position that there is a lack of evidence to suggest that these parties contributed to the loss. Is it not the point of the joinder to ensure this evidence is gathered by collecting it from the joined parties? AFCA seems to be skipping this step, but ruling that the evidence does not show there has been contribution to the loss. AFCA relies on a circular argument by stating that there is no evidence of the other parties' wrongdoing, and declines the opportunity to have the other parties joined to the complaint to confirm this conclusion. AFCA has imposed the burden on Infocus to provide documentation and exchanges between the Complainants and the other financial firms, which it has no access to, and which could only be provided to AFCA within the complaint process. The fact that not all information may have been disclosed, cannot draw one to conclude that there was no contribution to the alleged loss by those other financial firms. To ensure a fair process is followed, AFCA should join the other parties that may (as per AFCA's Guidelines) have contributed to the loss, and request they provide the relevant evidence for this matter.
24. Similarly, in [REDACTED] (paragraph 54-55 of Infocus' letter to AFCA), AFCA refused to join other parties to the complaint, even when contemporaneous emails and file notes showed (along with comments from the Complainant) that another party had provided them with advice, which contributed to the alleged loss. Infocus was drawn into a conciliation conference without that third party being present, even though a parallel complaint was apparently afoot (as advised by the Case Manager). It is unclear to Infocus why multiple respondents to a claim are not included to ensure that a fair outcome is reached for all parties. Infocus has concerns that this conduct allows consumers to profit from complaints by 'double dipping'. AFCA held sufficient evidence that there were concurrent wrongdoers in this matter, but opted not to ensure the complaint was assessed in a fair and efficient manner.

### Loss calculations

25. It is apparent to Infocus that not all Case Managers have the skills and knowledge to complete loss calculations for complex financial advice matters. For example, please refer to [REDACTED] [REDACTED] (paragraph 36 of Infocus' letter to AFCA), where Infocus had requested documentation from the Complainants, and the Case Manager discredited the relevance of these documents for the loss calculations. Infocus then spent more time preparing an educational email to the Case Manager to explain why they were relevant to this case.
26. AFCA's approach to contribution of loss is unclear; Infocus has not seen an AFCA case where contribution to loss by the Complainant has been considered. In [REDACTED] (paragraphs



49-53 of Infocus' letter to AFCA), there was a mountain of documentation (including signed advice documents), illustrating that the Complainants were overspending, and had been advised to get it under control (which the Complainants opted not to do); however, AFCA did not take this into consideration in their Recommendation, and Infocus' request to review the loss calculations was disregarded.

27. While the contribution to loss from the Complainants does not abrogate the financial firm's responsibility to act in accordance with their statutory obligations, it should result in some reduction of liability. This is sending a message to consumers that *caveat emptor* applies, and that one must protect their own interests. Infocus are left with the impression that AFCA works on the basis that Complainants have no responsibility to understand what they are signing, or to protect their own interests (disregarding *Alphapharm v Toll*).
28. In [REDACTED] (paragraphs 37-40 of Infocus' letter to AFCA), the loss calculations were issued by the Case Manager on 21 December 2020. When Infocus' legal representatives enquired with the Case Manager in February 2021 as to the next step, they were advised that the Complainants had requested that a new Case Manager take over the dispute, and that this new Case Manager would be in contact shortly. Infocus was never notified of the Complainants' request, and never received a copy of the correspondence sent by the Complainants (if any). Infocus were unaware that it is an option to request a change of Case Manager (in particular, as in this matter the loss calculations were unfavourable for the Complainants' position), and is concerned this was allowed in the latter stages of the complaint resolution process (2 years after the complaint was received by AFCA). This decision disregards the amount of time expended, and expense incurred, by the parties preparing submissions, and explaining the issues to the Case Manager.
29. Infocus' legal representative spoke with the newly assigned Case Manager on 24 February 2021 to discuss this matter, and was advised that the Complainants felt the previous Case Manager was biased. If AFCA determined the Case Manager was not biased, why is it accepting their removal at this later stage of the complaint? It is of concern that the new Case Manager has also advised that she has been unable to discuss the loss calculations with the Complainants. The 'rushing' approach displayed in the other examples provided in this letter, is certainly not being applied consistently. It was the Complainants that requested the change of Case Manager, further delaying the matter, and now AFCA is allowing them to continue delaying it further. Nevertheless, the new Case Manager has enquired about further settlement offers that Infocus is willing to consider. Infocus has now been advised that the AFCA Team Manager is currently reviewing the loss calculations. It remains uncertain for Infocus the criteria used to escalate to management the requests for a change of Case Manager or to review the loss calculations at the convenience of just one party whose unreasonable claim of \$500,000 has not been met.
30. In addition, it appears that AFCA does not consider the implications on the loss calculations of their jurisdictional decisions regarding matters that can be partially heard by them. For instance, in [REDACTED] (paragraph 15 of Infocus' letter to AFCA), the alleged loss was caused by conduct that took place before 2008 (financial advice provided in 2007). AFCA has advised that they cannot consider events prior to 2008. Thus, if the causative event took place before 2008, and AFCA has advised that these events will not be assessed, AFCA cannot assess the loss in this matter without breaching its own Rules and jurisdictional decision.

