



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

26 March 2021

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

Email: AFCAreview@treasury.gov.au

Dear Danny,

AFCA Review

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide input into Treasury's review of the Australian Financial Complaints Authority.

The FPA supports appropriate, accessible, fair and efficient redress for consumers who have suffered loss as a result of misconduct.

The FPA would welcome the opportunity to discuss with Treasury the issues raised in our submission. Please contact me on 02 9220 4500 or ben.marshan@fpa.com.au if you have any questions.

Yours sincerely

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Head of Policy, Strategy and Innovation
Financial Planning Association of Australia¹

¹ The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practising financial planners and 5,720 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This has been exported to 27 member countries and the more than 192,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 19 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally.
- We are recognised as a professional body by the Tax Practitioners Board.



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

REVIEW OF THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY

Prepared for Treasury
26 March 2021

Key issues

Interaction with other requirements

The FPA supports measures to enhance consumer redress available where misconduct has caused consumer detriment.

The compensation framework for financial advice now includes four similar elements presenting a high risk of duplication and confusion:

1. Licensee investigation and compensation obligations in the Corporations Act
2. ASIC RG256: Consumer remediation
3. ASIC's Financial Services and Credit Panel (FSCP) who will have oversight of individual financial planners' adherence to the legislated FASEA Code of Ethics, and
4. IDR/EDR system

Each of these four elements comes with a set of timeframes and definitions. The FPA suggests care is needed to ensure there is not a disconnect between the requirements in the law for a specific subsector, the obligations ASIC includes in the updated RG256, the requirements in the IDR/EDR framework, and the pending structure for oversight of planners' obligations under the Code. Consumers and businesses need consistency and certainty on the rules that apply in each situation.

For example:

- Schedule 11 of the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (FSRC 2020 Act) which is due to commence on 1 October 2021, introduces new definitions and obligations for:
 - breach reporting, which apply to all Australian Financial Services Licensees, and
 - notifying clients, investigating and compensating clients in relation to 'reportable situations', which apply only where personal financial advice has been provided to a retail client in relation to a relevant financial product.

The new FSRC 2020 Act includes obligations include definitions, timeframes for conducting financial advice investigations, identifying and communicating with affected consumers, and compensation requirements, for example.

- ASIC is in the process of updating RG 256: Consumer remediation. As part of its consultation process to update its guidance, ASIC proposed timeframes, definitions and other investigation processes in CP335. Obligations in the current RG256 and suggestions in ASIC's CP335 may confuse licensees as, based on the wording used in these documents, they have the potential to be interpreted as redefining key definitions in the FSRC 2020 Act and creating two sets of requirements for the same steps in the remediation process.
- In December 2020, the Government announced that the operation of ASIC's Financial Services and Credit Panel (FSCP) would be expanded to create a single, central disciplinary body for financial advisers as per the Royal Commission recommendation 2.10, with the responsibility of enforcing the legislated Financial Planners and Advisers Code of Ethics 2019 (the FASEA Code).

Under the FASEA Code, the single disciplinary body can impose sanctions on relevant providers found to have breached the FASEA Code. As stated in the Explanatory

Memorandum to the FASEA Code, sanctions include requiring the relevant provider to 'provide the services to the retail client again at no cost, or to reduce or waive fees', and 'require specified corrective action'. It also states: "Under s1324 of the Corporations Act, any person may recover damages for a contravention of the Corporations Act, including a contravention of s921E through a breach of the [FASEA] Code" (paragraph 14).

- Similarly, the role of AFCA is to investigate a complaint and compensate consumers for any direct loss or damage caused by a financial firm's breach of any obligation the firm owed the consumer when providing a financial service. AFCA may also make appropriate non-monetary orders obliging a member to take (or not take) a particular course of action in order to effectively resolve a dispute. (RG267).

Each of the above four elements for consumer compensation have their own set of requirements, for example, in relation to:

- Investigations
- Consumer communication
- Timeframes for meeting obligations
- Record keeping
- Time limits for complaints or investigations
- Reporting to regulators
- Jurisdictions
- Sanctions and awards

The FPA supports the compensation of consumers who have suffered loss as a result of provider misconduct and breaches of the law. However, the FPA is concerned about a lack of clarity on how these elements inter-relate for personal financial advice providers, and which set of requirements apply in which circumstances.

All the components apply to all financial advice providers including large, medium and small businesses, and sole practitioners who hold a licence. While some licensees have experience in remediations and complaints, others may have never undertaken a remediation process or been subject to an EDR complaint before.

