

Our Ref: APB.SJM
Your Ref:



30 March 2021

By Email: AFCAreview@treasury.gov.au

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

Dear Sirs

Piper Alderman submission to the Review of the Australian Financial Complaints Authority

1. Piper Alderman Background

- 1.1 Piper Alderman is a long established national law firm with offices in Sydney, Melbourne, Brisbane and Adelaide.
- 1.2 Piper Alderman's specialist banking and financial services team assists our clients to navigate the complex financial landscape by providing specialist legal advice which takes into account the business imperatives of financiers.
- 1.3 We advise large, mid-tier and boutique domestic and overseas banks, financial institutions and other financiers as well as Australian and foreign government instrumentalities. We act for Financial Firms of all sizes and often represent clients in relation to complaints made against them to AFCA.
- 1.4 Below are responses to a number of the questions raised in the Terms of Reference. These responses are provided by Piper Alderman as a law firm that provides advice and other legal services to a range of AFCA members.
- 1.5 Defined terms in this submission that are not otherwise defined have the meaning given to them in the AFCA Compliant Resolution Scheme Rules (AFCA Rules).

2. Executive Summary

- 2.1 There is a perception of our clients and practitioners engaging with AFCA that its outcomes are often, from the perspective of strict legal analysis, wrong and its processes infected by a lack of impartiality and independence. It is axiomatic that outcomes that are wrong as a matter of legal principle and informed by impartiality will be unfair.

Lawyers

**Adelaide . Brisbane
Melbourne . Sydney**

ABN 42 843 327 183

Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
Australia

DX 10216 Sydney Stock Exchange

t +61 2 9253 9999
f +61 2 9253 9900

www.piperalderman.com.au

Partners:

Andrea Beatty
t +61 2 9253 3818
abeatty@piperalderman.com.au

Simon Morris
t +61 2 9253 9909
smorris@piperalderman.com.au

Associate:

Chelsea Payne
t +61 2 9253 3840
cpayne@piperalderman.com.au

- 2.2 It is the view of these authors that AFCA's delivery of its statutory objectives would be significantly enhanced by the AFCA Rules being reviewed to:
- (a) permit a limited right of judicial review of non-superannuation Determinations. It is submitted that the effective removal of any avenue of judicial review for Financial Firms from non-superannuation Determinations and the corresponding lack of court oversight is not assisting AFCA achieve its stated objective to resolving disputes about products and services provided by Financial Firms; and
 - (b) make clear that AFCA's remit is to deal with consumer complaints that arise within the frame of a customer relationship. In the opinion of the authors, it is not the place of AFCA, a complaints and conduct body, to be attributing liability to Financial Firms in circumstances where the relevant conduct is not the conduct of the Financial Firm and where no relevant customer relationships exists between the Complainant and the Financial Firm.
- 2.3 By way illustration of the problems that have beset AFCA in the exercise of its power and the charges which we submit ought be made, we refer you to the recent decision of His Honour Justice Stevenson of the Supreme Court of New South Wales in *D H Flinders Pty Ltd v Australian Financial Complaints Authority Limited* [2020] NSWSC 1690 (***D H Flinders***).
- D H Flinders Pty Ltd v Australian Financial Complaints Authority Limited* [2020] NSWSC 1690**
- 2.4 This was a matter in which the authors acted for D H Flinders.
- 2.5 The matter was conducted as a quasi-test case but related to 24 Complaints that had been brought against D H Flinders by customers of Equitable Financial Solutions Pty Ltd (**EFSOL**). EFSOL was a business that had, among other things, provided a range of credit and financial products targeting people of Islamic faith. The products were manufactured as being Sharia Law compliant and assisted EFSOL's customers save for a deposit for investment in residential homes. EFSOL's customers were retail customers.
- 2.6 Separately, EFSOL had entered into a corporate authorised representative agreement with D H Flinders in respect of a specific wholesale managed investment scheme called the 'EFSOL Income Fund. Under their agreement with D H Flinders and as registered with ASIC, EFSOL was only authorised to act on D H Flinders' behalf in relation to the specified wholesale fund.
- 2.7 The EFSOL Income Fund was never operational as EFSOL was unable to on board any wholesale investors. After approximately 19 months, D H Flinders terminated its agreement with EFSOL and notified ASIC that EFSOL had ceased acting as its authorised representative.
- 2.8 EFSOL subsequently entered into liquidation, with retail customers becoming unsecured creditors owed approximately \$20 million. There was no prospect of any recovery by these unsecured creditors.
- 2.9 As a consequence, complaints were made by EFSOL customers to AFCA against EFSOL. EFSOL customers had no awareness of D H Flinders' existence, or the wholesale fund subject to the corporate authorised representative agreement.