## Requests for extensions

31. There is inconsistency in the way AFCA Case Managers and the Registration and Referral Team approach the granting of extensions. While it has been suggested by AFCA to Infocus that they review these requests on a case-by-case basis, there seems to be very little transparency as to how these decisions are made, and how each AFCA staff member determines what constitutes 'exceptional circumstances' to grant an extension. There are times a Case Manager offers an extension; and others where Infocus contacts the Case Manager and the extension is agreed to over the phone, and then confirmed in an email; sometimes, Infocus has to provide numerous reasons and even when Complainants concur, it is still not sufficient. Please refer to [REDACTED] in paragraphs 10 -13 for an example of this inconsistent approach, which results in unfair treatment of the parties.

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

32. In Infocus' letter to AFCA, we have raised concerns regarding the inconsistent outcomes we have evidenced in matters which are very similar in nature, and in which the issues raised by the Complainants are almost identical. For example, in [REDACTED] (please refer to paragraphs 16-20 of Infocus' letter to AFCA) AFCA has decided to hear the matter, even though it is outside its jurisdiction. Infocus has repeatedly referred AFCA to a similar case ([REDACTED]), in which AFCA confirmed that it cannot consider complaints where the conduct (the advice) triggering a complaint has been provided prior to 1 January 2008. In this case, AFCA determined not to consider the matter, as it related to advice provided in 2007. In [REDACTED], there were subsequent advice documents (between 2008-2011) relating to a similar strategy to the one which is the subject of [REDACTED]. AFCA's inconsistency puts into question how procedural fairness is granted to all parties regardless of the staff member reviewing the complaint.
33. It is also of concern that AFCA has indicated to Infocus that they may consider how to proceed with the closed [REDACTED], when AFCA's decision was issued on 21 October 2020. Infocus also notes that not even the AFCA Independent Assessor has the power to re-open a complaint, or change a determination about AFCA's jurisdiction, in line with AFCA Rule A.16.4.
34. It should be noted in relation to the matter mentioned above that it has been 4 months since Infocus' first requested to have this matter reviewed by the Rules Team, and more than 3 months since the matter was escalated to AFCA's senior management. However, to date Infocus are not aware of the outcome of their review (while Infocus were declined an extension of 12 days to provide a response to this complex matter).
35. Infocus has also identified that AFCA appears to apply their rules inconsistently, and the rules are not always well defined. A relevant example of this is how AFCA treat property advice (real estate) complaints. AFCA seems to rely on a broad and convenient interpretation of the AFCA Rules and Operational Guidelines in relation to 'financial advice', which undermines AFCA's obligations to consider complaints in an independent, impartial and fair manner. It is unclear from AFCA's Rules or Operational Guidelines, how, and when, AFCA's broader definition of a 'financial service' should be applied, or how it interacts with the provision of actual financial services in the Corporations Act 2001 (Cth).
36. For example, in [REDACTED] (paragraph 22-24 of Infocus' letter to AFCA), inappropriate Property advice has been accepted as within AFCA's jurisdiction, even though Infocus submitted that AFCA has no jurisdiction to consider matters related to direct property, and therefore, it should be deemed outside of AFCA's jurisdiction. In this matter, it remains unsubstantiated how

Infocus can be deemed liable for alleged losses caused by the Complainants' decision, as trustees, to purchase the specific property they chose. Infocus also referred to previous AFCA decisions that have supported the position that direct property is not a financial product, and any advice related to direct property is not a financial service ( [REDACTED] ).

37. While AFCA may suggest that they are not obliged to follow the doctrine of precedent, AFCA's Rules require AFCA to act fairly and timely when assessing a complaint, and in a manner, which provides procedural fairness to the parties and supports consistency in decision-making. The lack of expertise of an AFCA staff member cannot excuse AFCA's breach of the principles that underpin their scheme.

### **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?***

***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?***

38. In line with the defects and issues identified with respect to AFCA's operation and management of complaints, it is Infocus' view that both the AFCA members and the parties referring matters to them should have access to a mechanism where the substance of their decisions can be reviewed. We provide a further example below to illustrate this.
39. In [REDACTED] (paragraphs 49-53 of Infocus' letter to AFCA), due to the material concerns Infocus had about AFCA's loss calculations, we provided a detailed submission requesting that AFCA review them, and consider how any adjustments might affect the estimated loss. A further email to the Case Manager was sent referring to the unreasonable decision from AFCA to include debts incurred prior to August 2008, using the whole amount of the interest to increase the loss, but conversely appearing to only apply part of the interest to calculate the tax benefit received, disregarding the Complainants' contribution to loss or apportionment of loss to other parties, amongst other issues identified within AFCA's loss calculations. For instance, AFCA disregarded Infocus' requests for accurate information around the settlement that occurred with the subsequent licensee. While the licensee for the period between 1 January 2008 and July 2008 (and prior) no longer existed, and therefore, could not be joined to the complaint, Infocus was ostensibly attributed to the full loss, without any clarification provided as to how any apportionment of liability was assessed (which it suspects did not occur).
40. AFCA's calculations in this matter were unreasonable, and did not represent the losses. However, no appropriate assessment of the issues raised by Infocus was completed. Infocus discussed the concerns above with the Case Manager, who just closed the request by emailing Infocus that "I have finalised my assessment and I will issue my recommendation in due course". The Recommendation was subsequently issued without Infocus' valid and substantiated concerns being addressed.





41. We have not attached the documents related to the matters mentioned above as they should all be in AFCA's respective files. Please advise whether you require Infocus to provide any documentation or further information, and we will be happy to assist.