A lack of clarity will only serve to confuse licensees and result in the duplication of costly processes, further complicating compensation avenues for consumers and providers alike. This has the potential to drive up the cost and timeframes of personal advice compensation, while providing no additional compensation benefit for affected consumers.

The FSRC 2020 Act, proposals to update RG256, the IDR/EDR obligations and the pending proposed model for the new FSCP single disciplinary body, mandate licensees to undertake the same type of action, which is to investigate, report and compensate. However, the specific requirements on how licensees should undertake such action differs slightly. This creates the potential for expensive duplication and oversight, and confusion for consumers and industry.

The FPA suggest Treasury, ASIC and AFCA consider how these sets of requirements can be rationalised to ensure the intent of all these measures is achieved in a manner that improves consumer outcomes through cost effective and efficient regulation.

The FPA notes that it has been suggested that ASIC should provide a consolidated regulatory guidance on how the four consumer compensation elements interact into one process.

However, this may be an issue with the provisions in laws. There is a risk that provisions in the Corporations Act, AFCA Act and FSRC 2020 Act set different requirements and standards for the same consumer issue, requiring licensees to undertake different actions for the same matter, and setting duplicated requirements for AFCA and ASIC. This will confuse consumers and industry and risk some consumers and issues falling down the cracks or potentially being awarded double compensation.

Hence, this issue may not be adequately addressed through ASIC regulatory guidance and may warrant further investigation by Treasury in the first instance.

The FPA recommends Treasury, ASIC and AFCA consider, rationalise and provide details of the interaction of:

- *the licensee remediation obligations in the FSRC Act 2020*
- *the enforcement of the FASEA Code by the FSCP*
- *the rights of the consumer to recover damages for a contravention of s921E under s1324 of the Corporations Act*
- *ASIC's updated RG256: Consumer remediation*
- *IDR and EDR*

IDR/EDR and remediation programs

Regulatory Guide 271: Internal Dispute Resolution, released July 2020, states that an 'IDR response' - a written communication from a financial firm to the complainant, informing them of the final outcome of their complaint at IDR (either confirmation of actions taken by the firm to fully resolve the complaint or reasons for rejection or partial rejection of the complaint) (RG 271.53) – must be provided to a complainant no later than 30 calendar days after receiving the complaint (RG 271.56).

As RG267 and section B.4 of the AFCA Rules, consumers have two years from the date of the IDR decision to lodge a complaint with AFCA. Consumers who do not receive an IDR response within the set timeframe, or extended timeframe under special circumstances, are also permitted to lodge a complaint with AFCA.

Section A.5.2 of the AFCA Rules states that:

AFCA will refer the complaint back to the Financial Firm and set a timeframe for the Financial Firm to either resolve the complaint or to provide its position in relation to the complaint. This opportunity will not normally be provided:

a) if AFCA considers it appropriate to commence investigating or otherwise progressing the complaint immediately,

A.5.3 AFCA will specify the time provided for a Financial Firm to resolve the complaint, having regard to any applicable regulatory guidance.

However, the new requirements in sections 912EA and 912EB of the FSRC 2020 Act set detailed and specific timeframes for investigations and compensation, which are different to ASIC's IDR timeframes. For example, s912EB of the FSRC 2020 Act requires that:

(4) The investigation must be completed as soon as is reasonably practicable after it is commenced.

(5) The financial services licensee must take reasonable steps to give the affected client a notice of the outcome of the investigation:

(a) in writing within 10 days after the completion of the investigation;

Under s912EB of the FSRC 2020 Act, a financial services licensee must conduct an investigation if there are reasonable grounds to believe that a 'reportable situation' has arisen and that the affected client has suffered or will likely suffer loss or damage as a result of the reportable situation. Civil penalties apply to a breach of this obligation, including a breach of the timeframes set in s912EB(5).

Should a consumer complaint be captured by the definition of 'reportable situation', it is assumed these new obligations would apply. Hence, the FPA has recommended to ASIC that it would be inappropriate to apply to IDR/EDR timeframes to any matters that are under investigation as required by s912EB. Equally, it would be inappropriate for a complaint to be accepted into AFCA's jurisdiction if the matter was subject to an investigation by the licensee as required under s912EB.

It must be clear for consumers and firms how 'reportable situations', investigations and complaints will be dealt with.

Systemic issues

Rule A.17 defines systemic issue as "an issue that is likely to have an effect on consumers or small businesses in addition to any Complainant". This section of the Rules requires AFCA to raise the potential systemic issue with the relevant Firm and give it a reasonable opportunity to respond, and require the Firm to provide any information and documents AFCA considers necessary to investigate the issue.