- 2.10 Our understanding of the facts is that AFCA brought D H Flinders' role to the attention of EFSOL complainants and encouraged separate complaints to be made against DH Flinders.
- 2.11 AFCA rejected D H Flinders' arguments regarding AFCA's jurisdiction to hear these complaints and commenced determining EFSOL customer complaints against D H Flinders and in favour of the Complainants by attributing liability to D H Flinders by applying attribution of liability concepts pursuant to section 917B of the Corporations Act.
- 2.12 Under the AFCA Rules, D H Flinders had no rights to merit review; its only available avenue was to challenge AFCA's authority, jurisdiction and power as a matter of contract.
- 2.13 D H Flinders was successful in these Supreme Court proceedings. Stevenson J relevantly:
- (a) ruled that AFCA only has the contractual authority to deal with complaints against AFS licensees regarding the conduct of an authorised representative if that representative was acting within the scope of their authority; and
 - (b) observed that the AFCA Rules do not contemplate AFCA giving advice as to whether a complaint about one Financial Firm might better suited, or alternatively, be directed to another Financial Firm.
- 2.14 On 13 January 2021 at the direction of ASIC,¹ AFCA published new approved Rules and supplementary Operational Guidelines to amend the Rules and definitions for 'financial firm' and 'representative'. These new Rules incorporating the updated definitions are applicable to complaints lodged from 13 January 2021. When promulgating these new Rules, AFCA stated that the amendments means that a complaint can be made against a Financial Firm concerning any "employee, agent or contract of the Financial Firm" regardless of whether representative's conduct is "within or without authority".

Delivering against statutory objectives

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

Limited right in Financial Firm to judicial review problematic

3.1 There are currently limited appeal options available for Financial Firms dissatisfied with the outcome of their non-superannuation related Determination, which are discussed below.

AFCA Appeal

- (a) The primary role of the Independent Assessor is to identify, address and respond to complaints received about AFCA's complaints handling service and performance and make necessary recommendations about significant issues.² Consequently, an Independent Assessor does not have the ability to review the merits or substance of a Determination.³ Rather, all the Independent Assessor considers is whether AFCA's

¹ ASIC Corporations (AFCA Regulatory Requirement) Instrument 2021/0002.

² Australian Financial Complaints Authority (AFCA) Complaint Resolution Scheme Rules (**AFCA Rules**) 13 January 2021 A.16.4

³ Australian Financial Complaints Authority (AFCA) Operational Guidelines to the Rules (**Operational Guidelines**) January 2021 76.

provided service was satisfactory and what they can recommend to address the issues found.⁴

- (b) Beyond the role and function of the Independent Assessor, there is no further avenue of review from a determination made by an AFCA Member. against their findings.⁵ The AFCA Chief Ombudsman will review the Independent Assessor's recommendations and if they do not accept it, it will be referred to the Chair of the AFCA Board in accordance with the Independent Assessor's Terms of Reference.⁶ Although the Independent Assessor is able to review Determinations, it does not have the ability to reverse and re-make a decision. Instead, learnings from past Determinations are used when future Determinations are made.

3.3 Test Case

- (a) Under AFCA Rule A.7.2(b), a Financial Firm may with AFCA's consent commence legal proceedings if AFCA agrees to allow the Financial Firm to treat the complaint as a test case and the Financial Firm meets the requirements set out in Rule C.2.2(f).
- (b) AFCA's Operational Guidelines to the Rules state that if a test case is being pursued by a Financial Firm with AFCA's agreement, AFCA may decide to defer consideration of complaints raising similar issues pending the outcome of the test case.
- (c) This review option is restrictive in two ways:
 - (1) bringing proceedings requires the consent of AFCA, and it is within AFCA's discretion whether it will delay the determination of similar complaints while the case is under consideration; and
 - (2) the test case can only be brought before a court by both parties prior to a Determination being made. Consequently, a Financial Firm is forced to undertake costly litigation based on preliminary observations of the Case Manager if it appears that an error or law may be made, to avoid its right to review being extinguished upon Determination.