Sincerely



Infocus Securities Australia Pty Ltd





11 March 2021

Australian Financial Complaints Authority

WITHOUT PREJUDICE

Dear [REDACTED]

**Reference: Challenge of AFCA matters**

1. We refer to Infocus' meeting with [REDACTED], in which Infocus raised numerous issues that it has experienced with the management of the complaints. As promised, we provide details of the specific matters below where we are challenging AFCA's position.
2. The list below is non-exhaustive, and we reserve our right to raise further issues. Infocus draws AFCA's attention to the number of issues experienced in comparison with the number of complaints that have been raised against Infocus. Infocus have had to invest additional time and expense in addressing these matters, which only serves to increase its costs.
3. The details provided below are a record of the poor experience with AFCA's management of complaints. Infocus has invested significant resources addressing all the issues to ensure that AFCA applies procedural fairness, and reasonable outcomes.
4. As stated in our email dated 24 February 2020, to [REDACTED], Infocus requests that all active matters (cases 1 to 6 below) are placed on hold so that we are not forced to proceed through further stages of the AFCA complaint resolution process, prior to the challenges/issues being resolved. Infocus is of the view that the continuation of the dispute resolution process prior to the resolution of challenges is not in line with procedural fairness, one of the key principles that underpin the AFCA scheme (AFCA Rule A.2.1.c).
5. We have not attached the documents mentioned below as AFCA should hold a copy in the respective files, however, please advise whether you require Infocus to provide this documentation.





1) [REDACTED]

6. Infocus made a submission to AFCA on 22 January 2021 challenging AFCA's jurisdiction to hear this matter, as it was submitted well after the Legacy scheme expired, and the complaint solely related to alleged losses which the Complainant was aware of more than 6 years ago, and therefore should be excluded under the standard AFCA Rules. The submission specifically stated that: "Infocus requests a review of AFCA's jurisdiction in this matter, and that written confirmation is provided of the outcome of their review, in line with AFCA's Operational Rules".
7. The matter was not referred to the Rules Team, and on 28 January 2021, the AFCA Case Manager responded that the complaint had been progressed to Case Management, based on an incorrect interpretation of the AFCA Rule B.4.3.1 (i.e., that the Complainants had two years to complain from the date of the IDR response, completely disregarding the requirement to assess whether they were aware of the loss). Infocus then had to spend time and resources preparing a further submission educating the Case Manager on the AFCA Rules, and again requesting a review by the Rules Team. AFCA is obliged to ensure that its staff have the appropriate expertise, and sufficient organisational resources, to consider complaints, in line with the principles established in AFCA Rule A.2.
8. Infocus has received a letter from the AFCA Case Manager dated 25 February 2021 (one month after Infocus' initial submission) enclosing the correspondence sent to the Complainant advising that the complaint appears to fall outside their Rules.
9. This complaint should have been immediately rejected. As this was not the case, Infocus incurred internal costs when no such costs should have been incurred. Infocus expects that the Case Management fee will not be invoiced, nor that it will be incurring any AFCA costs.

2) [REDACTED]

10. Infocus requested an extension of 12 days for the Complainants to provide our IDR response. As AFCA is aware, this is a complex Legacy matter. The Complainants agreed to the extension. While AFCA was not copied in on the acceptance email from the Complainants, when Infocus sought to confirm the extension with AFCA and provide a copy of the Complainants' approval, we were advised that: [AFCA] "only provides extensions at the registration stage if particularly exceptional circumstances apply. We also only provide extensions for a maximum of 7 days". There was no consideration from AFCA of whether exceptional circumstances apply, or the opportunity for Infocus to utilise a 7-day extension.
11. Infocus was also dealing with a similar matter ([REDACTED]), in which it was granted an extension longer than 7 days for the same reasons as for this matter (i.e., influx of Legacy complaints around 30 June 2020). At the time, Infocus had been notified of several complaints that had been reopened under the Legacy scheme (5 in total), 4 of which were complex disputes, and required significant investigation, all of which takes additional time and resources. An extension of a reasonable period of time as the one requested in this matter, allows the Financial Firm to complete a comprehensive review of the matter, which also benefits the Complainants. Infocus raised all of these points with AFCA, however, on 28 August 2020, it was were advised that

an extension would not be granted as: “only confirmation from the complainant is not enough to assess the extension request”.