A.17.1 A systemic issue is an issue that is likely to have an effect on consumers or Small Businesses in addition to any Complainant.

A.17.2 AFCA will investigate potential systemic issues. In doing so, it:

a) must raise the potential systemic issue with the relevant Financial Firm and give it a reasonable opportunity to respond;

b) can require the Financial Firm to provide any information and documents AFCA considers necessary to investigate the issue

A.17.3 If AFCA identifies a systemic issue as a result of its investigation, it will:

a) refer the issue to the relevant Financial Firm for remedial action;

b) obtain a report from the Financial Firm as to the remedial action undertaken; and

c) continue to monitor the matter until a resolution has been achieved that is acceptable to AFCA.

A.17.4 As part of investigating and referring a systemic issue to the Financial Firm for remedial action, AFCA can require the Financial Firm to do or refrain from doing any act which AFCA considers reasonably necessary to achieve any one or more of the following objectives:

a) facilitating AFCA's investigation of the systemic issue;

- b) *improving industry practice and communication;*
- c) *remediating loss or disadvantage suffered by consumers or Small Businesses (whether or not they have complained about the systemic issue);*
- d) *preventing foreseeable loss or disadvantage to consumers or Small Businesses;*
- e) *minimising the risk of the systemic issue recurring; or*
- f) *efficiently dealing with multiple complaints related to the systemic issue*

The AFCA Rules go further than the requirement in s1052 of the Corporations Act, which obliges AFCA to refer to appropriate authorities contraventions and breaches, settled complaints AFCA thinks may require investigation; and matters where AFCA considers that there is a systemic issue.

Section 912D of the FSRC 2020 Act sets a detailed definition of 'reportable situation' (see Attachment 1: Reportable situation) and the requirements under which the licensee must lodge a report or the 'reportable situation' with ASIC; s912EB sets an "Obligation to investigate reportable situations that may affect [financial advice] clients". Provision (8) of s912EB of the FSRC 2020 Act requires compensation. The focus of s912EB of the FSRC 2020 Act is the investigative due process to identify any 'reportable situation', any occurrence or likely occurrence of consumer loss, and all 'affected consumers'.

Equally, there are investigations and sanctions provided for under the FASEA Code of Ethics.

This creates a situation where ASIC, the single disciplinary body, and AFCA are potentially investigating the same matter, and providing oversight of the licensee's investigation of the same matter. As discussed in FPA's response to Terms of Reference 1.3 *AFCA's funding and fee structures*, AFCA charges licensees additional and expensive fees for the EDR scheme's ongoing investigations of systemic issues. ASIC also charge licensees for its investigations of 'reportable situations' and oversight of the Corporations Act through its industry levy. It is unclear as to the new single disciplinary body's involvement in such investigations and therefore any resulting cost-recovery for potentially investigating and providing oversight of advisers on the same 'reportable situation'.

The FPA supports AFCA's role in identifying systemic issues and notifying the firm and ASIC of suspected systemic issues. This is a vital consumer protection function. However, AFCA's role in relation to investigating systemic issues further and requiring licensee action should be restricted to avoid unnecessary regulatory duplication and costs. The new breach reporting, investigation and compensation obligations in the FSRC 2020 Act create a solid and consistent framework in the primary legislation under the extensive definition of 'reportable situation'. Continuing AFCA's current rules in relation to systemic issues will result in the duplication of obligations and potential directions from both AFCA and ASIC in relation to the same matter which will only cause inefficiencies and confusion for industry and consumers. ASIC as the Regulator should determine any further action required and direct firms on such matters.

The FPA recommends Rule A.17: Systemic issues of the AFCA Rules be amended to restrict AFCA to the identification and notification of systemic issues only.

The Rules should be appropriately updated to acknowledge the new requirements set the FSRC 2020 Act:

- *in line with the new legislated requirements for investigations and compensation of reportable situations, and*

- *to support the transferring of any IDR and EDR complaints that are found to meet the new definition of a 'reportable situation', and therefore fall under the new investigations and compensation obligations in s912EA and s912EB of the FSRC 2020 Act, to the appropriate licensee remediation process or program. It should be made clear that such complaints must comply with the investigation and compensation requirements and timeframes in the FSRC 2020 Act, not the IDR/EDR timeframes.*

External Experts

AFCA as part of their operational guidelines may in certain cases obtain external experts to provide additional information or reports where their internal expertise is insufficient to fairly make a determination in the case. The FPA is very supportive of this process. However, the FPA is aware of AFCA making use of “experts” who are generally less qualified and have less industry experience than the financial planner in the firm they are handling a complaint on. For example we are aware of the use of experts who have only ever operated in a single firm for significant periods of time (and therefore have no broad experience of best practice across the profession) or have only minimum diploma level subject qualifications (as opposed to even a complete diploma, but more appropriately degree or professional certification level qualifications) engaged to provide “expert” reports on financial planners with significantly more experience and professional level qualifications. To ensure that the profession has faith in the AFCA determination process, it is imperative that AFCA only engage experts with broad industry experience and the highest professional and ethical qualifications.