3.4 Court Option

- (a) The merits of judicial review of an AFCA Determination fail on two points.
- (b) Firstly, the *Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)* has been amended by the AFCA Act to expressly exclude AFCA Determinations from statutory review.⁷
- (c) Secondly, to argue that judicial review is in fact available for Financial Firms, it requires contending the principle found in the seminal case of *R v Panel on Take-overs &*

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Explanatory Memorandum, Treasury Laws Amendment (Putting Consumers First-Establishment of the Australian Financial Complaints Authority) Bill 2017 (Cth) [1.179]-[1.180].

Mergers; ex parte Datafin plc [1987] WB 815.⁸ It was found in this case that private bodies which perform public law functions are subject to judicial review. Whether the *Datafin* findings are applicable to Australian law is a contentious issue, making it difficult to assess whether the *Datafin* principle would apply to Australian cases.

- (d) In *Mickovski v Financial Ombudsman Service Ltd* (2012) 36 VR 456, the Court of Appeal held that the *Datafin* principle did not apply to Determinations made by AFCA's predecessor FOS. In this case both a judicial review and a challenge in contract was brought. The court held that as the decision in question was determined by governing rules to be "final", the decision could only be reviewed as a matter of contract if it had been "affected by fraud or dishonesty or lack of good faith [...] unless [...] the determination has not been carried out in accordance with the agreement"⁹.
- (e) While in the case, the Court of Appeal found that an error was made in construction of a rule going to jurisdiction, it was found that the error identified was not sufficient enough to vitiate the decision or take it outside the ambit of the contractual decision-making power. The court held that FOS was not exercising a public duty or a function involving a public element when the parties to the complaint were consensually subject to FOS' jurisdiction.¹⁰ A similar conclusion could be drawn about AFCA to argue that as they are not exercising a public duty they should not be subject to judicial review.
- (f) Recent case law has shown that the *Mickovski* principle has been favoured over the judgment of *Datafin* in arguing that FOS was not subject to judicial review and similarly, could be applied as such to the AFCA scheme.¹¹

3.5 Under the AFCA scheme, express provisions for statutory appeal to the Federal Court are available to superannuation complaints if there has been an error of law.¹² However, for non-superannuation complaints no such express provision is available. There is no logic to distinguish between superannuation and non-superannuation determinations regarding appeal rights.

3.6 Complainants on the other hand, are provided with an opportunity within 30 days of their receipt of a Determination, to reject the Determination and to bring an action in the courts or take any other available action against the Financial Firm.¹³

3.7 This imbalance in rights suppresses AFCA's objective of fairness by preventing Financial Firms from often having questions of law determined by a non-judicial body with no rights of appeal. It is not helpful to AFCA to be impervious to judicial oversight.

3.8 It is understandable that due to the nature of external dispute resolution that it is not in the best interests of consumers to allow well-resourced Financial Firms to bring an action against an individual Complainant in what can be very costly court proceedings. We therefore submit

⁸ *R v Panel on Take-overs & Mergers; ex parte Datafin plc* [1987] WB 815 (**Datafin**).

⁹ *Ibid* [42].

¹⁰ *Ibid* [32].

¹¹ See e.g. *Bilaczenko v Financial Ombudsman Service Ltd* [2013] FCA 1268 and *BFJ Capital Pty Ltd v Financial Ombudsman Service Ltd (in liq)* [2019] VSC 71.

¹² AFCA Rules, A.15.1.

¹³ AFCA Rules, A.15.4.

that a judicial review mechanism (similar to what exists currently for superannuation complaints under section 1054C of the Corporations Act) be initiated to allow Financial Firms to seek declarations by the court on points of law, at the expense of the Financial Firm. That is, this should be at no cost to the Complainant(s).

Impartiality and independence

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

- (a) in a way that is independent, impartial and fair;¹⁴ and
- (b) in a manner that provides procedural fairness to the parties.¹⁵

3.10 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";¹⁶ and
- (b) may "assist Complainants to submit a complaint".¹⁷

3.11 The AFCA Rules referred to are directed to assisting complainants with the task of submitting a complaint they had themselves decided to make about a Financial Firm. In the case of *D H Flinders*, Stevenson J observed that the Rules do not contemplate AFCA giving advice as to whether a complaint about one Financial Firm might better suited, or alternatively, be directed to another Financial Firm.