12. AFCA’s email requested further information regarding why the extension was required (which had already been provided), and enquired whether Infocus “was close to a resolution with [REDACTED] regarding the above complaint?” An AFCA representative had also stated (verbally) that AFCA would only extend the timeframe if we were attempting to ‘resolve the dispute’. Decisions such as this prevent the complaint being appropriately considered in a way that is cooperative, with the minimum of formality, and procedurally fair (AFCA Rule A.2.1.c). As will be mentioned below, Infocus is concerned about the approach of coercing the Financial Firm to make an offer to resolve the complaint in order for procedural fairness to be granted.
13. There is inconsistency in the way AFCA Case Managers and the Registration and Referral Team approach the granting of extensions. While it has been suggested by AFCA that they review these requests on a case-by-case basis, there seems to be very little transparency as to how these decisions are made, and how each AFCA staff member determines what constitute ‘exceptional circumstances’. There are times a Case Manager offers an extension, although rarely; and others where Infocus contacts the Case Manager and the extension is agreed to over the phone, and then confirmed in an email; sometimes, Infocus have to provide numerous reasons and even when Complainants concur, it is still not sufficient. This issue resulted in the AFCA Data cube for the period July – December 2020 showing this complaint as ‘Non-response at registration’.
14. In our response to AFCA dated 9 October 2020, Infocus requested that “AFCA review the limitations of their jurisdiction in this matter (as outlined herein) and advise Infocus of the outcome”. On 4 November 2020 Infocus made a further submission to AFCA requesting “written confirmation of the outcome of the review conducted by its Rules Team regarding this matter”. Infocus’ letter outlines the reasons why this matter falls outside of AFCA’s jurisdiction, critically, because it stems from advice provided to the Complainants prior to 1 January 2008 (AFCA Rule F2.1.).
15. Infocus’ request to refer the matter to the Rules Team was disregarded, and on 5 November 2020 we received a letter from the Case Manager stating that some aspects of the complaint fell within AFCA’s jurisdiction. Infocus responded to AFCA on 6 November 2020, and again requested a review by a senior AFCA staff member from the AFCA Rules Team, reiterated its position about AFCA not having the ability to hear this matter, and provided further information for it to be assessed accordingly. The complaint was referred to the Rules Team on 6 November 2020.
16. Infocus’ submissions referred to [REDACTED], in which AFCA confirmed that it cannot consider complaints where the conduct (the advice) triggering a complaint has been provided prior to 1 January 2008. In this case, AFCA determined not to consider the matter, as it related to advice provided in 2007. In [REDACTED], there were subsequent advice documents (between 2008-2011) relating to a similar strategy to the one which is the subject of the [REDACTED] complaint. AFCA’s inconsistency is unacceptable, and puts in question how procedural fairness is granted to all parties regardless of the staff member[s] reviewing the complaint.
17. While AFCA may suggest that they are not obliged to follow the doctrine of precedent, AFCA’s Rules requires AFCA to act fairly and timely when assessing complaint, and in a manner, which provides procedural fairness to the parties and supports consistency of decision-making. The lack of expertise of an AFCA staff member cannot excuse AFCA’s breach of the principles that underpin their scheme.

18. On 7 December 2020, AFCA decided that they could hear certain aspects of the complaint. To dismiss the fact that the [REDACTED] and this complaint were being treated differently, the AFCA response stated that: [REDACTED] “relates solely to the pre-2008 conduct of [REDACTED] to recommend the Calia Strategy in 2007. The Complainants also signed the Statement of Advice (SoA) in 2007. Everything was set up and the funds were invested by the middle of 2007. As the complaint and loss stems from advice provided by [REDACTED] in 2007, it was appropriate to be excluded under AFCA Rule F.2.1(b)”. This statement is confusing, as both complaints related to the same conduct of [REDACTED], and the same investment strategy. In the [REDACTED], the strategy was also implemented before 2008, and the alleged loss also stems from advice provided in 2007. However, AFCA arbitrarily decided to proceed, progressed the complaint, and scheduled a conciliation.
19. Infocus challenged AFCA’s decision by referring it to [REDACTED], who then referred it to [REDACTED]. It has been 4 months since Infocus’ first requested to have this matter reviewed by the Rules Team, and 3 months since the matter was escalated, however, to date Infocus are not aware of the outcome of this review. While Infocus were declined an initial extension of 12 days, AFCA wanted to force Infocus to attend a conciliation conference with the Complainants, ostensibly for the sake of meeting their timeframes. The conciliation was rescheduled on 11 January 2021, because the Complainants were “not able to make it”, not because the parties had the right to hear AFCA’s decision on jurisdiction before progressing the complaint.
20. At our meeting with [REDACTED], it was suggested that AFCA will continue to hear this matter. Infocus remains concerned about AFCA’s jurisdictional determination, and maintains the position set out in the submissions noted above. We will be assessing the course of action to challenge this, once the response from AFCA is received. It is also of concern that AFCA is even considering to reopen the [REDACTED] when AFCA’s decision was issued on 21 October 2020 (Infocus notes that not even the AFCA Independent Assessor has the power to re-open a complaint, or change a determination about AFCA’s jurisdiction, in line with AFCA Rule A.16.4).
21. Further, it remains unclear how AFCA intends to proceed with the calculations of loss in this matter, if the alleged loss (which we do not concede) was caused by conduct that took place before 2008. AFCA has advised that they cannot consider the “financial and investment advice provided by the Advisor in the Statement of Advice in 2007, including recommending the Calia Strategy and any alleged resulting loss from this advice”. Thus, if the causative event took place before 2008, and AFCA has advised that these events will not be assessed, how can AFCA then assess the loss in this matter without breaching its own Rules and jurisdictional decision?

3) [REDACTED]

22. This complaint in which the Complainants allege inappropriate Property advice has been accepted as within AFCA’s jurisdiction. Infocus’ response dated 11 August 2020 submitted that AFCA has no jurisdiction to consider matters related to direct property, and therefore, it should be deemed outside of AFCA’s jurisdiction. Nowhere in the advice document was it recommended that the Complainants purchase a specific property for a specific price. The advice was limited to a strategic allocation of existing superannuation funds (combined with an investment loan, and based on information provided by the Complainants), to purchase a property within the SMSF structure. Infocus submits that the Complainants would have purchased the property regardless of any advice received. Therefore, it has been Infocus’ position that it remains unsubstantiated how Infocus can be

deemed liable for alleged losses caused by the Complainants' decision, as trustees, to purchase the specific property they chose.