The FPA recommends AFCA's operational guidelines ensure only external experts of significant and broad industry expertise, and professional level qualifications are obtained to provide expert reports as part of the complaints hearing process.

Frivolous, vexatious and malicious complaints

External dispute resolution is a vital service for consumers. However, history shows that there is a risk of frivolous, vexatious and malicious complaints being filed against Firms, with the complaint progressing through the entire EDR process at the request of the consumer even when the EDR scheme does not support the complaint.

As described in the AFCA Complaint Fee Guide, “complaints are resolved and closed at various statuses in the complaint resolution process, and these are described as the resolution points...Complaints may progress to the next complaint status/resolution point and incur the higher complaint cost of that next status”. The AFCA complaint resolution points are:

1. Registration and referral
2. Rules review
3. Case management 1
4. Case management 2
5. Case management conciliation
6. Decision - preliminary view
7. Decision – determination

In some situations, multiple AFCA resolution points have found in favour of the planner and not awarded compensation to the consumer, and the scheme has recommended the complaint does not proceed further. However, as the EDR findings are only binding on the member/Firm, the complainant can request the complaint proceed to full determination. After progressing through the entire EDR system,

the claim is denied as it was again found in favour of the planner, no compensation was awarded and that there was no basis to the complaint. While there is little impact on the complainant, the impact on the provider and the scheme is significant. This is known as a frivolous, vexatious or malicious complaint.

Frivolous, vexatious and malicious complaints significantly divert resources away from those consumers in need of assistance and who have valid EDR complaints where Firm actions or behaviour has caused consumer detriment. The adverse consequences for the provider can be devastating, particularly for small businesses, and include loss of face, financial costs, time diverted away from servicing clients, and a significant impact on PI insurance premiums even though the complaint was successfully defended. (See Attachment 2 – Confidential case studies: Frivolous, vexatious and malicious complaints.)

Section 1051(2)(d) of the Corporations Act states:

complainants are exempt from payment of any fee or charge, to the operator of the scheme or to any other entity, in relation to a complaint.

This provision in the Act is reflected in the AFCA Rules and fee modal and combine to create a moral hazard where one party will have a tendency to take risks because the costs that could result will not be felt by the party taking the risk, that is the complainant. All the risk is on the defendant, the Firm.

The following AFCA Datacube statistic shows the outcomes of complaints closed after AFCA's Determination where the primary business of the firm is 'financial planner / adviser'.



(Period: 1/7/2020 – 31/12/2020)

With 58 percent of complaints that proceeded all the way through the AFCA process to an AFCA Determination found in favour of the Firm, the FPA questions how many of those cases should have been permitted to progress to an AFCA Decision Maker.

If multiple AFCA resolution points find no wrongdoing and that no compensation should be awarded to the complainant, the FPA questions the fairness, and if it is 'right', that the complaint should be permitted to proceed through the EDR process if it is obvious that the case will again be found in favour of the Firm.

The FPA suggests there are potential steps in the AFCA process where a frivolous, vexatious or malicious complaint could be stopped however, there appears to be a lack of judicial restraint applied to such complaints if the consumer is not willing to come to a resolution. As demonstrated in the case

studies provided, AFCA cannot or will not stop the complaint from proceeding as the EDR scheme must follow the consumer's wishes.

The FPA recommends the issue of frivolous, vexatious and malicious complaints should be addressed on two levels:

1. If AFCA resolution points find in favour of the planner and no compensation is awarded to the consumer, and the scheme has recommended the complaint does not proceed, the complaint should not be permitted to proceed through the EDR process.
2. If multiple AFCA resolution points find in favour of the planner and no compensation is awarded to the consumer, and the scheme has recommended the complaint does not proceed, however the complaint does proceed through the EDR process as requested by the complainant, and a full Determination again finds in favour of the planner and no consumer compensation is awarded - the cost of the complaint should be shared and recovered through the AFCA annual membership fee of that industry sector. This would reduce the impact on innocent firms and the flow on effects to ongoing professional indemnity insurance costs and exclusions.