3.12 AFCA's Rules should be appropriately amended to ensure that AFCA does not step beyond its complaints-handling role to facilitate claims by actively encouraging complainants to file a complaint against a Financial Firm or assuming an advisor role. In *D H Flinders*, Stevenson J observed that in relation to D H Flinders, AFCA "was hardly behaving in a manner procedurally fair to D H Flinders nor in a manner that was impartial".¹⁸

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

4.1 AFCA's Rules give it power to determine complaints that arise from:

- (a) a customer relationship [Rule A.4.3(a)]; and
- (b) the provision of a Financial Service *by* the Financial Firm *to* the Complainant [Rule B.2.1] (emphasis added).

4.2 In our view, AFCA faces issues when it strays from the logic of that remit to seek to achieve some wider connection of justice.

¹⁴ AFCA Rules, A.2.1(c)(i).

¹⁵ AFCA Rules, A.2.1(c)(ii).

¹⁶ AFCA Rules, A.2.1(b)(ii).

¹⁷ AFCA Rules, A.3.2.

¹⁸ *D H Flinders* at [135].

- 4.3 To the extent there is ambiguity in the AFCA Rules which result in AFCA claiming jurisdiction that permits it to attribute liability to Financial Firms for conduct unrelated to a customer relationship concerning a person acting outside of any relationship with the Financial Firm, this ambiguity has been exacerbated by the recent AFCA Rules change in response to the *D H Flinders* decision. The Rules should be amended to clarify that liability can only attach to a Financial Firm in relation to the provision of a financial service by the Financial Firm to its customer.
- 4.4 As AFCA is not a judicial body, questions concerning liability of a Financial Firm under the Corporations Act should be excluded from the AFCA's remit and be a matter for the Federal Court.

Internal review mechanism

5. **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?**
- 5.1 The scope, remit and operation of AFCA's Independent Assessor function in the context of AFCA's current operation is not appropriate or effective.
- 5.2 AFCA's Independent Assessor is appointed by the AFCA board as part of their quality assurance and accountability framework.¹⁹
- 5.3 To request an internal review by AFCA, the dissatisfied party must first complain directly to AFCA by completing an informal online feedback form.²⁰ However, as evident in the AFCA Operational Guidelines to the Rules even if a service complaint is made against AFCA regarding a Determination, the Complaints and Feedback procedure cannot be used as a review mechanism.²¹ Only after AFCA has responded to the form can the dissatisfied party proceed with more formal mechanisms by complaining to an Independent Assessor.²² The Terms of Reference require a party to make a complaint to the Independent Assessor within three months of AFCA considering and responding to the complaint through its Complaints and Feedback process, unless special circumstances apply.²³ When a complaint is being made to an Independent Assessor, the complaint must be framed in a general way and directed towards the process engaged in by AFCA.²⁴
- 5.4 Currently, the Independent Assessor can only be of assistance to Financial Firms for future complaints, where AFCA often deal with similar complaints in the same manner. This is restrictive in the fact that the existing determination cannot be reviewed or re-determined. This has a significant financial impact on the Financial Firms both in terms of compensation payable to the complainant, as well as the cost payable to AFCA for handling the complaint.

¹⁹ AFCA Rules A.16.3.

²⁰ Ibid A.16.1.

²¹ Operational Guidelines, 76.

²² AFCA Rules A.16.2.

²³ AFCA, Independent Assessor Terms of Reference, Term 6.

²⁴ Ibid, Terms 12-15.

5.5 It is often the case that a Financial Firm's request for a review will stem from an alleged misapplication of law by a Case Manager or a failure of a Case Manager to understand the nature of the Financial Service provided by the Financial Firm. In these instances, an independent review will not serve the objective of compensating the Financial Firm for the financial burden incurred as a result of a Determination made in favour of the Complainant.

5.6 Our proposed solution to this is addressed in 6 below.

6. 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?

6.1 In light of our views that a right of appeal should be provided to Financial Firms, if a right of judicial review is not created for Financial Firms in relation to non-superannuation Determinations, we believe it would be beneficial to expand the scope of the Independent Assessor's remit to review the merits and substance of an existing Determination, and be able to re-make a Determination.

Yours faithfully
Piper Alderman

Per: 

Andrea Beatty
Partner
Level 23, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
T: 02 9253 3818
E: abeatty@piperalderman.com.au
W: www.piperalderman.com.au



Simon Morris
Partner
Level 23, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
T: 02 9253 9909
E: smorris@piperalderman.com.au
W: www.piperalderman.com.au



Chelsea Payne
Associate
Level 23, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
T: 02 9253 3840
E: cpayne@piperalderman.com.au
W: www.piperalderman.com.au