23. Infocus also referred to previous AFCA decisions that have supported the position that direct property is not a financial product, and any advice related to direct property is not a financial service [REDACTED]. In line with the concerns mentioned in relation to the matter above, Infocus finds the lack of consistency in the assessment of similar matters unacceptable.
24. A response was provided by a Case Analyst from the Rules Team on 27 August 2020 advising that "it was not appropriate to exclude this complaint". On 16 October 2020, Infocus wrote to AFCA and drew its attention to [REDACTED] ruling, which stated that: "the real property investment advice occurred in 2011; real property investment advice is not a financial product under section 763B of the Corporations Act 2001 (Cth), and advice about investing in real property is not a financial service. This means Infocus cannot be responsible for the complaint". This approach was disregarded in AFCA's letter dated 27 August 2020, when assessing its jurisdiction. Infocus therefore requested AFCA to "provide a response as whether it has jurisdiction to consider the alleged property advice, and if AFCA decides they do have jurisdiction, then to bring other parties who were involved in the purchase of the Property into the dispute".
25. On 9 November 2020, the AFCA Case Manager maintained the decision to hear the matter, without referring it to the Rules Team for re-assessment. The Case Manager also requested further information regarding the third parties that contributed to the alleged loss. Even though the parties' joinder had not been resolved, the Case manager confirmed the conciliation conference was proceeding on 12 November 2020. It is unclear from AFCA's Rules or Operational Guidelines, how, and when, AFCA's broader definition of a 'financial service' should be applied, or how it interacts with the provision of [actual] financial services in the Corporations Act 2001 (Cth). This broad and convenient interpretation of the AFCA Rules and Operational Guidelines undermines AFCA's obligations to consider complaints in an independent, impartial and fair manner.
26. On 10 November 2020, Infocus provided the Case Manager with the details of how the complaint would be resolved more efficiently and effectively if the additional Financial Firms whose contribution to the alleged loss were identified, and joined as a party (in line with AFCA Operational Guidelines (A.6.2)). Infocus also noted its concern regarding the lack of clarity as to the issues AFCA had decided to hear, and the losses claimed by the Complainants. The Complainants had not quantified their alleged loss, nor provided supporting documentation to substantiate their claims against Infocus. They continued to refer to events and alleged losses caused after 2013, which falls outside this complaint. Infocus noted that "clarity as to the issues in the dispute is essential for a conciliation conference to be successful", and asked AFCA to reassess its jurisdiction and consider joining the parties to the complaint. Infocus also requested that the Complainants provide sufficient evidence of the alleged loss and the relevant supporting documentation, and advised that "without this, the purpose of the conciliation will be defeated. We consequentially ask AFCA to hold off on proceeding with the proposed conciliation meeting scheduled for 12 November 2020".
27. The Case Manager responded on the same day that: "while we may not currently have all the information to fully assess the complaint at this stage, the aim of a conciliation conference is to try to resolve the complaint by agreement on the day". Infocus does not understand how the parties are expected to resolve a complaint when there's no clarity as to what the complaint is about, and what the Complainants are claiming. The Case Manager also stated that the parties would benefit from the conciliation by gaining "a better understanding of the issues and circumstances". However,

it is not up to the parties to complete the jurisdictional review, and to assess whether there is merit to the complaint.

28. Based on the above, the Case Manager forced the parties to attend the conciliation. As expected, the conciliation did not result in the parties reaching an agreement. Both Infocus and the Complainants were at a loss as to what AFCA's position was regarding joining the other parties to the complaint. There was no discussion whatsoever of a possible resolution with the Complainants directly, or the parties' intention to do so. Consequently, the outcome of the conciliation was that Infocus had to provide more information regarding the third parties' contribution to the alleged loss, which AFCA was to review. This not only wasted all of the parties' time (including the AFCA conciliator), but also suggests that AFCA is more preoccupied with progressing matters through the different stages of the dispute resolution process, while undermining the principles of procedural fairness.
29. Infocus submitted further information regarding the joinder of other parties on 12 November, 17 November and 20 November 2020 following AFCA's requests. On 8 December 2020, the Case Manager advised that the other parties were not being joined to the complaint. Infocus responded on 11 December 2020 challenging AFCA's position, and AFCA's position was confirmed by letter dated 21 January 2021.
30. The AFCA Operational Guidelines A.6.2 state that AFCA will join a Financial Firm if we consider the complaint would be resolved more efficiently and effectively if the additional Financial Firm was joined as a party. For example, this might be the case where another Financial Firm may have contributed to the Complainant's loss and so contribution by that other Financial Firm may be fair". AFCA's letter dated 21 January 2021 had a twist to AFCA's previous position and to their own Operational Guidelines, and stated that "in order to join the Financial Firms to the complaint, there needs to have been an alleged breach of obligations by the Financial Firms. You have not provided any new information or identified any breach of a legal obligation". AFCA's letter goes on to say that [AFCA] "acknowledge your claim as a matter of fairness, [but] we need to understand how the interaction and conduct of the Financial Firms contributed to the alleged loss". However, AFCA then states that they will not join the parties "in the absence of a defined allegation of breach".
31. There is direct and indisputable evidence that other Financial Firms contributed to the alleged losses. It has been AFCA's position that there is a lack of evidence to suggest that these parties contributed to the loss. Is it not the point of the joinder to ensure this evidence is gathered by collecting it from the joined parties? AFCA seems to be skipping this step, but ruling that the evidence does not show there has been contribution to the loss. In accordance with AFCA's Operational Guidelines A.6.2, and a fair and reasonable process to the parties, the process of joining third parties should be as follows:
  - a. Step 1: AFCA assesses whether the complaint would be resolved more efficiently and effectively if the Financial Firms are joined as parties to the complaint (at this stage, AFCA is not supposed to determine whether the parties contributed to the loss or not).
  - b. Step 2: AFCA gathers the evidence from all involved parties and assess the parties' conduct and alleged loss
  - c. Step 3: AFCA determines the parties' contribution to loss (if any).