Reducing the prevalence and impact of frivolous, vexatious and malicious complaint would allow AFCA to focus its resources on cases with true consumer detriment, significantly improving the EDR system.

One factor leading to an encouragement of consumers to make and push complaints through AFCA is the no cost to consumer. In reviewing other consumer complaint tribunals across other sectors in Australia, there are a number of examples of consumers being required to pay a small fee to lodge a complaint past a certain point. For example, the ACT Civil and Administrative Tribunal charges a \$162.50 fee to lodge a dispute. A similar funding mechanism could be introduced which may lead to consumers with a frivolous, vexatious or malicious complaint from continuing to push the case through the AFCA framework when AFCA have made an initial determination in favour of the firm to assist in reducing the case cost on financial firms.

The FPA recommends

- *Frivolous, vexatious and malicious complaints should not be permitted to proceed through the EDR process if AFCA resolution points find no wrongdoing and in favour of the planner and no compensation is awarded to the consumer.*
- *AFCA incorporate into its fee model an appropriate methodology for the sharing of fees for frivolous, vexatious and malicious complaints across the relevant industry sector.*
- *AFCA collect data in relation to frivolous, vexatious and malicious complaints, including the costs of such complaints on Firms and AFCA resources.*
- *AFCA considers the introduction of a dispute lodgement fee where a consumer disagrees with the initial AFCA assessment and requests escalation of the complaint.*

FPA response to Terms of Reference

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

Independent and fair

Assisting complainants

The FPA members have raised concerns about the assistance AFCA provides to complainants throughout the EDR process and whether this impacts on the EDR scheme's ability to be independent, impartial and fair to all parties.

The FPA understands there may be consumers needing assistance in understanding their rights and identifying whether a service provider has breached the law or best practice. Financial services law and what is deemed best practice can be complex and is unique to that industry.

RG 267.119 states:

AFCA should be adequately resourced to assist complainants to draft and lodge their complaints. This does not amount to scheme staff advocating for complainants, and should not compromise the impartiality of the complaints resolution process.

The FPA suggests there is a risk that the lines have been blurred between what is appropriate assistance versus AFCA acting in an advisory relationship with complainants when fulfilling its 'accessibility' principle.

While the FPA acknowledges the changes to the AFCA Rules made in January 2021 to address this issue in response to a decision in the NSW Supreme Court, *DH Flinders Pty Limited v Australian Financial Complaints Authority Limited [2020] NSWSC 1690*, the FPA suggest there is a need to assess AFCA's internal systems and processes to ensure the scheme is performing in a manner consistent with its obligation to be independent and impartial to all parties.

While FPA members have raised the issue of AFCA coaching complainants through the EDR process, this is not something we can provide case study evidence on. However, the FPA believe the concerns raised warrant Treasury investigating this issue further.

Unfounded complaints proceeding through EDR process

The existence of frivolous, vexatious and malicious complaints in the AFCA system significantly undermines the fairness and efficiency of the scheme. As discussed above, there are potential steps in the AFCA process where a frivolous, vexatious or malicious complaint could be stopped however, if the consumer is not willing to come to a resolution, AFCA currently cannot or will not stop the complaint from proceeding through the EDR process. This is evident in the case studies provided (Attachment 2) and the AFCA Datacube statistics previously discussed.

As per AFCA's current Complaint Fee Guide, the fee incurred by the Firm increases as the complaint progresses through AFCA's process.

"AFCA has a two-point approach to the calculation of complaint fees, based on the following:

1. *The status in the AFCA complaint resolution process where increases in complaint fees are triggered. Complaint fees are based on a number of factors, including the complexity and level of resources required to deal with a complaint at each status of the process.*

Complaints that are unable to be resolved at a status in the process, including where a complaint response has not been received from a financial firm, normally progress to the next status and incur the applicable complaint fee for that status, once progressed.

2. *The AFCA work stream that a complaint is resolved in (fast track, standard or complex)."*

AFCA's current fee structure, and process or willingness to allow complaints that were found in favour of the Firm at AFCA resolution points, to proceed through the EDR process, significantly undermine AFCA's fairness, impartiality and efficiency.

(See Frivolous, vexatious and malicious complaints section above for recommendations.)

Efficient and timely

Ensuring the dispute resolution process is conducted properly, thoroughly, fairly and right, should be the priority. Advice complaints can be complex and should not be bound by strict timeframes.

However, there have been efficiency issues raised with the FPA where AFCA have requested the same information from the licensee when the case is escalated to the next status/resolution point. Licensees are concerned that information in the AFCA file may not always be read in detail by the proceeding case manager resulting in inefficiencies and delays in the assessment of the complaint.

The FPA is concerned by reports of lengthy delays in AFCA's handling of complaints where complainants are represented by a paid third party intermediary. As presented in Attachment 3: Confidential case study – Third party representatives, concerns have been raised about potential conflicted remuneration practices of some complainant third party representatives who are paid for their time and at each stage of the EDR process, incentivising delays in the case and to push for the complaint to progress through the EDR process.

The FPA supports the role of regulated financial counsellors however, we question the status of some complainant third party representatives who may be unregulated.

The FPA recommends complainant third party representatives' practices are investigated and reviewed.

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

There is concern about the consistency of AFCA's decisions at the various resolution points. This may be a reflection of AFCA's processes and culture of the consumer is always right. The fact that the consumer has the power to demand a complaint proceed through the EDR process, regardless of AFCA's findings at each resolution point, significantly reduces AFCA's capability of producing consistent, predictable and quality outcomes based on judicial and procedural fairness.

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

As discussed in the section above (see *Interaction with other requirements: Systemic issues*), the FPA suggests the AFCA Rules be amended to restrict AFCA’s role to the identification and notification of systemic issues only. This should be considered an integral and standard operational procedure and cost for AFCA and Firms should not receive an additional bill from AFCA if a systemic issue is identified and reported by the scheme. Cost recovery of this BAU activity should be factored into the membership levy.

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

As stated in the AFCA funding model overview and consultation summary, the AFCA funding and fee structure includes three components:

1. *An annual membership levy based on the size and type of business - The membership levy that more than 85% of AFCA financial firm members will pay for a 12 month membership period is \$350.*
2. *A user charge based on the number of complaints (for financial firms with more than one complaint closed past the initial Registration and Referral stage).*
3. *Complaint fees, based on complaint complexity and the resolution stage reached. More than 85% of AFCA financial firm members are likely to not receive a complaint and will not pay any complaint fees or user charge.*

Not all three components will apply to all members. Which component applies, how much is charged and when will depend on the type of business, the number of complaints received and at what stage of the process the complaints are closed.

Fairness and scale

The FPA questions whether the principle of fairness has been appropriately applied to the AFCA funding and fee structure, and whether it is fair that small businesses and sole practitioners pay the same fees and charges as large Firms.

The FPA recommends the 3 year review of the AFCA funding model be conducted under the lens of the EDR principles.

Impact and cost of unfounded complaints

As advice is a multi-faceted service, complaints against financial planners are usually identified as complex for the purposes of AFCA’s fee structure.

Complaint Closed Status	Invoice Service Code	Resolution point	Fast Track	Standard	Complex
ALL					
CRGR	RGR	Registration & Referral		100	
CTOR	N/A	Rules Review		0	

CFCM1/CCM1	FCM1/CM1	Case Management 1	890		
CCM2	CM2	Case Management 2		2,225	2,515
CCM2	CM2C	Case Management - Conciliation		2,375	2,755
CFPRV	FPRV	Fast Track - Preliminary View	2,130		
CFDEC	FDEC	Fast Track - Decision	3,975		
CPRV	PRV	Decision - Preliminary View		5,655	7,055
CDEC	ODEC	Decision - Ombudsman		8,880	11,355
CDEC	PDEC	Decision - Panel			13,330
	OCON	Ombudsman Conference	1,415		

As discussed above, the FPA is concerned about the impact of the Firm incurring high fees and reputational damage from frivolous, vexatious and malicious complaints being allowed to progress through AFCA's EDR process on the request of the complainant rather than based on the merit of the complaint.

These fees are not covered by the Firm's professional indemnity insurance and can have a significant impact for Firms, particularly the cash flow of small businesses.

Systemic issues

As per Appendix 2: Systemic Issue Fees of the AFCA Complaints Fee Guide, AFCA charges Firms a separate fee to undertake an investigation of a systemic issue. Four different charging levels can apply, reflecting the time taken by AFCA to investigate the matter and the level of expertise required:

- Level One - \$4,410
- Level Two - \$10,260
- Level Three - \$16,095
- Discretionary

In Rule A.17.1 AFCA defines a systemic issue is an issue that is likely to have an effect on consumers or small businesses in addition to any complainant.

As discussed above, the new FSRC 2020 Act obliges licensee to report, investigate, identify all consumer who have suffered loss or damage, or will likely suffer loss or damage as a result of the 'reportable situation' and compensate those consumers. These requirements attract civil penalties in the Act and are enforced through ASIC oversight.