32. AFCA's letters mentioned above have conveniently omitted steps 1 and 2, and have left Infocus as the only party to the complaint in breach of its own Rules and the expected procedural fairness it should be applying to all complaints. AFCA relies on a circular argument by stating that there is no evidence of the other parties' wrongdoing, and declines the opportunity to have the other parties joined to the complaint to obtain confirm this conclusion. AFCA imposes the burden on Infocus to provide documentation and exchanges between the Complainants and the other Financial Firms, which it has no access to, and which could only be provided to AFCA within the complaint process. As stated in Infocus' letter dated 11 December 2020, the fact that not all information may have been disclosed, cannot draw one to conclude that there was no contribution to the alleged loss by those other Financial Firms. To ensure a fair process is followed, AFCA should join the other parties that may (as per AFCA's Guidelines) have contributed to the loss, and request they provide the relevant evidence for this matter.
33. AFCA's decision not to join the parties was received by Infocus on 21 January 2021. This communication from the Case Manager also requested confirmation, by 22 January 2021, [as to]: "whether Infocus is making an offer in an attempt to resolve the complaint. Otherwise, I will progress the complaint to preliminary stage on Monday, 25 January 2021". When Infocus sought clarification of this timeframe, the Case Manager advised that "I will be progressing the complaint to preliminary view (PV) status on 25 January 2021, which will increase the case fee by \$7,645. If Infocus is looking to make an offer, please let me know what the offer is by this week and I will relay same to the complainants. If the complainants are looking to accept the offer but require a bit more time to consider, I am happy to hold off progressing the complaint to PV status by a few days. In short, if you are looking to make an offer while it is still in case management – conciliation status, please do so by tomorrow, 22 January 2021".
34. Infocus then had to make a submission to AFCA regarding how unreasonable this timeframe was, and noted, again, that the Complainants have not substantiated their claims against Infocus. Discussions about the loss calculations were not fully conducted during the conciliation (and could not be), as noted above. The outstanding information has been requested by Infocus in its initial response to AFCA dated 11 August 2020, and in the subsequent response dated 16 October 2020.
35. AFCA requested that in 24 hours an offer be made to the Complainants, by Infocus. This is, as noted above, was without Infocus having the particulars of how the alleged loss was calculated. As Infocus stated in its email dated 21 January 2021, the rushing of the conciliation, without first addressing the request to determine the joinder of other parties to the complaint, undermined the conciliation's purpose (resolving the complaint) as per AFCA Rule A.8. AFCA's conduct suggests no intention to assist negotiations, and no conversations have been had with the parties to date about this (in line with AFCA Guidelines A.8). AFCA's unreasonable deadline puts in question AFCA's genuine interest in a fair resolution to the matter.
36. Following the numerous requests to AFCA to ask the Complainants to substantiate their claim, they provided further information. While assessing the documentation provided, Infocus noted that the rental income statements for the period 2011 – 2015 were not provided. The Case Manager advised on 3 February 2021 that the Complainants have not provided the statements to AFCA, "however, I believe the information can be found in the cash management statements and tax returns which have been exchanged previously". On 3 February 2021, Infocus then spent more time preparing an educational email to the Case Manager to explain why the rental income statements were relevant for the loss calculations. The rental statements were then requested and provided by the Complainants. Infocus is concerned about the expertise of the Case Manager assessing this complex matter.



4) [REDACTED]

37. This complaint was reopened on 17 December 2019 as part of the Legacy scheme review, and since then has been through the AFCA dispute resolution process. The loss calculations for this matter were issued by AFCA on 21 December 2020. When Infocus' legal representatives enquired with the AFCA Case Manager in February 2021 as to the next step for this matter, he advised that the Complainants had requested that a new Case Manager take over the dispute, and that this new Case Manager would be in contact shortly.
38. Infocus was never notified of the Complainants' request, and never received a copy of the correspondence sent by the Complainants (if any). Infocus were unaware that it is an option to request a change of Case Manager, and are particularly concerned this was allowed in the latter stages of the complaint resolution process (2 years after the complaint was received by AFCA). This decision disregards the amount of time used, and expense incurred, by Infocus preparing submissions and explaining the issues to the Complainants and Case Manager. A generous offer was made to the Complainants, and this was declined (AFCA's estimate of losses were approximately 25% of what Infocus offered to the Complainants to settle this matter).
39. Infocus' legal representative spoke with the newly assigned Case Manager on 24 February 2021 to discuss this matter, and was advised that the Complainants felt the previous Case Manager was biased. If AFCA determined the Case Manager was not biased, why is it accepting their removal at this later stage of the complaint?
40. It is of concern that the new Case Manager has also advised that she has been unable to discuss the loss calculations with the Complainants. The 'rushing' approach displayed in the complaints above, is certainly not being applied in this matter. It was the Complainants that requested the change of Case Manager, further delaying the matter, and now AFCA is allowing them to continue delaying it further. Nevertheless, the new Case Manager has enquired about further settlement offers that Infocus is willing to consider. However, to date, Infocus is not privy to the Complainants' position as their request to change Case Manager was not communicated to it.

5) [REDACTED]

41. Infocus' response to AFCA dated 12 November 2020 in response to the request to provide further information drew AFCA's attention to the fact that the Complainants had not identified the loss they claim to have suffered, and had not provided any evidence to support this. Infocus raised a jurisdictional challenge, and asked AFCA to consider discontinuing the complaint, in line with AFCA's Rule[s] A.8.3 a) & b), as there was no evidence of a loss. In the alternative, Infocus asked AFCA to request the Complainants to provide an explanation as to how and why they believe Infocus is responsible for the alleged loss, and their calculations of loss along the relevant supporting documentation. This information had already been requested in Infocus' IDR response dated 21 August 2020.
42. As an extension was granted to the Complainants to respond, Infocus responded to the Case Manager that we were waiting to hear the outcome of the review conducted by the AFCA Rules Team on the matter. Infocus enquired (verbally) as to why the Case Manager was proceeding with

the exchange of documents if the jurisdictional review had not been completed, and was advised that he [the Case Manager] wished to see both parties' submissions to be able to make a decision regarding jurisdiction. The Case Manager advised in an email dated 7 December 2019, that the complaint was within AFCA's Legacy jurisdiction, and provided Infocus with a timeframe to respond to further submissions from the Complainants.

43. Infocus provided a response to AFCA on 11 December 2020, and reiterated its position that the Complainants had not provided their loss calculations or explained how the alleged loss was the result of Infocus' conduct. Infocus had previously requested that the Complainants provide an explanation as to how and why they believe Infocus is responsible for the alleged losses listed in their letter dated 16 November 2020.
44. A conciliation was scheduled for 11 January 2021, however, the above request for this critical information relating to the loss assessment was disregarded. In an email dated 23 December 2020, Infocus drew the Case Manager's attention to its letter dated 11 December 2020, and noted that it was ideal to have a better understanding for the conciliation of how they calculated the alleged losses noted in their letter dated 16 November 2020. The Case Manager advised the Complainants would reply by 4 January 2021. The Complainants provided a further email on that date, which subjective at best, but did not provide any further information in terms of what the loss was, and how it was calculated.
45. The conciliation proceeded, and again, despite Infocus having no clarity as to how the loss was assessed by the Complainants, the conciliation conference ended with AFCA's inappropriate suggestion that the Financial Firm may wish to make an offer, ostensibly seeking to close the matter without regard to what was correct and fair. The objective of the conciliation to have the parties reach an agreement was not achieved, and as with the [REDACTED], Infocus had to proceed with further requests for information from the Complainants to be able to understand their losses. Infocus' latest submission dated 8 February 2021 continues to list the outstanding information requested from the Complainants, which as of the date of this letter has still not been received. Nevertheless, the Case Manager has enquired whether we are prepared to make an offer to resolve, or meet the unreasonable and unsubstantiated claim of \$211,000.
46. It is open to conclude that if the Case Managers assigned to these complex matters had the expertise to identify and address the issues involved, they would be in the position to request the relevant information and documentation with the initial letter sent to the parties, or at least before the conciliation. It appears that they progress matters to conciliations in a failed attempt to have the complaint resolved, and therefore avoid the task of reviewing the issues raised.

6) [REDACTED]

47. Similar to the complaint above, Infocus raised with the AFCA Case Manager on 12 December 2019 that "the conciliation would be inappropriate (as we need a transparent and complete representation of the Complainant's losses)" if the documentation previously requested was not provided in a reasonable time prior to the conciliation.

48. Further documentation from the Complainants was provided by AFCA on 12 December 2019, and the conciliation was rescheduled to 10 February 2020. Infocus was then forced to attend a conciliation conference where the issues of the complaint had not been defined, and the loss calculations from the Complainants were far from being clear. The file for this matter evidences that due to its complexity, numerous exchanges were required for the parties to review the alleged losses, and how the calculations were reached by the Complainants (Infocus maintains its position that the Complainant has not demonstrated the advice was inappropriate and lead to loss, and has further concerns that the Complainants' representatives' calculations are presumptuous and exaggerated). In light of the quantum and complexity of the claim, Infocus asks that an expert be brought in to assess the losses, as was requested by Infocus in its letter dated 12 November 2020.

7)

49. AFCA issued the loss calculations for this matter on 3 September 2020. Due to the material concerns Infocus had about AFCA's calculations, we provided a detailed submission on 14 September 2020, and requested that AFCA review them, saliently asking that AFCA consider how any adjustments might affect the estimate loss. A further email to the Case Manager was sent on 17 September 2020, referring to the unreasonable decision from AFCA to include debts incurred prior to August 2008, using the whole amount of the interest to increase the loss, but conversely appearing to only apply part of the interest to calculate the tax benefit received, disregarding the Complainants contribution to loss or apportionment of loss to other parties, (who may have contributed to the loss), amongst other issues identified. For instance, AFCA disregarded Infocus' requests for accurate information around the settlement that occurred with the subsequent licensee. While the licensee for the period between 1 January 2008 and July 2008 (and prior) no longer existed, and therefore, could not be joined to the complaint, Infocus was ostensibly attributed the full loss, without any clarification provided as to how any apportionment of liability was assessed (which it suspects did not occur).