A.17 of AFCA's Rules create a duplicated and expensive process that risk distracting firms from meeting their new obligations in the Act. With the commencement of the FSRC 2020 Act on 1 October 2021, and the ASIC's current review of RG256:Consumer remediation, the FPA recommend AFCA's role be restricted to the identification and notification of potential systemic issues. AFCA should not be involved in the ongoing investigation of a potential systemic issue or liaising with the Firm to address the systemic issue. This should be the role of ASIC.

The FPA understands that the identification of potential systemic issues is embedded in the EDR process with all case workers trained in how to identify such potential issues. The FPA supports this

approach and recommends the cost of identifying and reporting systemic issues should be an AFCA operational cost recovered via the annual membership levy.

Review of AFCA funding arrangements

ASIC's RG267: Oversight of AFCA, requires that "AFCA must develop and consult appropriately with financial firms and other stakeholders on its funding arrangements, taking into account the statutory criteria and its current and forecast caseloads" (RG 267.120). The new investigation and compensation obligations for personal advice providers in the FSRC 2020 Act have the potential to:

- reduce the incidents of advice related complaints being registered with AFCA
- reduce AFCA's involvement in monitoring a Firm's investigations of potential systemic issues - this is a requirement in the Act with ASIC oversight. AFCA's role should be limited to the identification and notification of potential systemic issues only.

The September 2018 Overview of AFCA's funding and fee structure states:

The interim funding model will apply for the first three years of AFCA operations (FY2018/2019 – FY2020/2021), while AFCA establishes an evidence base of complaint volumes and complexity in an expanded jurisdiction.

It is unclear whether AFCA intend to conduct a separate consultation, however, any review of AFCA's funding and fee structure should consider the potential for a reduction in advice related complaints and activity given the requirement in the primary legislation for advice licensees to report, investigate and compensate for 'reportable situations'.

Accessibility

The FPA considers the accessibility principle of AFCA should apply equally to consumers and Firms. We note that the AFCA Complaint Fee Guide and other pertinent documents are located in AFCA's secure services member portal. The Fee Guide contains important factual and detailed information about AFCA's EDR process and charging system, as well as administrative, complaint stream allocation, and fee adjustment deadlines for Firms who may be subject to a complaint.

It is unclear when and how this important information is provided and communicated to Firms. The FPA suggest it would be good practice to provide this information in a notification that a complaint has been lodged against them.

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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?

The FPA supports the role of an Independent Assessor to:

- a) respond to service complaints about AFCA
- b) identify, address and report on issues affecting AFCA's complaint handling operations and performance; and
- c) as appropriate, make recommendations in response to identified issues (RG267.212)

The FPA supports quality assurance and accountability measures to improve AFCA's service.

As detailed in the Independent Assessor's Terms of Reference, the Independent Assessor provides his/her findings in writing to the complainant and to AFCA. If the Independent Assessor finds that AFCA has not met its service standards, he/she can make a recommendation in writing to the Chief Ombudsman that AFCA should offer an apology, should pay compensation for any distress or inconvenience caused by the poor service (non-financial loss) or take other action. The independent assessor role and function plays an important part in

As detailed in items 17 to 20 of the Terms of Reference, the Chief Ombudsman may decide to accept or reject a recommendation of the independent Assessor:

"If the Chief Ombudsman does not agree with the recommendation from the Independent Assessor, the matter will be referred to the Chair of the AFCA Board. The Chair of the AFCA Board may make a final decision or alternatively refer the matter to the Board for final decision."

This brings into question the independence of the Independent Assessor and the commitment of AFCA to continuously improve its services.

It is also unclear how the Independent Assessor is funded – is the Firm or complainant who lodged the complaint with the Independent Assessor required to pay a fee under a user pays model; or is the Independent Assessor funded under the AFCA annual membership levy?

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?

The FPA understands that review procedures are built into the AFCA complaints handling system, with access to legal and industry experts at all resolution points/decision points of the EDR process - each resolution point should review the decision made by the previous resolution point.

The FPA questions if there is a need to introduce an internal mechanism to review the substance of an AFCA decision in addition to the seven existing resolution points in the EDR process; or whether the focus should be on identifying and fixing issues within the process to improve the fairness, independence, efficiency, impartiality and quality of AFCA's system.

A review mechanism is a widely accepted and fundamental element of the process of 'natural justice'. If an AFCA decision is legally incorrect, fair judicial processes would suggest an option for investigation and review of that decision by a party independent of the decision making body may be appropriate.

However, there are pros and cons associated with introducing a formal mechanism where the substance of an AFCA decision can be reviewed. For example (not limited to):

1. Independence - should the review mechanism be internal to AFCA or Independent/external?
2. Fairness – judicial and procedural fairness would suggest a review of the substance of an AFCA decision should be able to be requested by either the complainant or defendant.

3. Accessibility – how would the review mechanism be funded? It would be unreasonable for a review mechanism to be funded by only one party to the complaint. The cost of a review could be borne by the party requesting the review.
4. Efficiency and effectiveness – a mechanism to review the substance of an AFCA decision could increase the time taken to finalise the complaint outcome, increasing the stress and impact of the complaint process on both parties, and on the resources of the scheme itself.
5. Accountability – any review mechanism should include recommendations for enhancements / changes to AFCA's Rules, EDR processes, the ability for claims to progress through resolution points, and the use of precedence, for example, to improve outcomes for all parties.

Attachment 1:
**Reportable situation (s912D Financial Sector Reform (Hayne Royal
Commission Response) Bill 2020**

912D What are reportable situations?

- (1) There is a reportable situation in relation to a financial services licensee if one of the following paragraphs is satisfied:
 - (a) the financial services licensee or a representative of the financial services licensee has breached a core obligation and the breach is significant;
 - (b) the financial services licensee or a representative of the financial services licensee is no longer able to comply with a core obligation and the breach, if it occurs, will be significant;
 - (c) the financial services licensee or a representative of the financial services licensee conducts an investigation into whether there is a reportable situation of the kind mentioned in paragraph (a) or (b) and the investigation continues for more than 30 days;
 - (d) an investigation described in paragraph (c) discloses that there is no reportable situation of the kind mentioned in paragraph (a) or (b).
- (2) There is also a reportable situation in relation to a financial services licensee if:
 - (a) in the course of providing a financial service, the financial services licensee or a representative of the financial services licensee has engaged in conduct constituting gross negligence; or
 - (b) the financial services licensee or a representative of the financial services licensee has committed serious fraud; or
 - (c) any other circumstances prescribed by the regulations for the purposes of this paragraph exist.
- (3) Each of the following is a core obligation:
 - (a) an obligation under section 912A or 912B, other than the obligation under paragraph 912A(1)(c);
 - (b) the obligation under paragraph 912A(1)(c), so far as it relates to provisions of this Act or the ASIC Act referred to in paragraphs (a), (b), (ba) and (c) of the definition of financial services law in section 761A;
 - (c) in relation to financial services, other than traditional trustee company services provided by a licensed trustee company—the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth legislation that is covered by paragraph (d) of that definition and that is specified in regulations made for the purposes of this paragraph;
 - (d) in relation to traditional trustee company services provided by a licensed trustee company—the obligation under paragraph 912A(1)(c), so far as it relates to

Commonwealth, State or Territory legislation, or a rule of common law or equity, that is covered by paragraph (d) or (e) of that definition.

- (4) For the purposes of this section, a breach of a core obligation is taken to be significant if:
- (a) the breach is constituted by the commission of an offence under any law and the commission of the offence is punishable on conviction by a penalty that may include imprisonment for a maximum period of:
 - (i) if the offence involves dishonesty—3 months or more; or
 - (ii) in any other case—12 months or more; or
 - (b) the breach is constituted by the contravention of a civil penalty provision under any law, other than a civil penalty provision prescribed by the regulations for the purposes of this paragraph; or
 - (c) the breach is constituted by a contravention of subsection 1041H(1) of this Act or subsection 12DA(1) of the ASIC Act (misleading or deceptive conduct in relation to a financial product or a financial service); or
 - (d) the breach results, or is likely to result, in material loss or damage to:
 - (i) in the case of a managed investment scheme—a member or members of the scheme; or
 - (ii) in the case of a superannuation entity—a member or members of the entity; or
 - (iii) in all cases—a person or persons to whom the financial services licensee or a representative of the financial services licensee provides a financial product or a financial service as a wholesale or retail client; or
 - (e) any other circumstances prescribed by the regulations for the purposes of this paragraph exist.
- (5) Otherwise, for the purposes of this section, a breach of a core obligation is significant having regard to the following:
- (a) the number or frequency of similar breaches;
 - (b) the impact of the breach on the financial services licensee's ability to provide financial services covered by the licence;
 - (c) the extent to which the breach indicates that the financial services licensee's arrangements to ensure compliance with those obligations are inadequate;
 - (d) any other matters prescribed by regulations made for the purposes of this paragraph.