50. AFCA's approach to contribution of loss is unclear; Infocus has not seen an AFCA case where contribution to loss by the Complainant has been considered. In this matter, there was a mountain of file documentation (including signed advice documents), illustrating that the Complainants were overspending, and had been advised to get it under control (which the Complainants opted not to do).

51. Further issues with AFCA's calculations in this matter included:

- a. Applying loan interest to a total 'loss' from the start date of the alleged loss in August 2008 (which is not what occurred, any loss accrued over the course of 10 years) and then stating in the Recommendation that it was to 'maintain the real value of the compensation' (why not then include the loan interest in the 'actual' and 'but for' calculations?).
- b. Disregarding Infocus' request for an explanation as to where the distributions from the investments had been included under the 'but for' and 'actual' scenarios. Further noting that, if AFCA were claiming the distributions would have been the same under the 'but for' and 'actual' scenarios, the Complainants, who were overspending as per the file notes, would have had to sell down some of the investments to repay the debt, resulting in smaller distributions under the 'but for' scenario, due to the lower asset base, and therefore, a smaller loss.

- c. Applying the interest on loans to increase the loss, but appearing to not use the full amount of said interest to reflect the tax deductions the Complainants actually received (overstating their actual losses).
- d. Deducting the estimated tax-deductible interest under the 'but for' (apparently 'non-g geared') scenario from the interest under the 'actual' scenario, thus reducing the tax deductions that the Complainants actually received, and therefore substantially increasing the total losses. Interest was then applied to this sum from the alleged start date of the loss, which as noted above could not have been August 2008, increasing the losses awarded.

52. While none of this abrogates the adviser's responsibility to act in accordance with their statutory obligations, it also should result in some reduction in liability, and send a message to consumers that *caveat emptor* applies, and that one must protect their own interests. Infocus are left with the impression that AFCA works on the basis that Complainants have no responsibility to understand what they are signing or to protect their own interests (disregarding *Alphapharm v Toll*).

53. AFCA's calculations in this matter were unreasonable, and did not represent the losses. However, no appropriate assessment was completed of the issues raised by Infocus. Infocus discussed the concerns above with the Case Manager on 15 and 16 September 2020. However, on 25 September 2020, the Case Manager sent Infocus an email stating that "I have finalised my assessment and I will issue my recommendation in due course". The Recommendation was subsequently issued on 25 September 2020, with Infocus' valid and substantiated concerns being addressed.

8) [REDACTED]

54. In this matter, AFCA refused to join other parties to the dispute, even when contemporaneous emails and file notes showed (along with comments from the Complainant) that another party had provided them with advice, which contributed to the alleged loss.

55. Infocus was drawn into a conciliation conference without that third party being present, even though a parallel complaint was apparently afoot (as advised by the Case Manager). It is unclear to Infocus why multiple respondents to a claim are not included to ensure that a fair outcome is reached for all parties. Infocus has concerns that this conduct allows Complainants to profit from complaints by 'double dipping'. AFCA held sufficient evidence that there were concurrent wrongdoers in this matter, and opted not to ensure the complaint was assessed in a fair and efficient manner.

9) [REDACTED]

56. The complaint was clearly ill-conceived and vexatious in line with AFCA's Rule C.2.2.d, and this was evidenced in our IDR response and jurisdictional challenge dated 27 August 2020, which was submitted well before the IDR referral stage had expired. The Complainant claimed that he had paid fees and received no service, however, he had paid no fees to Infocus, and was not entitled to any services (the alleged 'fees' were commissions paid by the product provider to Infocus, which they

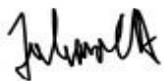
had confirmed in writing) and there was no agreement that the commissions were consideration in any agreement to provide financial services. Infocus shared this information with AFCA and the Complainant, and requested that AFCA ask him to produce statements showing he had actually paid fees to us. The case incorrectly progressed to Case Management Level 1, rather than to 'Rules review', and Infocus was shortly thereafter advised by the Case Manager that the complaint had been 'withdrawn'. This was raised with AFCA on 2 November 2020.

57. The Case Manager for this matter also requested Fee Disclosure Statements, which, is an error for this matter. Had the Case Manager had some understanding of ASIC's RG 245 (Fee Disclosure Statements), would have realised they were not required for such a client.
58. Infocus requested the AFCA case management fee to be waived, since our jurisdictional review request was lodged before the fee was levied. AFCA admitted they made an error, but did not reverse the invoice stating that: "while they did not respond to our jurisdictional challenge, it would have been rejected anyway".

10) [REDACTED]

59. The response for this matter was due on 24 July 2020. Following a discussion with the Case Manager, Infocus advised that the 3-day grace period was going to be utilised, and the response was submitted to AFCA on 27 July 2020. The case was subsequently progressed to Case Management after the 3-day grace period expired on 28 July 2020. Therefore, Infocus' response was received by AFCA before it was progressed.
60. This case was unfairly progressed to Case Management, even though there was a clear statement from both parties that they were attempting to resolve the dispute, and the matter was going to be settled (which seems to be AFCA's preference to grant extension as stated above), and both the Financial Firm and the Complainant requested AFCA to hold off on progressing the matter. As a result of this issue, this complaint was marked as 'Non-response at registration' for the AFCA Data cube for the period July – December 2020.

Sincerely



[REDACTED]

Infocus Securities Australia Pty Ltd